Zoning Ordinances Banning the Sale of Medical Marijuana Likely Discriminate Against People With Disabilities

By Jessica Vogele

In July 2015, the New York State Department of Health licensed five companies to manufacture and sell medical marijuana in compliance with the Compassionate Care Act of 2014.[i] Although no manufacturing plants will be located on Long Island, there are plans to build two dispensaries – one in Nassau County and the other in Suffolk County.[ii] The proposed site for Suffolk County is located in the Town of Riverhead and has met considerable resistance from town residents due to its proximity to a high school and the risks of increased violent crime and traffic generally associated with medical marijuana dispensaries.[iii] This backlash against the proposed site has prompted the Village of Islandia to preemptively amend its zoning ordinance in order to ensure that no dispensaries will be placed within the village's boundaries in the future.[iv]

The issue here is whether the village's new zoning ordinance, which prohibits the sale of medical marijuana dispensaries within its boundaries, discriminates against people with disabilities.

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In California, where medical marijuana has been legal for almost 20 years, zoning ordinances that have banned medical marijuana dispensaries have largely been upheld by the courts. In *City of Riverside v. Inland Empire*,[v] the Supreme Court of California, in 2013, upheld a zoning ordinance that banned medical marijuana dispensaries on the grounds that the city had legitimately exercised its inherent police powers to promote the public health and safety of the community through its land use regulations. Notably, California's marijuana laws did not preempt this ordinance because the laws did not explicitly or implicitly require the general availability of dispensaries, thus allowing the city to exercise its inherent land use rights to ban sales of medical marijuana for the public welfare.[vi]

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Later that year, the California Court of Appeal, Fourth District, in *Modiano v. City of Anaheim*,[vii] addressed the issue of whether zoning laws that ban medical marijuana are unlawful based on its discriminatory effect on the disabled population. There, the plaintiffs, who were disabled patients, claimed that the city's ban on medical marijuana dispensaries violated the California Disabled Persons Act ("DPA") because it directly discriminated against disabled people by eliminating a lawful source of medical marijuana and thereby forcing disabled people, who may not have the resources or physical capability to travel large distances, to access medical marijuana elsewhere to treat their conditions.[viii] The court, however, found, while citing to *Inland Empire*, that the state medical marijuana law did *not* give dispensaries the right to possess, cultivate, or distribute medical marijuana in a locality that had prohibited such activities.[ix] In other words, the legality of a source of medical marijuana depended on whether it was endorsed by the locality where that source was situated.[x] As a result, there was no violation of the DPA because a disabled person had no right to access a medical marijuana dispensary that was declared *unlawful* by a locality.[xi]

Though Title II of the Americans with Disabilities Act ("ADA") prohibits public entities from discriminating against disabled individuals in their use of public services, which has been applied to discriminatory zoning ordinances, the ADA does *not* extend federal protection to individuals who use federally illegal drugs, and marijuana remains classified as illegal federally.[xii] Consequently, the ADA would not ban Islandia's new ordinance. However, federal law is merely a *floor* of rights, not a ceiling,[xiii] so the question remains whether localities in New York, by banning medical marijuana dispensaries, are engaging in discrimination under New York State Human Rights Law ("NYSHRL"). Specifically, the NYSHRL is similar to the ADA in that it declares that a public entity is prohibited from denying, withholding from, or refusing public services or accommodations to individuals with disabilities.[xiv] Operatively, under the New York medical marijuana law, an individual who is certified to use medical marijuana is deemed to have a dis-

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ability under the NYSHRL.[xv]

The NYSHRL defines a disability to mean a "physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions, which prevents the exercise of a normal bodily function."[xvi] New York's medical marijuana law goes on to state that "certified patients…shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, *including but not limited to* civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use…of marihuana."[xvii] This open-ended language ("including but not limited to") suggests that New York's medical marijuana law may indeed prevent localities from using their inherent police power to ban medical marijuana dispensaries due to the implications of denying a disabled individual's "right or privilege" under NYSHRL.

In contrast, California's medical marijuana law does *not* have the same open-ended language and solely protects against arrest based on "possession, transportation, delivery, or cultivation of medical marijuana," subject to a few exceptions.[xviii] There is no language in the California law that expressly or impliedly limits a locality from declaring medical marijuana dispensaries illegal,[xix] whereas New York's law likely has *express* limitations, by way of its open-ended language.[xx]

Municipalities across the country that have amended their zoning laws to prohibit medical marijuana sales have cited to evidence of fears that dispensaries attract violent crimes, loitering, increased recreational use, and illegal resale markets, all of which are purportedly risks that are unique to medical marijuana dispensaries, not pharmacies or medical clinics.[xxi] Nonetheless, the New York medical marijuana law explicitly states that its goal is to strike a balance between providing treatment to severely disabled individuals and protecting the public's health, safety and general welfare.[xxii] It is postulated that the open-ended language of the law, concerning criminality, will result in these local ordinances being overturned for the purposes of providing treatment to disabled individuals. If we are dealing with medical marijuana dispensaries as medical in nature, and New York's medical marijuana law expressly prohibits the denial of "any right or privilege" on the basis of state authorized use, zoning ordinances that ban such dispensaries likely deny disabled individuals the "right or privilege" to access medical treatment. Consequently, they should be held invalid as discriminatory.

Note: Jessica Vogele is currently ranked number one at Touro Law Center, Central Islip, for the Class of 2017. She is also a law clerk at Lieb at Law, P.C.

[i] Yancey Roy, Nassau, Suffolk each will get a medical marijuana dispensary, NEWSDAY, July 31, 2015, http://www.newsday.com/long-island/nassau-suffolk-each-to-get-a-medical-marijuana-dispensary-1.10696514.

[ii] *Id.*

[iii] Will James, *Faceoff over medical marijuana dispensary in Riverhead continues at public hearing*, NEWSDAY, Sept. 16, 2015, http://www.newsday.com/long-island/faceoff-over-medical-marijuana-dispensary-in-riverhead-continues-tonight-at-public-hearing-1.10852391.

[iv] Sophia Chang, Islandia trustees ban medical marijuana sales, NEWSDAY, Oct. 11, 2015, http://www.newsday.com/business/islandia-trustees-ban-medical-marijuana-sales-1.10948884.

[v] City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 56 Cal. 4th 729, 762-63 (2013).

[vi] *Id.* at 762.

[vii] Modiano v. City of Anaheim, No. G048303, 2013 WL 6841811, at *1 (Cal. Ct. App. Dec. 30, 2013).

[viii] *Id.* at *3.

[ix] *Id.* at *3-4.

[x] *Id.*

[xi] *Id.*

[xii] James v. City of Costa Mesa, 700 F.3d 394, 397 (9th Cir. 2012).

[xiii] 42 U.S.C. § 12201(b).

[xiv] N.Y. Exec. Law § 296.

[xv] N.Y. Pub. Health Law § 3369(2).

[xvi] N.Y. Exec. Law § 292.

[xvii] N.Y. Pub. Health Law § 3369(1) (emphasis added).

[xviii] Cal. Health & Safety Code § 11362.71.

[xix] *Id.*

[xx] N.Y. Pub. Health Law § 3369(1).

[xxi] *See, e.g.*, Cnty. of Los Angeles v. Hill, 192 Cal. App. 4th 861, 871-72 (2011).

[xxii] A06357 Memo. Assemb. Reg. Sess. (N.Y. 2013).