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6

7 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
8 **FOR THE COUNTY OF TEHAMA**

9  
10 JASON BROWNE; DAWN BROWNE;  
WILLIAM BROWNE; MICHAEL BLACK,  
11 GRANT NOTT; LINDSAY CROOKS;  
BRIAN LOUCKS; JASON CATER, JOSH  
12 HALL; *and* THOMAS SCOTT,

13 Petitioners,

14 vs.

15 COUNTY OF TEHAMA; TEHAMA  
COUNTY BOARD OF SUPERVISORS; *and*  
16 TEHAMA COUNTY DEPARTMENT OF  
PLANNING,

17 Respondents.  
18

CASE NO. CI 63676

SUPPLEMENTAL BRIEF  
RE: ASSEMBLY BILL NO. 2650  
IN SUPPORT OF RESPONDENT'S  
DEMURRER

19  
20 The purpose of this supplemental brief is to bring to the Court's attention recently-enacted  
21 legislation that may affect the analysis of the County's pending demurrer.

22 On September 30, 2010, Governor Schwarzenegger signed Assembly Bill No. 2650 into  
23 law. (Stats. 2010, ch. 633, hereinafter "A.B. 2650".)<sup>1</sup> This legislation adds Health and Safety  
24 Code section 11362.768 to the MMPA, prohibiting the establishment of any "medical marijuana  
25 cooperative, collective, dispensary, operator, establishment, or provider who possesses,  
26 cultivates, or distributes medical marijuana" within a 600-foot radius of a school. Of critical  
27 importance here, Section 11362.768 expressly recognizes and affirms local governments'

28 <sup>1</sup> A complete copy of A.B. 2650 is attached hereto (as Attachment "1") for the court's convenience.

1 authority to establish more stringent land use regulations: "Nothing in this section shall prohibit a  
2 city, county, or city and county from adopting ordinances or policies that *further restrict the*  
3 *location or establishment* of a medical marijuana cooperative, collective, dispensary, operator,  
4 establishment, or provider." (§ 11362.768, subd. (f).)

5 As will appear, not only is this legislation directly relevant to the disposition of many of  
6 Petitioners' claims, the legislative history underlying A.B. 2650 also conclusively undermines  
7 Petitioners' argument that the MMPA preempts local land use and regulatory authority.<sup>2</sup>

#### 8 **I. A.B. 2650 UNDERMINES PETITIONERS' MMPA PREEMPTION ARGUMENTS**

9 A.B. 2650 was motivated by many of the same concerns underlying Ordinance No. 1936.<sup>3</sup>  
10 The statute's central provision prohibits any "medical marijuana cooperative, collective,  
11 dispensary, operator, establishment, or provider" that "has a storefront or mobile retail outlet  
12 which ordinarily requires a local business license" from locating "within a 600-foot radius of a  
13 school." (Health & Saf. Code, § 11362.768.)

14 As originally introduced, A.B. 2650 did not explicitly address its effect upon local land  
15 use ordinances.<sup>4</sup> Almost immediately, concerns were expressed that the bill might unduly restrict  
16 local regulatory authority. The very first Assembly committee report noted that "[s]ince the  
17 passage of SB 420 in 2003, much of the medical marijuana regulation has been determined by  
18 local jurisdictions better equipped to resolve issues related to the unique nature of its city or  
19 county,"<sup>5</sup> and *medical marijuana advocates* complained that "[t]his legislation usurps the

20 <sup>2</sup> A.B. 2650 does not contain an urgency clause, and therefore will not take effect until January 1, 2011. (Cal. Const.,  
21 art. IV, § 8, subd. (c).) However, the mandamus relief sought by Petitioners is a prospective remedy (i.e., "operates *in*  
22 *futuro*"), and consequently the propriety of such relief must take into account changes in the law occurring during the  
23 pendency of the case. (*Renken v. Compton City School Dist.* (1962) 207 Cal.App.2d 106, 116; *Callie v. Board of*  
*Supervisors* (1969) 1 Cal.App.3d 13, 19.) Since A.B. 2650 will obviously take effect well before any judgment in  
this matter becomes final, it is properly considered by this court. Further, the lessons gleaned from A.B. 2650's  
legislative history are relevant today, and do not depend upon the statute's effective date.

24 <sup>3</sup> (Compare Assem. Pub. Saf. Comm., analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8,  
25 2010, Supp. Req. for Jud. Not., Exh. "A" and Sen. Loc. Gov. Comm, analysis of Assem. Bill. No. 2650 (2009-2010  
26 Reg. Sess.) as amended Jun. 10, 2010, Supp. Req. for Jud. Not., Exh. "G" with Tehama County Code, § 9.06.020,  
subd. (h).)

27 <sup>4</sup> (Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010, Supp. Req. for Jud. Not., Exh. "J".)

28 <sup>5</sup> (Assem. Pub. Saf. Comm., analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010,  
Supp. Req. for Jud. Not., Exh. "A")

1 authority of local governments to make their own land-use decisions."<sup>6</sup> The Marijuana Policy  
2 Project asserted that "[i]t is wholly inappropriate to enact a one-size-fits-all policy to apply to  
3 every jurisdiction in California - the largest and most diverse state in the nation," and Americans  
4 for Safe Access specifically argued that:

5  
6 *Furthermore, local land use decisions are best made by City Councils and County Boards*  
7 *of Supervisors based on the individual circumstances in the community. Usurping this*  
8 *local authority with an arbitrary statewide limit will interfere with the ability of local*  
9 *governments to use their discretion in developing the kinds of regulations that are already*  
10 *proven to protect legal patients and the community at large. Land use issues related to*  
11 *these associations should continue to be made at the local level - just like those for other*  
12 *legal businesses or organizations.*<sup>7</sup>

13  
14 The Bill's author responded by clarifying that the preemptive intent of A.B. 2650 was  
15 limited, i.e., to "provide[] local jurisdictions necessary guidance *while allowing them to construct*  
16 *a more restrictive ordinance.*"<sup>8</sup> This intent was subsequently incorporated into two savings  
17 clauses, Subdivisions (f) and (g) of proposed Health and Safety Code 11362.768,<sup>9</sup> which remain  
18 in A.B. 2650 as adopted.<sup>10</sup> These provisions effectively favor restrictive local regulations, by  
19 allowing local governments "to construct a *more restrictive ordinance*" *at any time*, but "set[ting]

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21 <sup>6</sup> (Assem. Pub. Saf. Comm., analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010,  
22 Supp. Req. for Jud. Not., Exh. "B", quoting Marijuana Policy Project comment letter.)

23  
24 <sup>7</sup> (*Ibid.*, quoting Americans for Safe Access comment letter.)

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26 <sup>8</sup> (Assem. Comm. on Appropriations, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15,  
27 2010, Supp. Req. for Jud. Not., Exh. "D".)

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29 <sup>9</sup> Subdivision (f) provides that:

30  
31 *Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies*  
32 *that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary,*  
33 *operator, establishment, or provider.*

34  
35 Subdivision (g) provides that:

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37 *Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the*  
38 *location or establishment of a medical marijuana cooperative, collective, dispensary, operator,*  
39 *establishment, or provider.*

40  
41 <sup>10</sup> (See Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended May 28, 2010, Supp. Req. for Jud. Not., Exh. "L";  
42 Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 1, 2010, Supp. Req. for Jud. Not., Exh. "M".)

1 a January 1, 2011 deadline for adopting any local ordinance that is *less restrictive* than AB  
2 2650.”<sup>11</sup>

3 This limited preemption of local regulatory authority was the subject of intensive debate.  
4 Subsequent committee reports provided detailed discussions of the local police power, and  
5 repeatedly questioned whether *any* state interference with that plenary authority in this area was  
6 warranted.<sup>12</sup> Notably, at no time during the legislative process was it ever suggested – by any  
7 participant – that the existing provisions of the MMPA preempt local authority to regulate  
8 marijuana-related land uses.<sup>13</sup> Quite the contrary, the legislative committee reports repeatedly  
9 stressed the breadth of the local police power in this area and the desirability of minimizing state  
10 interference.<sup>14</sup> Perhaps more importantly, the Legislature *acted* on this understanding, carefully  
11 crafting the provisions of A.B. 2650 to preserve local authority to construct more restrictive  
12 ordinances. These efforts would, of course, have been pointless – and the savings clauses  
13 surplusage – if, as suggested by Petitioner, the MMPA already preempted all more restrictive  
14 local regulations upon marijuana-related land uses. The Legislature clearly viewed A.B. 2650 as  
15 its first tentative foray into the regulation of marijuana as a land use, which is utterly inconsistent

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16 <sup>11</sup> (Sen. Loc. Gov. Comm, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010,  
17 Supp. Req. for Jud. Not., Exh. “G”; Assem. Comm. on Appropriations, analysis of Assem. Bill. No. 2650 (2009-  
18 2010 Reg. Sess.) as amended Apr. 15, 2010, Supp. Req. for Jud. Not., Exh. “D”. See also Sen. Pub. Saf. Comm.,  
analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, Supp. Req. for Jud. Not., Exh.  
“F”).

19 <sup>12</sup> (Sen. Loc. Gov. Comm, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010,  
20 Supp. Req. for Jud. Not., Exh. “G”; Sen. Pub. Saf. Comm., analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.)  
21 as amended Jun. 10, 2010, Supp. Req. for Jud. Not., Exh. “F”). Interestingly, the Assembly and Senate committee  
22 reports most critical of any restriction on local land use authority were issued by committees chaired by two of the  
Legislature’s most vocal advocates of medical marijuana, Assemblyman Tom Ammiano and Senator Mark Leno (one  
of the original sponsors of the MMPA).

23 <sup>13</sup> Several of the committee reports (notably those prepared for committees chaired by Messrs. Ammiano and Leno)  
24 did insinuate that *the CUA* might preclude the state (and by extension local governments) from enacting the proposed  
25 setback between marijuana collectives and schools. However, these arguments were evidently not accepted by either  
the committees themselves or the Legislature as a whole – all of whom overwhelmingly passed the A.B. 2650  
notwithstanding these arguments. (Nor should these arguments have been accepted, for the reasons set forth in the  
County’s moving papers.)

26 <sup>14</sup> (See, e.g., Sen. Loc. Gov. Comm, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10,  
27 2010, Supp. Req. for Jud. Not., Exh. “G” [“Local land use decisions that strike a delicate balance between protecting  
28 school children and ensuring that patients and caregivers can obtain medical marijuana are best made by city and  
county officials . . . The Committee may wish to consider whether AB 2650 substitutes an arbitrary, one-size-fits-all  
standard for local officials’ informed judgments about their communities”].)

1 with Petitioners' assertion that the MMPA broadly preempts local efforts to regulation such uses.

2 In addition to producing legislation that (1) expressly recognizes local regulatory  
3 authority, and (2) affirmatively favors more restrictive marijuana ordinances, A.B. 2650's  
4 legislative history also teaches a more subtle lesson. As noted in the County's moving papers,  
5 "given the controversy that would inevitably have attended" a proposal to restrict local authority  
6 over marijuana-related land uses, "we do not believe that [the MMPA] can reasonably be  
7 understood as adopting such a requirement silently and without debate." (See *Ross v. RagingWire*  
8 *Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931.) The debate over A.B. 2650 proves the  
9 truth of this observation. Unlike the original MMPA, A.B. 2650 actually does address local land  
10 use authority, and was consequently subject to intensive scrutiny. This lead to deliberate tailoring  
11 of A.B. 2650's savings clauses to achieve precisely the limited preemptive effect that the  
12 Legislature desired. One can scarcely imagine a clearer contrast with the legislative proceedings  
13 leading up to adoption of the original MMPA, which did not even mention either land use or the  
14 local police power.

15 In this case, many of Petitioners' claims are premised upon the effect of Ordinance No.  
16 1936 on medical marijuana collectives, which assertedly contravenes the MMPA. (See, e.g., Pet.,  
17 §§ 28, 29, 37.) However, as applied to medical marijuana collectives, Ordinance No. 1936 fits  
18 neatly into A.B. 2650's savings clauses.<sup>15</sup> Consequently, these claims - never strong - are now  
19 wholly unsupportable. More broadly, both the plain language of new Health and Safety Code  
20 section 11362.768 and the legislative history behind that language make it abundantly clear that  
21 the Legislature did not intend the MMPA to establish broad statewide preemption of all local land  
22 use ordinances, nor to grant an unlimited right to engage in marijuana-related activities in any  
23 location free from local regulations. Indeed, the Legislature has made it clear that where  
24 preemption in this area is truly intended, it is explicitly prescribed and carefully limited - and is  
25 especially protective of *more restrictive* local regulations.

26 <sup>15</sup> Although the effect of the ordinance upon medical marijuana collectives is considerably more modest than  
27 Petitioners' claim, the ordinance is nonetheless more restrictive than A.B. 2650 in at least two ways: It applies to all  
28 collective cultivation sites, not just those with a "storefront or mobile retail outlet which ordinarily requires a local  
business license," and it requires greater setbacks from a broader class of facilities. (And, of course, Ordinance No.  
1936 was also "adopted prior to January 1, 2011.")

1 **II. CONCLUSION**

2 When the MMPA was passed, its sponsors described it as "the very best we could hope to  
3 get enacted into law"<sup>16</sup> – and they were right. Efforts to judicially expand the MMPA's limited  
4 criminal protections have been handily rejected, and A.B. 2650's savings clauses clearly indicate  
5 legislative unwillingness to intrude upon the power of local governments to more closely regulate  
6 marijuana-related land uses. With this additional support, the County's demurrer should be  
7 sustained without leave to amend.

8  
9 Respectfully submitted,

10 DATED: Nov 8, 2010

11 WILLIAM JAMES MURPHY  
12 Tehama County Counsel

13 By   
14 ARTHUR J. WYLENE  
15 Assistant County Counsel

16 Attorneys for the RESPONDENTS

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28 <sup>16</sup> (Sen. John Vasconcellos & Assemblyman Mark Leno, letter to Assembly Speaker Herb Wesson, Sep. 10, 2003, 1  
Assem. J. (2003-2004 Reg. Sess.) p. 3932, Supp. Req. for Jud. Not., Exh. "O". )

BILL NUMBER: AB 2650      CHAPTERED  
BILL TEXT

## CHAPTER 603

FILED WITH SECRETARY OF STATE    SEPTEMBER 30, 2010  
APPROVED BY GOVERNOR    SEPTEMBER 30, 2010  
PASSED THE SENATE    AUGUST 11, 2010  
PASSED THE ASSEMBLY    AUGUST 16, 2010  
AMENDED IN SENATE    JULY 15, 2010  
AMENDED IN SENATE    JUNE 10, 2010  
AMENDED IN ASSEMBLY    MAY 28, 2010  
AMENDED IN ASSEMBLY    APRIL 15, 2010  
AMENDED IN ASSEMBLY    APRIL 8, 2010

INTRODUCED BY    Assembly Member Buchanan  
                  (Coauthors: Assembly Members Carter, Portantino, Torres, and  
Torrico)

FEBRUARY 19, 2010

An act to add Section 11362.768 to the Health and Safety Code,  
relating to medical marijuana.

## LEGISLATIVE COUNSEL'S DIGEST

AB 2650, Buchanan. Medical marijuana.

Existing law added by initiative, the Compassionate Use Act of 1996, prohibits any physician from being punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. The act prohibits the provisions of law making unlawful the possession or cultivation of marijuana from applying to a qualified patient, the qualified patient's primary caregiver, or an individual who provides assistance to the qualified patient or the qualified patient's primary caregiver, who possesses, cultivates, or distributes marijuana for the personal medical purposes of the qualified patient upon the written or oral recommendation or approval of a physician. Existing statutory law requires the State Department of Public Health to establish and maintain a voluntary program for the issuance of identification cards to qualified patients and establishes procedures under which a qualified patient with an identification card may use marijuana for medical purposes. Existing law regulates qualified patients, a qualified patient's primary caregiver, and individuals who provide assistance to the qualified patient or the qualified patient's primary caregiver, as specified. A violation of these provisions is generally a misdemeanor.

This bill would provide that no medical marijuana cooperative, collective, dispensary, operator, establishment, or provider authorized by law to possess, cultivate, or distribute medical marijuana that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. The bill also would provide that local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of these medical marijuana establishments would not be preempted by its provisions; and that nothing in the bill shall prohibit a city, county, or city and county from adopting ordinances that further restrict the location or establishment of these medical

marijuana establishments. The bill would express a legislative finding and declaration that establishing a uniform standard regulating the proximity of these medical marijuana establishments to schools is a matter of statewide concern and not a municipal affair and that, therefore, all cities and counties, including charter cities and charter counties, shall be subject to the provisions of the bill. By creating a new crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 11362.768 is added to the Health and Safety Code, to read:

11362.768. (a) This section shall apply to individuals specified in subdivision (b) of Section 11362.765.

(b) No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school.

(c) The distance specified in this section shall be the horizontal distance measured in a straight line from the property line of the school to the closest property line of the lot on which the medical marijuana cooperative, collective, dispensary, operator, establishment, or provider is to be located without regard to intervening structures.

(d) This section shall not apply to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is also a licensed residential medical or elder care facility.

(e) This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license.

(f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(h) For the purposes of this section, "school" means any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in private homes.

SEC. 2. The Legislature finds and declares that establishing a uniform standard regulating the proximity of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers to schools is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this act shall apply to all

cities and counties, including charter cities and charter counties.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.