

LEBANON CITY COUNCIL AGENDA

October 22, 2014 (Noon)

Santiam Travel Station
750 3rd Street, Lebanon, Oregon

Mayor Paul Aziz

Council President Bob Elliott
Councilor Robert Furlow

Councilor Jason Bolen
Councilor Rebecca Grizzle

Councilor Floyd Fisher
Councilor Wayne Rieskamp

MISSION STATEMENT

The City of Lebanon is dedicated to providing exceptional services and opportunities that enhance the quality of life for present and future members of the community.

CALL TO ORDER / FLAG SALUTE

ROLL CALL

CONSENT CALENDAR: *The following item(s) are considered routine and will be enacted by one motion. There will not be a separate discussion of these items unless a Councilor so requests. In this case, the item(s) will be removed from the Consent Calendar and considered separately.*

AGENDA: Lebanon City Council Agenda – October 22, 2014

PUBLIC COMMENTS: *The Council welcomes all respectful comments regarding the City's business. Citizens may address the Council by approaching the microphone, signing in, and stating their name and address for the record. Each citizen is provided up to 5 minutes to provide comments to the Council. The Council may take an additional two minutes to respond. The City Clerk will accept and distribute written comments at a speaker's request.*

REGULAR SESSION:

1) Proposed Tax for the Sale of Marijuana

Presented by: Tré Kennedy, City Attorney

*Approval/Denial by ORDINANCE BILL NO. 2014-7, ORDINANCE NO. 2855
Approval/Denial by RESOLUTION NO. 2014-35*

2) Medical Marijuana Dispensary Ban

Presented by: Tré Kennedy, City Attorney

DISCUSSION

EXECUTIVE SESSION: *Executive Sessions are closed to the public due to the highly confidential nature of the subject. It is unlawful to discuss anything outside of the Executive Session. Final action/decisions are to be made in open session.*

Per ORS 192.660(2)(i) To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

REGULAR SESSION:

3) City Manager Evaluation

Presented by: Paul Aziz, Mayor

Approval/Denial by MOTION

ITEMS FROM COUNCIL

PUBLIC COMMENTS: *An opportunity for citizens to comment on items of city business.*

ITEMS FROM PRESS: *An opportunity for the Press to ask questions pertaining to city business.*

ADJOURNMENT

NEXT SCHEDULED COUNCIL MEETING(S)

- November 12, 2014 (5:30 p.m.) Work Session (Elected Officials Liability Training)
- November 12, 2014 (6 p.m.) Regular Session
- December 10, 2014 (6 p.m.) Regular Session

Agenda Item 1



Legal

John Kennedy, City Attorney

MEMORANDUM

To: City Council

Date: 10/1/2014

From: John Kennedy, City Attorney

Subject: Marijuana Taxation Update

On November 4, 2014 Oregon will vote on the legalization of recreational marijuana. If approved by voters, the measure would legalize recreational marijuana for people ages 21 and older, allowing adults over this age to possess up to eight ounces of "dried" marijuana and up to four plants. Additionally, the measure would task the Oregon Liquor Control Commission with regulating sales of the drug. The bill does allow municipalities to ban sale (not use) of recreational marijuana in a city if an initiative (voter initiated and approved) is passed in the City.

Currently, Cities around the state are addressing the potential to tax the recreational use of marijuana at the municipal level. After discussion of this issue I will request guidance from Council as to whether to prepare an ordinance to tax the recreational use of marijuana.

AN ORDINANCE OF THE CITY OF LEBANON) ***Ordinance Bill No. 2014-7***
ESTABLISHING A TAX ON THE SALE OF)
MARIJUANA AND MARIJUANA –INFUSED)
PRODUCTS IN THE CITY OF LEBANON) ***Ordinance No. 2855***

WHEREAS, Chapter 2, Section 4 of the Lebanon City Charter provides:

Powers of the City. The City shall have all powers which the Constitutions, statutes, and common law of the United States of America and of the State of Oregon expressly or impliedly grant or allow municipalities as fully as though this Charter specifically enumerated each of those powers.

WHEREAS, the City of Lebanon desires to tax the sale or transfer of marijuana and marijuana-infused products within the City.

THE CITY OF LEBANON ORDAINS AS FOLLOWS:

SECTION 1. Title 3 Revenue and Finance of the Lebanon Municipal Code hereby adds a new Chapter 3.20, establishing a tax on the sale of marijuana and marijuana-infused products, as follows:

3.20.010 Purpose

For the purposes of this Chapter, every person who sells marijuana, medical marijuana or marijuana-infused products in the City of Lebanon is exercising a taxable privilege. The purpose of this Chapter is to impose a tax upon the retail sale of marijuana, medical marijuana, and marijuana-infused products.

3.20.020 Definitions

When not clearly otherwise indicated by the context, the following words and phrases as used in this chapter shall have the following meanings:

- A. “Director” means the Director of Finance for the City of Lebanon or his/her designee.
- B. “Gross Taxable Sales” means the total amount received in money, credits, property or other consideration from sales of marijuana, medical marijuana and marijuana-infused products that is subject to the tax imposed by this chapter.
- C. “Marijuana” means all parts of the plant of the Cannabis family Moraceae, whether growing or not; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin, as may be defined by Oregon Revised Statutes as they currently exist or may from time to time be amended. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.
- D. “Oregon Medical Marijuana Program” means the office within the Oregon Health Authority that

administers the provisions of ORS 475.300 through 475.346, the Oregon Medical Marijuana Act, and all policies and procedures pertaining thereto.

E. "Person" means natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business, trust, organization, or any group or combination acting as a unit, including the United States of America, the State of Oregon and any political subdivision thereof, or the manager, lessee, agent, servant, officer or employee of any of them.

F. "Purchase or Sale" means the retail acquisition or furnishing for consideration by any person of marijuana within the City and does not include the acquisition or furnishing of marijuana by a grower or processor to a seller.

G. "Registry identification cardholder" means a person who has been diagnosed by an attending physician with a debilitating medical condition and for whom the use of medical marijuana may mitigate the symptoms or effects of the person's debilitating medical condition, and who has been issued a registry identification card by the Oregon Health Authority.

H. "Retail sale" means the transfer of goods or services in exchange for any valuable consideration and does not include the transfer or exchange of goods or services between a grower or processor and a seller.

I. "Seller" means any person who is required to be licensed or has been licensed by the State of Oregon to provide marijuana or marijuana-infused products to purchasers for money, credit, property or other consideration.

J. "Tax" means either the tax payable by the seller or the aggregate amount of taxes due from a seller during the period for which the seller is required to report collections under this chapter.

K. "Taxpayer" means any person obligated to account to the Finance Director for taxes collected or to be collected, or from whom a tax is due, under the terms of this chapter.

3.20.030 Levy of Tax

A. There is hereby levied and shall be paid a tax by every seller exercising the taxable privilege of selling marijuana and marijuana-infused products as defined in this chapter.

B. The amount of tax levied shall be established by a City Council resolution.

3.20.040 Deductions

The following deductions shall be allowed against sales received by the seller providing marijuana:

- A. Refunds of sales actually returned to any purchaser;
- B. Any adjustments in sales which amount to a refund to a purchaser, providing such adjustment pertains to the actual sale of marijuana or marijuana-infused products and does not include any adjustments for other services furnished by a seller.

3.20.050 Seller Responsible for Payment of Tax

A. Every seller shall, on or before the last day of the month following the end of each calendar quarter (in the months of April, July, October and January) make a return to the Director, on forms provided by the City, specifying the total sales subject to this chapter and the amount of tax collected under this chapter. The seller may request or the Director may establish shorter reporting periods for any seller if the seller or Director deems it necessary in order to insure collection of the tax and the Director may require further information in the return relevant to payment of the tax. A return shall not be considered filed until it is actually received by the Director.

B. At the time the return is filed, the full amount of the tax collected shall be remitted to the Director. Payments received by the Director for application against existing liabilities will be credited toward the period designated by the taxpayer under conditions that are not prejudicial to the interest of the City. A condition considered prejudicial is the imminent expiration of the statute of limitations for a period or periods.

C. Non-designated payments shall be applied in the order of the oldest liability first, with the payment credited first toward any accrued penalty, then to interest, then to the underlying tax until the payment is exhausted. Crediting of a payment toward a specific reporting period will be first applied against any accrued penalty, then to interest, then to the underlying tax. If the Director, in his or her sole discretion, determines that an alternative order of payment application would be in the best interest of the City in a particular tax or factual situation, the Director may order such a change. The Director may establish shorter reporting periods for any seller if the Director deems it necessary in order to insure collection of the tax. The Director also may require additional information in the return relevant to payment of the liability. When a shorter return period is required, penalties and interest shall be computed according to the shorter return period. Returns and payments are due immediately upon cessation of business for any reason. All taxes collected by sellers pursuant to this chapter shall be held in trust for the account of the City until payment is made to the Director. A separate trust bank account is not required in order to comply with this provision.

D. Every seller required to remit the tax imposed in this chapter shall be entitled to retain five percent (5%) of all taxes due to defray the costs of bookkeeping and remittance.

E. Every seller must keep and preserve in an accounting format established by the Director records of all sales made by the dispensary and such other books or accounts as may be required by the Director.

Every seller must keep and preserve for a period of three (3) years all such books, invoices and other records. The Director shall have the right to inspect all such records at all reasonable times.

3.20.060 Penalties and Interest

A. Any seller who fails to remit any portion of any tax imposed by this chapter within the time required shall pay a penalty of ten percent (10%) of the amount of the tax, in addition to the amount of the tax.

B. Any seller who fails to remit any delinquent remittance on or before a period of 60 days following the date, on which the remittance first became delinquent, shall pay a second delinquency penalty of ten percent (10%) of the amount of the tax in addition to the amount of the tax and the penalty first imposed.

C. If the Director determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of twenty-five percent (25%) of the amount of the tax shall be added thereto in addition to the penalties stated in subparagraphs A and B of this section.

D. In addition to the penalties imposed, any seller who fails to remit any tax imposed by this chapter shall pay interest at the rate of one percent (1%) per month or fraction thereof on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.

E. Every penalty imposed, and such interest as accrues under the provisions of this section, shall become a part of the tax required to be paid.

3.20.070 Failure to Report and Remit Tax - Determination of Tax by Director

If any seller should fail to make, within the time provided in this chapter, any report of the tax required by this chapter, the Director shall proceed in such manner as deemed best to obtain facts and information on which to base the estimate of tax due. As soon as the Director shall procure such facts and information as is able to be obtained, upon which to base the assessment of any tax imposed by this chapter and payable by any seller, the Director shall proceed to determine and assess against such seller the tax, interest and penalties provided for by this chapter. In case such determination is made, the Director shall give a notice of the amount so assessed by having it served personally or by depositing it in the United States mail, postage prepaid, addressed to the seller so assessed at the last known place of address. Such seller may make an appeal of such determination as provided in section 4.34.080. If no appeal is filed, the Director's determination is final and the amount thereby is immediately due and payable.

3.20.080 Appeal

Any seller aggrieved by any decision of the Director with respect to the amount of such tax, interest and

penalties, if any, may appeal that decision to the City Manager, except that the appeal shall be filed within 30 days of the serving or mailing of the determination of tax due. The City Manager shall hear and consider any records and evidence presented bearing upon the Director's determination of amount due, and make findings affirming, reversing or modifying the determination. The findings of the City Manager shall be final and conclusive, and shall be served upon the appellant in the manner prescribed above for service of notice of hearing. Any amount found to be due shall be immediately due and payable upon the service of notice.

3.20.090 Refunds

A. Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once, or has been erroneously collected or received by the City under this chapter, it may be refunded as provided in subparagraph B of this section, provided a claim in writing, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the Director within one year of the date of payment. The claim shall be on forms furnished by the Director.

B. The Director shall have 20 calendar days from the date of receipt of a claim to review the claim and make a determination in writing as to the validity of the claim. The Director shall notify the claimant in writing of the Director's determination. Such notice shall be mailed to the address provided by claimant on the claim form. In the event a claim is determined by the Director to be a valid claim, in a manner prescribed by the Director a seller may claim a refund, or take as credit against taxes collected and remitted, the amount overpaid, paid more than once or erroneously collected or received. The seller shall notify Director of claimant's choice no later than 15 days following the date Director mailed the determination. In the event claimant has not notified the Director of claimant's choice within the 15 day period and the seller is still in business, a credit will be granted against the tax liability for the next reporting period. If the seller is no longer in business, a refund check will be mailed to claimant at the address provided in the claim form.

C. No refund shall be paid under the provisions of this section unless the claimant established the right by written records showing entitlement to such refund and the Director acknowledged the validity of the claim.

3.20.100 Actions to Collect

Any tax required to be paid by any seller under the provisions of this chapter shall be deemed a debt owed by the seller to the City. Any such tax collected by a seller which has not been paid to the City shall be deemed a debt owed by the seller to the City. Any person owing money to the City under the provisions of this chapter shall be liable to an action brought in the name of the City of Lebanon for the recovery of such amount. In lieu of filing an action for the recovery, the City of Lebanon, when taxes due are more than 30 days delinquent, can submit any outstanding tax to a collection agency. So long as the City of Lebanon has complied with the provisions set forth in ORS 697.105, in the event the City turns over a delinquent tax account to a collection agency, it may add to the amount owing an amount equal

to the collection agency fees, not to exceed the greater of fifty dollars (\$50.00) or fifty percent (50%) of the outstanding tax, penalties and interest owing.

3.20.110 Violation Infractions

A. All violations of this chapter are punishable as set forth in LMC 1.16. It is a violation of this chapter for any seller or other person to:

- 1) Fail or refuse to comply as required herein;
- 2) Fail or refuse to furnish any return required to be made;
- 3) Fail or refuse to permit inspection of records;
- 4) Fail or refuse to furnish a supplemental return or other data required by the Director;
- 5) Render a false or fraudulent return or claim; or
- 6) Fail, refuse or neglect to remit the tax to the city by the due date.

B. Violations of this section shall be considered a Class C misdemeanor. The remedies provided by this section are not exclusive and shall not prevent the City from exercising any other remedy available under the law, nor shall the provisions of this ordinance prohibit or restrict the City or other appropriate prosecutor from pursuing criminal charges under state law or City ordinance.

3.20.120 Confidentiality

Except as otherwise required by law, it shall be unlawful for the City, any officer, employee or agent to divulge, release or make known in any manner any financial information submitted or disclosed to the City under the terms of this chapter. Nothing in this section shall prohibit:

A. The disclosure of the names and addresses of any person who is operating a licensed establishment from which marijuana is sold or provided; or

B. The disclosure of general statistics in a form which would not reveal an individual seller's financial information; or

C. Presentation of evidence to the court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim by the Director or an appeal from the Director for amount due the City under this chapter; or

D. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures; or

E. The disclosure of records related to a business' failure to report and remit the tax when the report or tax is in arrears for over six months or the tax exceeds five thousand dollars (\$5,000). The City Council

expressly finds and determines that the public interest in disclosure of such records clearly outweighs the interest in confidentiality under ORS 192.501(5).

3.20.130 Audit of Books, Records or Persons

The City, for the purpose of determining the correctness of any tax return, or for the purpose of an estimate of taxes due, may examine or may cause to be examined by an agent or representative designated by the City for that purpose, any books, papers, records, or memoranda, including copies of seller's state and federal income tax return, bearing upon the matter of the seller's tax return. All books, invoices, accounts and other records shall be made available within the City limits and be open at any time during regular business hours for examination by the Director or an authorized agent of the Director. If any taxpayer refuses to voluntarily furnish any of the foregoing information when requested, the Director may immediately seek a subpoena from the Lebanon Municipal Court to require that the taxpayer or a representative of the taxpayer attend a hearing or produce any such books, accounts and records for examination.

3.20.140 Forms and Regulations

A. The Director is hereby authorized to prescribe forms and promulgate rules and regulations to aid in the making of returns, the ascertainment, assessment and collection of said medical marijuana tax and in particular and without limiting the general language of this chapter, to provide for:

- 1) A form of report on sales and purchases to be supplied to all vendors;
- 2) The records which sellers providing marijuana and marijuana-infused products are to keep concerning the tax imposed by this chapter.

Passed by the Lebanon City Council by a vote of ___ for and ___ against and approved by the Mayor on this ___ day of October, 2014.

CITY OF LEBANON, OREGON

Paul Aziz, Mayor
Bob Elliott, Council President

ATTEST:

Linda Kaser, City Recorder

**A RESOLUTION OF THE LEBANON CITY)
COUNCIL ESTABLISHING TAX RATES)
FOR THE SALE OF MARIJUANA, MEDICAL)
MARIJUANA AND MARIJUANA INFUSED)
PRODUCTS IN THE CITY OF LEBANON)**

Resolution No. 2014-35

RECITALS:

A. The Lebanon City Council on October __, 2014 adopted Ordinance No. __, establishing a tax on marijuana and marijuana infused products in the City of Lebanon, which shall be codified as Chapter 3.20 of the Lebanon Municipal Code.

B. Per Section 3.20.030 of the LMC, the Council shall by resolution establish a tax rate for the sale of such products.

THE CITY OF LEBANON RESOLVES AS FOLLOWS:

SECTION 1. Pursuant to Section 3.20.030 of Lebanon Municipal Code, the City Council of the City of Lebanon establishes a tax rate of zero percent (0%) of the gross sale amount paid to the seller by a registry identification cardholder, as defined in Section 3.20.020(G) of the Lebanon Municipal Code.

SECTION 2. Pursuant to Section 3.20.030 of Lebanon Municipal Code, the City Council of the City of Lebanon establishes a tax rate of ten percent (10%) of the gross sale amount paid to the seller of marijuana and marijuana-infused products by individuals who are not purchasing marijuana under the Oregon Medical Marijuana Program.

This Resolution shall be effective immediately upon its passage.

Passed by a vote of ____ for and ____ against by the Lebanon City Council on this ____ day of _____, 2014.

 Paul Aziz, Mayor
 Bob Elliott, Council President

ATTEST:

Linda Kaser, City Clerk / Recorder

Agenda Item 2



Legal

John Kennedy, City Attorney

MEMORANDUM

To: City Council

Date: 10/17/2014

From: John Kennedy, City Attorney

Subject: Medical Marijuana Dispensaries Ban

Attached is a Circuit Court decision that upholds home rule authority to ban medical marijuana dispensaries. In it, the Judge ruled in favor of the League and AOC concluding that state law does not preempt the city of Cave Junction from adopting a ban on dispensaries (or refusing to issue a business license). Given that conclusion, the Judge chose not to address the federal preemption arguments.

I would like to get Council's direction at the October 22 meeting as to whether or not you would like me to prepare a ban consistent with this decision. We would then have a ban in place, unless overturned by a higher court or legislature.

/lgk



OREGON JUDICIAL DEPARTMENT
Josephine County Court

October 16, 2014

FILED OCT 16 2014
JOSEPHINE COUNTY COURTS
BY _____

Mr. Ryan Kirchoff
Attorney at Law
130 NW D Street
Grants Pass, OR 97526

Mr. Rob Bovett
Attorney at Law
Association of Oregon Counties
1201 Court Street NE STE 300
Salem, OR 97301

Mr. Pat Kelly
Attorney at Law
717 NW 5th Street
Grants Pass, OR 97526

Mr. Sean O'Day
Attorney at Law
League of Oregon Cities
1201 Court St NE STE 200
Salem, OR 97301

Ms. Carla Scott
Deputy Attorney General
Oregon Dept. of Justice
1515 SW 5th Ave
Portland, OR 97201

RE: City of Cave Junction vs. State of Oregon; Josephine County Case No. 14CV0588

Dear Counsel:

What follows is the Court's letter opinion with respect to the reciprocal Motions for Summary Judgment pending in this case.

The benchmark case in the area of local preemption is La Grande/Astoria vs. PERB, 281 Or 137, wherein the Court wrote: "...as we have noted, local government authority may be preempted in either of two ways: 1) it may be preempted expressly, 2) or it may be preempted implicitly by virtue of the fact that it cannot operate concurrently with state or federal law".

The Court will address each type of preemption in order:

I. Express preemption

As Intervener's note in their memorandum, there are many Oregon laws that contain language of express preemption. Another example is ORS 417.045, which involves another drug, to wit:

"471.045 Liquor laws supersede and repeal inconsistent charters and ordinances. The Liquor Control Act, designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed."

Because of this language there has never been room for any government entity, other than the Oregon Liquor Control Commission, to regulate alcohol.

In this case, there are no such words of express preemption.

II. Implied preemption

In discussing implied preemption, all the parties base their arguments on several Oregon cases, which the Court will discuss.

In La Grande/Astoria vs. PERB, 281 Or 137, the general rule state on page 148, as follows: "It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulations of local conditions by a statewide law unless that intention is apparent."

In Haley vs. City of Troutdale, 281 Or 203, the city enacted an ordinance requiring "double-wall" construction in certain instances, despite Oregon's building code that allowed "single-wall" construction. On page 210, the state building code contains the following preemptive-sounding language: "The state building code shall be applicable and uniform throughout this state, and in all municipalities therein, and no municipality shall enact or enforce any ordinance, rule or regulation in conflict therewith."

Despite that language, the city's code requiring double-wall construction was not preempted by the state building code. The court found the statute ambiguous as to local preemption. On page 211, they wrote "certainly that intention is not unambiguously expressed. Until it is, we conclude that local requirements compatible with compliance of the state's standards are not preempted by ORS 456.750 et seq."

In AT&T Communications vs City of Eugene, 177 Or App 379, the city attempted to impose registration and licensing fees on AT&T, despite a myriad of state regulations that limited local

municipalities power to tax such utilities. Eugene's fees were not preempted, the court wrote on page 389: "A local law will be considered preempted if it is 'incompatible' with legislative policy, that is to say, if local and state or federal law cannot operate concurrently or if the state legislature or congress intended to preempt the local enactment." It was important to the court that Eugene's home rule charter conferred all authority to the city, not specifically denied by the state or federal constitution. Notably, the empowerment clause in the Eugene and Cave Junction city charters are almost identical. Eugene's home rule charter was enacted in 1976, and the court indicated a different result would follow, as it did in Eugene Theater et al. vs. Eugene, 194 OR 603 (1952), if Eugene had still been operating as a general law municipality.

In Oregon Restaurant Association vs. City of Corvallis, 166 Or App 506, the Oregon Indoor Clean Air Act prohibited smoking in all public places except areas designated according to the rules of the Oregon Health Division. The city's ordinance went beyond that, prohibiting smoking in all enclosed public places. On page 510, the court wrote:

"...in this case there is no conflict between the City's ordinance and the state law. The Act prohibits smoking in certain locations; it does not contain the slightest hint that the legislature intended to create a positive right to smoke in all public places where it did not expressly forbid smoking. Nothing in the Act is inconsistent with a local jurisdiction's decision to impose greater limits on public smoking. Because the Act and the ordinance are not inconsistent, there is no issue of preemption."

In Thunderbird Mobile Club LLC vs. City of Wilsonville, 234 Or App 457, the conflict was between Oregon's landlord tenant law, which provided a basic framework within which a mobile home park owner could cease operation, and the city of Wilsonville's much more onerous and expensive method of ceasing operation. Again, the state law appeared preemptive in its language but the court did not consider it so. Rather, on 471, it was noted: "Within the area of civil regulation, then, a chartered city can enact substantive policies in an area also regulated by state statute unless the local regulation is 'incompatible' with state law either in the sense of being 'clearly' preempted by express state law or because both [state law and local law] cannot operate concurrently."

Therefore, the issue in this case is whether or the City of Cave Junction, a home rule municipality, has the power to prohibit medical marijuana dispensaries despite HB3460 and Senate Bill 1531. As earlier indicated, there is nothing in either law that clearly preempts local regulation. The remaining question is whether or not these laws cannot operate concurrently, if a particular home rule municipality, such as the city of Cave Junction, is allowed to prohibit medical marijuana dispensaries.

The defendant's cite the language contained within Senate Bill 1531 as expressing "a clear intent to preempt local laws that would effectively ban outright OMMA – compliant dispensaries." State's Motion, page 7, line 21.

If that is so, it is certainly tepid language when compared with that found in AT&T Communications, supra (“the public utility commission shall have authority to determine the manner, and extent of the regulation of telecommunication services within the state of Oregon”); or, Thunderbird Mobile Club, supra (“This chapter applies, to regulates, determines rights, obligations and remedies under a rental agreement wherever made, for a dwelling unit located within this state”); or Haley, supra (“The state building code shall be applicable and uniform throughout this state and in all municipalities therein and no municipalities shall enact or enforce any ordinance, rules, or regulation in conflict therewith”), all of which were found not to be preemptive of local regulation.

Even though tepid, defendant claims that the following language in SB1531 removes a municipalities’ power to prohibit a medical marijuana dispensary:

1. Cross Reference to ORS 633.738

For the reasons stated in the Intervener’s brief, the Court does not believe ORS 633.738 has any application to medical marijuana.

2. The One Year Moratorium

The Court can certainly understand the state’s argument that a one year moratorium implies that, after that period, medical marijuana dispensaries must be allowed. The question for the Court is not to discern implication which is somewhat like attempting to read tea leaves; but to determine if this provision is incompatible with an outright ban. The use of the word “may” is instructive; instead of some other verbiage such as “may only”; or “is limited to”. It leaves open the question as to whether or not the City of Cave Junction may elect not to enact a moratorium (as they’ve done); and simply ban medical marijuana dispensaries; or, in the alternative, if the city enacted a moratorium, but during that period of time thought about the issue, and more importantly observed other medical marijuana dispensaries in practice and then decided to ban dispensaries or to refuse to issue a business license. The Court does not find that incompatible with the law as it is written.

3. Regulation of Time, Place, and Manner

This section does not strongly mitigate toward a particular interpretation. Again the word “may” is used. It is compatible with a reading that if a city elects to go forward with a medical marijuana dispensary they cannot do it in a grudging manner and attempt to restrict it out of existence.

The Court understands the state's argument that the language in these new laws express the legislature's intent to: "...provide reliable access to safe medical marijuana in a consistent manner throughout Oregon." State's Reply Brief, page 2, line 22 - 24.

However, this Court does not believe that some jurisdiction's election not to allow a medical marijuana dispensary is incompatible with that intent.

Following the state's logic, a local jurisdiction would never be able to prohibit, or even deny a business license, to a dispensary even for very legitimate reasons such as: their municipality is very small and doesn't even have a district described in ORS 475.314 (3)(a) within which to locate a dispensary; or the municipality is a bedroom community located near another city which has licensed several medical marijuana dispensaries.

Finally, the Court does not believe that the legislature's intent for widespread dispensaries, necessarily equates to greater access to medical marijuana than to traditional health care. In fact in ORS 475.300 where a legislative intent was expressed concerning medical marijuana it is stated: "...marijuana should be treated like other medicine." Other medicine, and other health care, are not found in every Oregon city and town. For example, if a resident of Fossil desires to fill a prescription, he/she must drive at least 20 miles to Condon because there is no pharmacy in Fossil. If that same person wanted to consult with a medical doctor, they would have to drive at least an additional 40 miles to Heppner; and if they were referred to a specialist, probably another 150 miles to Portland. This Court's first child was born after a 90 mile drive from our home to a hospital in the Dalles. Yet few Oregonians would say that they don't have general access to traditional pharmaceuticals, and physicians throughout Oregon. The resident of Fossil would understand that if he/she wanted immediate and quick access to traditional health care they might have to move to Portland (which no resident of Fossil would agree to).

In Zotolla vs. Three Rivers School District, Josephine County case number 12CV0045 and 11CV1240, this Court was confronted with a similar, but not the same issue. In that case, the legislature had recently enacted ORS 339.370-339.400. Well prior to its enactment, plaintiff was disciplined for conduct which the new law required to be reported to a subsequent prospective employer. The new law did not contain a retroactivity clause; but the defendant struggled mightily to imply one. This Court concluded its opinion by citing State ex rel Juv. Dept. vs Nicholls, 192 Or App 604, on page 610, wherein the Court of Appeals wrote:

"...the lack of an expressed retroactivity clause is itself important, because such clauses are commonplace and easy to draft in concept as well as practice."

The Court went on to indicate that the lack of such a clause:

"...therefore strongly suggests that the legislature either did not intend the statute to be retroactive or did not consider the matter." Page 611.

City of Cave Junction vs. State of Oregon
Josephine County Case No. 14CV0588
October 16, 2014
Page 6

The same is true with the issue of preemption. Because the new legislation SB1531 and HB3460, are not inconsistent with a city ban; or more likely a refusal to grant a business license; such local action is not preempted. The Oregon legislature will meet in several months. If they desire preemption, they can tell us then.

Summary judgment is granted in favor of Interveners and against plaintiff and defendants. Mr. Bovett or Mr. O'Day should draw up a consistent order. Because of the Court's ruling on this issue, the Court will not address the secondary issue as to whether or not the federal controlled substances act preempts this Oregon Legislation

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Pat Wolke', with a large, stylized initial 'P'.

Pat Wolke
Circuit Court Judge

PW:ah

*Executive Session

Per ORS 192.660(2)(i) To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

** Executive Sessions are closed to the public due to the highly confidential nature of the subject. It is unlawful to discuss anything outside of the Executive Session.*

Agenda Item 3



Administration

City Clerk/Recorder

MEMORANDUM

To: Mayor Aziz & Council

Date: October 15, 2014

From: Linda Kaser, City Clerk

Subject: City Manager's Six Month Evaluation – Executive Session

Background:

At the October 8 City Council Meeting, Council established a process for City Manager Gary Mark's six-month performance evaluation. Each Council member was provided with a City Manager Performance Evaluation form to be completed prior to the October 22 Noon Executive Session.

Executive Session:

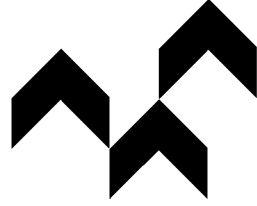
At the Executive Session, the Council will discuss individual ratings and then develop a single form that reflects the collective assessment of Gary's performance.

Regular Session:

After the Executive Session, Council will convene into Regular Session to provide the collaborative results in open session.

MOTION: *I move to approve the collective assessment of City Manager Marks' performance evaluation and enter those results into the official record.*

/lgk



CITY OF LEBANON
It's easier from here.