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Elizabeth M. Calciano
Assistant City Attorney
Cities of Monterey Park and Rolling Hills

Lauren B. Feldman[1]
Assistant City Attorney
Cities of Hermosa Beach and Lomita

[1] Ms. Feldman authored the portion of this paper relating to marijuana dispensaries.

Part I
SEX, DRUGS AND ROCK AND ROLL (OF THE HOUSING MARKET)

Introduction

This section summarizes the latest legislation and cases that impact your code enforcement duties; coincidentally most have to do with sex, drugs or rock and roll (of the housing market).

Sex
(aka Changes in the Regulation of Massage Establishments)

Until now, the regulation of massage establishments has been a purely local concern. Newly enacted SB 731 shifts substantial regulatory authority to the state. How this will affect the ability of local agencies to prevent the proliferation of massage parlors that serve as a front for prostitution is anyone's guess.

SB 731

SB 731[2] became effective on September 1, 2009. The law sets up a state-wide system of certification for massage therapists that exempts state-certified therapists from having to obtain a massage license or permit from the local government. The law responds to the criticism of legitimate massage therapists that it is a burden to obtain a multitude of licenses if their practice extends to more than one city or if they move within the state. Also, local massage therapist permit ordinance requirements are frequently varied, and some are fairly onerous – such as the annual AIDS test requirement. For a legitimate massage therapist, HIV status is arguably not the City's business. Legitimate massage therapists have to comply with burdensome requirements because of the actions of their less than legitimate colleagues.

Key Provisions of New Law

Senate Bill 731 created a massage therapy organization, now called the California Massage Therapy Council ("CMTC"), a nonprofit organization that

[2] SB 731 is codified at Business and Professions Code Chapter 10.5 (§§ 4600, *et. seq.*).

provides for the statewide certification of massage therapists and massage practitioners by the CMTC as of September 1, 2009. The law requires applicants for certification to be eighteen years of age or older, to meet specific educational criteria, to provide the CMTC with certain information and to keep that information current, to provide fingerprints for submission to the Department of Justice for a criminal background check, and to pay fees required by the CMTC.[3]

The Bill also prohibits cities and counties from enacting or enforcing certain ordinances regulating the practice of massage by a certificate holder. Key provisions of SB 731 are summarized below:

1. Any person certified by the CMTC has the right to practice massage, consistent with state law and the qualifications established by his or her certification in any city or county in the state and is not required to obtain any other license, permit, or other authorization, except as otherwise provided in the bill. However, the bill does not prevent a city from adopting or enforcing any local ordinance governing zoning, business licensing, and reasonable health and safety requirements for massage establishments or businesses.

2. Certain qualifying massage establishments or businesses--specifically, sole proprietorships, where the sole proprietor is certified by the CMTC, and massage establishments or businesses that employ or use only persons certified by the CMTC--enjoy even more freedom from local regulation. Specifically, while SB 731 expressly preserves the local agency's right to adopt land use and zoning requirements applicable to massage establishments or businesses, with respect to qualifying massage establishments and businesses as described, any such land use and zoning requirements must be no different than the requirements that are uniformly applied to other professional or personal services businesses.

3. Qualifying massage establishments or businesses cannot be required to provide additional restroom, shower, or other facilities that are not uniformly applicable to other professional or personal service businesses. Also, with respect to qualifying massage businesses only, the city cannot (1) require unlocked doors when there is no staff available to assure security for clients and massage staff who are behind closed

[3] The pathway set forth by the California Massage Therapy Council to obtain a certificate is found at http://www.camtc.org/Applications/portals.pdf.

doors, or (2) require windows that provide a view into massage rooms that interfere with the privacy of clients of the massage business.

4. Cities and counties remain free to adopt and enforce reasonable health and safety requirements with respect to massage establishments or businesses, including, without limitation, requirements for cleanliness of massage rooms, towels and linens, and reasonable attire and personal hygiene requirements for persons providing massage services. However, with respect to qualifying massage establishments and businesses, no additional qualifications, such as medical examinations, background checks, or other criteria may be imposed upon any person certified by the CMTC.

5. SB 731 does not inhibit the right of the city to adopt and enforce a local ordinance that authorizes city officials to conduct reasonable inspections of massage establishments, qualifying or otherwise, during regular business hours to ensure compliance with all applicable state and local laws. Furthermore, SB 731 does not inhibit the authority of a city to require the owner or operator of a message establishment or business, qualifying or otherwise, to notify the city of any intention to rename, change management, or convey the business to another person.

6. Nothing in SB 731 restricts or limits the city's authority to adopt and enforce local ordinances that govern any person not certified by the CMTC.

Recommendations

What does this mean for you in your duties as a code enforcement officer?

- Cities that regulate massage establishments must update their massage establishment ordinance to reflect SB 731 if this has not already been done. Otherwise, much of a city's ordinance is likely preempted and unenforceable against these establishments, and aspects of the businesses that could be regulated are foregone. There are many templates throughout the State as numerous cities have already adopted ordinances.

- Make sure to treat qualifying massage establishments in accordance with the new state law. There will be two separate systems with separate

rules governing qualifying and nonqualifying businesses. It helps to have an updated ordinance to keep it straight.

- Be creative in your efforts to distinguish the legal from the illegal establishments. Resources on the internet like Craig's List, blogs, Facebook, etc. can be inexpensive and effective research tools. For instance, one blog a diligent code enforcement officer found explained in detail many of the sexual acts offered inside one of her city's licensed massage establishments. However, before conducting an investigation on the internet, be sure to obtain approval from your department head because these websites would generally be prohibited for city employees to access on city computers. Further, if you find some incriminating information, save it electronically or print it out. If not, it may be gone the next time you type in the website.

- If you come across circumstances that lead you to suspect human trafficking, involve your police or sheriff's department. You can also report to the Department of Justice hotline: 1-888-428-7581 or your local FBI office. http://www.usdoj.gov/whatwedo/whatwedo_ctip.html

Drugs
(aka Medical Marijuana Dispensaries)[4]

The number of medical marijuana dispensaries exceeds the number of Starbucks in [the City of] Los Angeles.

-NPR (August 13, 2009)

In recent months, Los Angeles County has experienced a significant proliferation of storefront medical marijuana dispensaries, leaving cities responsible for determining how to regulate this unorthodox and rather controversial land use. If your City has not addressed this issue yet, it likely soon will. Many smaller cities have not. If your City has not dealt with this issue, as a Code Enforcement Officer you will likely be on the front lines when a dispensary opens up. Someone may very well tell you to: "Shut it down." Without the appropriate ordinances in place, this could be very difficult. Even with a proper ordinance, the law is very murky. Also, one important official may want to shut it down, while others will merely want to regulate it. What are you supposed to do?

This section explains the status of medical marijuana laws in California and provides options for cities considering prohibiting or permitting but regulating this budding industry. This information will help you get out in front of the problem and assist your City in coming to a policy decision before a dispensary sets up shop. Because such a use arguably can gain legal nonconforming status if there is no ordinance prohibiting it, it can be difficult to close the barn door after the use is established.

Background on California's Medical Marijuana Laws

In 1996, California voters approved the Compassionate Use Act, an initiative that exempts patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana for personal medical use ("CUA"). A qualified patient is an individual who has received a physician's recommendation for the use of marijuana for medical purposes and the primary caregiver is someone who has consistently assumed responsibility for the housing, health or safety of the patient.[5] This limited defense does not extend to those who supply marijuana to qualified patients and their caregivers and the acts

[4] Lauren Feldman of my office researched and wrote this section of this paper.
[5] *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 771.

of selling, giving away, transporting and growing large quantities of marijuana remain criminal despite the adoption of the CUA. [6]

In addition, the Legislature adopted the Medical Marijuana Program (MMP) in 2003 to clarify the scope of lawful medical marijuana practices by establishing a voluntary statewide identification card system, setting limits on the amount of medical marijuana qualified individuals could possess (this provision having since been struck down in *People v. Kelly*, discussed later), and to enhance medical marijuana access for patients and caregivers through collective and cooperative cultivation projects.[7] One important distinction is that the CUA provides a narrow criminal defense or immunity from prosecution for the use and cultivation of medical marijuana, while the MMP conditionally extends those defenses to the following additional state drug crimes: possession for sale; transporting marijuana; maintaining a location for selling controlled substances; managing a location for selling, giving or using controlled substances; managing a location for storage and distribution of controlled substances; and the provisions declaring a building used for selling, storing, manufacturing or distributing a controlled substance to be a nuisance.[8] The MMP additionally shields patients who have obtained a valid County identification card and their caregivers from arrest.

What appears to be a simple premise- in California, marijuana can be used for personal medical use- has saddled both the state and federal courts with complex legal issues concerning the relationship between state and federal drug laws, the scope of the CUA and the MMP and how cities can regulate this controversial land use. The results are somewhat inconsistent court decisions and a constantly evolving area of the law.[9] Further complicating matters, the federal government has shifted position. [10]

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[6] *Id.* at 772.

[7] Health and Safety Code Section 11362.7 *et seq.*

[8] See Cal. Health and Safety Code section 11362.775.

[9] *People v. Peron* (1997) 59 Cal.App.4th 1383 (the protections of the medical marijuana laws only apply to qualified patients and their caregivers and dispensary operators do not fall within the protections of those laws); *Garden Grove v. Superior Court* (2008) 157 Cal.App.4th 355 (federal supremacy principles do not prohibit a local law enforcement agency from returning medical marijuana to a qualified user whose possession of the drug is legally sanctioned under state law); *San Diego et al v. NORML* (2008) 165 Cal.App.4th 798 (while recognizing the understandable confusion between state and federal law, held that the state's MMP identification card provisions do not positively conflict with the federal CSA or pose impediment to the federal objectives of the law merely because state law and federal law treat marijuana differently).

[10] Bush administration firmly directed the Justice Department to raid medical marijuana distributors that violated federal drug laws even if the dispensaries appear to be complying with state laws. Between 2005 and 2008, dispensaries in San Diego and Los Angeles Counties, as well as many areas in Northern California, were frequently raided and shut down by federal DEA agents, leading to numerous arrests of

Collectives, Cooperative and Dispensaries

Given the conflicting court decisions, the issues of whether medical collectives and dispensaries are a lawful land use and whether cities can prohibit them are still not decided.

The medical marijuana advocates argue that the MMP and CUA ("medical marijuana laws") authorize collective distribution of medical marijuana and to ban these uses would contradict the intent of state law; the opponents argue that the storefront sales of marijuana is patently illegal under federal,[11] not expressly authorized under state law, and should not be tolerated or permitted. Courts come to inconsistent results.

The California Attorney General has declared dispensaries are not recognized under the law, but has found that a properly run cooperative or collective may be lawful under certain very strict operating requirements.[12] Last August, subject to a mandate in the MMP, the Attorney General published guidelines to (1) ensure the security and nondiversion of medical marijuana; (2) assist law enforcement in performing its duties in accordance with California law; and (3) help patients and caregivers understand how to grow, transport and use medical marijuana under state law. The guidelines limit lawful medical marijuana distribution activities to true agricultural co-ops and collectives that provide crops (in this case marijuana) to their members.[13] These guidelines were intended to

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medical marijuana distributors. The Justice Department indicated in late May 2009 that dispensaries operating in accord with California law would not be a priority for prosecution under the Obama administration. Despite this shift in federal drug priorities, in July 2009, a federal district court sentenced Charles Lynch to one year in federal prison, stemming from his arrest for operating a dispensary in violation of the CSA dated back to 2007. The case was controversial because Mr. Lynch was operating with the city's approval, having received a Conditional Use Permit and business license from the City of Morro Bay.

[11] *Gonzalez v. Raich* (2005) 545 U.S. 1.

[12] *See* Attorney General August 2008 Guidelines for Security and Non-Diversion of Marijuana Grown for Medical Use ("Guidelines"), Section IV.C.1.

[13] The Attorney General determined that a dispensary can only operate legally under California Law if it meets the operational characteristics of a co-op or collective as follows:

1. A collective, cooperative or any individual is not permitted to profit from the sale of marijuana.
2. Sale of medical marijuana (even from a non-profit) is subject to sales tax and requires a seller's permit from the State Board of Equalization.
3. The organization must obtain a business licenses.
4. Legitimate collectives and cooperatives ("co-op") merely facilitate collaborative growth efforts between members (actual patient and their caregivers), including the allocation of costs and revenues. While a "collective" is not defined under state law, this type of organization facilitates agricultural collaboration between members. Under state law, a legitimate co-op must file articles of incorporation and follow strict rules for its organization, elections, distribution of earnings and it must conduct business for the mutual benefit of its members. A co-op's earnings and savings of the

interpret how a storefront dispensary could be operated within the confines of state law and the AG considers the sale of marijuana by any organization other than a co-op or collective illegal under state law. Specifically, dispensaries that have customers complete a form designating the business owner as his/her caregiver in exchange for cash donations are likely unlawful, as a true co-op requires a collaborative effort from its membership.[14]

Recent Medical Marijuana Cases [15]

In May 2008, the Court of Appeal struck down the provision in the MMP limiting the amount of medical marijuana a qualified patient or caregiver may possess and cultivate without a physician's specific recommendation that the patient's needs exceed the limit.[16] The court found that when the voters adopted the CUA, it did not quantify the amount of marijuana a patient may possess for personal medical purposes, and the Legislature's imposition of quantity limits (no more than eight ounces of dried marijuana plus six mature or twelve immature pants) to be qualified for immunity from prosecution under the CUA improperly amended the law without approval of the voters under Article II, Section 10(c) of

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business must be used for the general welfare of its members or be distributed equally in the form of cash, property, services or credit.

5. Both co-ops and collectives are formed for the benefit of their members and should require membership applications and verification. The organization must verify status as a caregiver or qualified patient, maintain membership records, track expiration of recommendations, and refuse membership to those who divert marijuana for non-medical use. Members must agree not to distribute the marijuana to non-members or to use the marijuana for non-medicinal purposes.

6. Collectives and co-ops should only acquire marijuana from constituent members (patients and/or caregivers) and only then allocate it to members of the group. The AG recommends documenting each member's contribution of labor, resources or money and record the source of the marijuana.

7. Primary caregivers are allowed to be reimbursed for marijuana cultivation, but may not sell to non-members. A collective or co-op may credit members for marijuana they provide or reimburse the group for marijuana allocated to them.

8. Marijuana may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement of overhead costs and expenses only, or any combination of the above.

9. Collectives and co-ops should provide adequate security to protect members and surrounding homes and businesses from loitering and crime. The groups should also keep accurate records and follow accepted cash handling practices.

[14] See *Peron* 59 Cal.App.4th 1383; *see* Attorney General August 2008 Guidelines, Section IV.C.1.

[15] In all of these cases, the Judges have a specific role- to interpret what is already expressed in the CUA and the MMP, despite the attempts by the medical marijuana advocates to broaden the scope of these limited specific exceptions to the California Criminal law. The courts repeatedly direct these proponents back to the Legislature and the voters to address any perceived shortcoming in the law. 132 Cal.App.4th at 773.

[16] *People v. Kelly* (2008) 77 Cal. Rptr.3d 390 (reversing conviction based on prosecutor's reliance on unconstitutional statute- Health and Safety Code section 11363.77).

the California Constitution. The California Supreme Court has granted review of this case and oral argument has not yet been set.

In *People v. Mentch*, a case that came down in December 2008, the California Supreme Court clarified that primary caregiver immunity requires consistent caregiving independent of any assistance in taking medical marijuana.[17] This case is extremely relevant because many dispensary operators hold themselves out as primary caregivers of the facilities' countless clients by having the clients sign a form stating that the marijuana distributor is the primary caregiver despite a lack of any formal caregiving activities. The "caregiving" aspect of the relationship is often a pretense for marijuana sales and this case appears to limit the use of caregiver immunity to those individuals actually caring for sick patients. Such a limitation, in connection with the AG's regulations discussed above, indicate an attempt to strictly confine caregiver immunity while making medical marijuana available to those in need.

Lastly and most relevant, the City of Anaheim's ordinance banning dispensaries has been challenged and will be decided by the Court of Appeals later this year.[18] The City successfully defended its ordinance in the trial court in October 2007. This is the first case dealing with the City's authority to ban the dispensaries. Over sixty California cities have enacted similar bans in recent years and many cities are anticipating guidance on the validity of the bans from the appellate court.

The dispensary alleges that Anaheim cannot legally ban dispensaries because the ban conflicts with the state's medical marijuana laws and are preempted because the state has expressed intent that dispensaries be considered legal entities. Anaheim disagrees and argues that California's drug laws are limited defenses to criminal liability and the bills cannot be interpreted to have the effect of stripping the City of its police power to regulate this type of land use. This case brings up complicated arguments regarding federal preemption, state preemption of the City's ordinance and the scope of the MMP and a decision in this matter may provide some conclusive guidance on these issues. While a decision is anticipated in that case early next year, until the Courts affirmatively declare that the City is required to allow the use, there is a good faith basis for a City to adopt an ordinance prohibiting the use.

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[17] *People v. Mentch* (2008) 45 Cal.4th 274.

[18] The case is scheduled for oral argument in late September and a decision is expected in the beginning of 2010.

This is because Article XI, section 7 of the California Constitution reserves to cities a broad "police power" to determine how best to protect the public health safety and welfare. Based on this police power, over sixty cities in California have determined that banning dispensaries is the safest way to protect the public. These uses have been shown to generate serious secondary effects, such as robbery, diversion of marijuana for non-medical use and neighborhood disruption. This evidence of secondary impacts may form the basis for a ban using a traditional land use impact analysis, although cities may want to consider whether further research of secondary impacts in their own jurisdiction should be conducted to support adoption of such a ban. The MMP allows the City to adopt and enforce laws consistent with the state law.[19] Such a ban would not affect the rights granted under the Compassionate Use Act authorizing the personal use of marijuana for medicinal purposes and would only prohibit medicinal marijuana dispensaries, as an incompatible land use, from operating within the City.

The Los Angeles County District Attorney and the County Sherriff take the position that over-the-counter *sales* of marijuana are patently illegal under both state and federal law. In an August 6, 2009 letter, these County officials urged cities to adopt ordinances prohibiting dispensaries from operating. While the District Attorney is charged with prosecuting criminal behavior within all of Los Angeles County, it is up to local law enforcement to decide to proactively enforce state marijuana laws and local land use laws. Federal laws are enforced by the federal government. Despite the insistent tone in this letter, cities have a wide degree of discretion.[20]

Recommendations

1. Recommend that your jurisdiction address this issue and adopt an ordinance either prohibiting the use, regulating it, exempting it or possibly even taxing it. That way, when a dispensary opens up in your city, your duty as a code enforcement officer will be clear. While studying this issue, your city may want to adopt an interim ordinance prohibiting these uses so that they do not get established before your city has an ordinance in place.
2. Pay attention to the outcome of the *Anaheim* case which we all hope will provide some clarity to the law.

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[19] Cal. Health and Safety Code section 11362.83.

[20] Further, although the District Attorney and Sheriff declare that the sales of marijuana are illegal, the term "sale" leaves some room for interpretation. The AG has declared that non-profit cooperatives and collectives may lawfully operate in the state (discuss in more detail above), and while the DA and Sherriff proscribe marijuana sales, properly run collective and cooperative dispensaries do not engage in for-profit sale activities. Hence, a dispensary that operates within the AG's strict regulatory structure may be immune from criminal liability under the medical marijuana laws.

Rock and Roll
(of the Housing Market)

The housing market woes resulting from the collapse of the subprime loan market has created an unprecedented proliferation of vacant and foreclosed properties in many communities. The following measures are available to prevent these properties from becoming neighborhood blights.

Foreclosure Property Penalties

Civil Code Section 2929.3 permits local agencies to impose civil penalties of up to $1,000 per day on owners of poorly maintained foreclosed homes. The City must mail notice of the violation and provide an opportunity to abate at least 14 days before assessing the fines or penalties. This provision applies to the legal owner of residential property who purchases the property at a foreclosure sale. There is no requirement to adopt an implementing ordinance in order to impose the fine, although in order to simplify its administration some cities have done do. Also, the notice should provide the property owner with an opportunity to appeal the decision and request a hearing. The fees collected must go to the local nuisance abatement program.

Vacant Property Registration Ordinances

In cities that face a large number of foreclosures, many cities have adopted ordinances that require banks who have issued a notice of default to register and maintain properties in foreclosure. (See, e.g., Chula Vista Municipal Code Chapter 15.60 and Fresno Municipal Code section 10-620.)

Receivership

As an alternative to other code enforcement remedies, cities are increasingly using the Health and Safety receivership remedy for houses that present a nuisance, whether due to foreclosure or otherwise. This remedy was the focus of another session in this conference, so just the basics and recent case law are discussed here.

Courts consider a receivership to be a "drastic remedy" that is only employed when no other remedy will suffice to solve the problem. If after proper notice, an owner does not correct the health and safety violation, a court may

order the appointment of a receiver. The receiver then assumes responsibility for making the repairs or taking any other appropriate action, including demolition.[21] This is a flexible remedy that can deal with an uncooperative owner where a lasting resolution is needed. It is often employed when tenants are involved or when there are complications with the property but the owner is unavailable or uncooperative, or the property is highly leveraged.

The receiver is generally paid a substantial sum for his or her services. The receiver generally sells receiver's certificates or borrows money from a bank to fund his or her activities and the contractors to repair the property, and then liens the property to recover these funds when the property is sold. Cities can request that the receiver's debt have priority over all the other secured debt, but it is up to the court's discretion whether to grant that priority. Further, the City does not control the receiver once he or she is appointed, although the receiver does have to follow the court's orders that the City can propose. Absent court permission, the City cannot require a prospective receiver, to enter into any agreement concerning the receiver's role regarding property following a trustee's sale or termination of receivership, how the receivership will be administered or how much is charged or paid to third parties hired to provide services, who the receiver will hire, or seek approval to hire, to perform services; or what capital expenditures will be made on the property.[22] Many cities have requested that their legal costs in petitioning for the receivership be reimbursed by the receiver, and courts have reportedly allowed such costs in many instances. If not, the City does have the right to lien the property for such costs.

Last year, the California Supreme Court issued a favorable ruling for the City of Santa Monica in a receivership case.[23] This case was eagerly watched by City Attorneys, not just for the main ruling – that a receiver can demolish a structure if that is the most appropriate method to "rehabilitate" a property – but also for a sense of how favorably the court would view the use of the receivership remedy by cities. Fortunately for cities, the California Supreme court ruled for the City and took a reasonable view of the Health and Safety receivership statute. For example, in that case the court did not require the City to follow every minute procedural notice requirement as long as the City substantially complied with the notice provision. That said, if a City seeks a receivership remedy, city staff should carefully follow every requirement in order to avoid challenge.

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[21] Health & Safety Code § 17980.7(c).
[22] CRC 3.1179(b); Rutter Group, California Debt, 4:914.5.
[23] *City of Santa Monica v. Gonzales* (2008) 43 Cal.4th 905, 934.

PART II
OTHER RECENT CASES OF INTEREST[24]

Electronic Billboards

Electronic billboards have become more common lately. Some jurisdictions have banned or regulated them out of concerns that these billboards may be more distracting to motorists than regular billboards and more intrusive to neighboiring uses.[25] A recent federal court case upheld a ban of all such signs,[26] but another only upheld the ban at night.[27] Many cities' sign ordinances do not contain current definitions to regulate these signs, so cities may want to consult with the City Attorney to consider revising the municipal code to address electronic billboards.

Mobile signs

Mobile signs are signs carried on or pulled by a vehicle for the primary purpose of advertising. The City of West Hollywood's ordinance banning all such signs was recently upheld in a published opinion of the court of appeal.[28] In that case, a non-profit organization drove its "Tiger Truck" around town with four one-hundred inch video screens depicting scenes of animals being killed or injured by humans. Again, cities may want to consult with the City Attorney to consider revising the municipal code to address such a use.

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[24] This section drew on a paper prepared by Deborah Fox at Meyers Nave entitled "Signs of the Time – Play Now, Pray Later: Regulating Signs, Sex and Religious Facilities" presented at the League of California Cities, 2009 City Attorneys Department Conference.

[25] See Research Review of Potential Safety Effects of Electronic Billboards on Driver Attention and Distraction; http://www.fhwa.dot.gov/REALESTATE/elecbbrd/elecbbrd.pdf.)

[26] *Naser Jewelers v. City of Concord* (1st Cir. 2008) 513 F.3d 27.

[27] *Clear Channel Outdoor, Inc. v. City of Minnetonka* , No. 27-CV-06-23485(4th Dist. March 7, 2007).

[28] *Showing Animals Respect and Kindness v. City of West Hollywood* (2008) 166 Cal.App.4th 815.

PART III

WARRANTS: WHERE CAN I STAND AND WHY?

FOURTH AMENDMENT REVIEW

Vehicle abatement inspections. Routine fire safety inspections. Building and safety inspections. What do they have in common? No matter how the Municipal Code or the Fire Code or the Building Code provision is worded, no matter how much the particular provision may appear to provide the inspector with the authority to inspect the property, the inspector must nevertheless comply with the Fourth Amendment of the United States Constitution. Our Municipal Codes cannot give us an exception to the Fourth Amendment to the U.S. Constitution. Generally, that means an inspection warrant is required for inspections or abatements, although there are exceptions.

The United Supreme Court has explained the Fourth Amendment as follows:

> "The Fourth Amendment provides that, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.' [Cite omitted.] As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment. [¶] Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[29]

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[29] *Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523, 528-29.

The main exceptions to the need to obtain a warrant are as follows. Before relying on these exceptions, however, I recommend consulting with your City Attorney unless there is an emergency situation.

Consent

An occupant of the property can voluntarily consent to an inspection.[30] The owner of a house that does not occupy it does not have the right to consent to an inspection.

Open Fields, Aerial Surveillance, but not the "Curtilage"

Courts have found that the Fourth Amendment does not apply to observations while standing on open fields because there is no reasonable expectation of privacy.[31] Further, the Fourth Amendment does not apply to aerial surveillance. (*U.S. v. Eastland* (1993) 989 F.2d 760.) However, courts have held that the yard around the house -- called the "curtilage" -- is protected by the Fourth Amendment. As in all Fourth Amendment analysis, the Court must determine the reasonable expectations of privacy in the curtilage.[32] Inspectors can stand on a neighboring property, IF the neighbor has consented.[33]

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[30] *People v. James* (1977) 19 Cal.3d 99, ___.

[31] See *United States v. Pace* (1992) 955 F.2d 270, 274 (open fields do not warrant Fourth Amendment protection).

[32] *Katz v. United States* (1967) 389 U.S. 347. The centrally relevant consideration in determining the extent of the curtilage is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." (*United States v. Dunn* (1987) 480 U.S. 294.) The *Dunn* Court identified four factors useful in analyzing curtilage questions: (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by residents to protect the area from observation by people passing by. (*Id.* at 301.) The Court refused to adopt a bright line rule that curtilage should extend only to the nearest fence. Fences, however, are to be considered in defining the curtilage. (*Id.*)

[33] See *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 310-11.

Vacant Buildings

Case law holds that inspections of vacant and abandoned buildings do not require a warrant.[34] However, a "vacant" building is often in the eye of the beholder, so consult with your City Attorney before entering one without a warrant.

[34]See *City and County of San Francisco v. City Investment Corp.* (1971) 15 Cal.App.3d 1031 (fireman's inspection of a fire-gutted building, which was vacant and open to the public, did not violate the Fourth Amendment).

Exigent Circumstances

Properties with immediate hazards can be expected without a warrant, for example, warrants are not required to fight a fire, seize unwholesome food or destroy diseased animals in an emergency.[35]

Designated Highly-Regulated Industries

The courts have allowed searches of certain highly-regulated businesses to be inspected without a warrant such as bars and other liquor serving establishments, junkyards and massage parlors, where the search furthers an administrative purpose and as long as the specific statutory procedures are followed.[36]

[35] See *Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523, 539.
[36] See *People v. Paulson* (1990) 216 Cal.App.3d 1480, 1490 (liquor industry); *New York v. Burger* (1987) 482 U.S. 691, 704 (junkyards); *Kim v. Dolch* (1985) 173 Cal.App.3d 736, 743 (massage parlors).