

## County Board May Not Take Actions That Implement Essential Feature of a Referended Ordinance

When a referendum petition is presented against an ordinance and the board of supervisors decides to "entirely repeal the ordinance" rather than present it to the voters, the board must revoke the challenged ordinance in its entirety and may not take additional action that has the practical effect of implementing the essential feature of the ordinance. *County of Kern v. TCEF*, 246 Cal.App.4th 301 (2016) In 2009, the Board of Supervisors of Kern County enacted a zoning ordinance that effectively allowed medical marijuana dispensaries in commercial zoning districts. In 2011, the Board enacted a new zoning ordinance, the Dispensary Ban Ordinance, which banned all medical marijuana dispensaries throughout the county's jurisdiction. Opponents circulated a referendum petition, and obtained the requisite signatures. The Board responded by repealing the entire chapter of the zoning ordinance that included both the Dispensary Ban Ordinance and the 2009 ordinance allowing dispensaries in commercial zoning districts. The result was that dispensaries were not allowed in any zoning district anywhere in the county. Elections Code section 9145 requires that when a county board of supervisors is presented with a qualified referendum petition, it must either "entirely repeal the ordinance against which a [referendum] petition is filed" or submit the ordinance to a vote. The court of appeal agreed with Kern County that this language did not necessarily require the county to return all circumstances to the status quo that existed before the Dispensary Ban Ordinance was enacted, and that the county had discretion to take other actions besides repealing the referended ordinance. However, this discretion is limited by the overriding principle that these actions may not have the practical effect of implementing the core element of the challenged ordinance. The court first noted that the election laws applicable to cities prohibit a city council, after a successful referendum, from enacting an ordinance in all essential features like the repealed ordinance. It explained that "this legal standard does not require a return to the status quo ante in every particular, allows for some changes, but significantly limits the authority of a city council to make changes that address the subject matter of the protested ordinance." The court then applied this rule to counties, interpreting the phrase "entirely repeal the ordinance" as precluding additional actions that would implement the essential feature of a referended ordinance. "In other words, additional action by a board of supervisors violates section 9145 if it fails to return to the status quo ante on the essential feature of the protested ordinance." The court observed that the focus should be on the practical effect of the board's action, "because substance, not form, is the proper test for determining the real character of conduct or a transaction." The court found that by revoking the entire zoning chapter, the county had also repealed the 2009 ordinance that authorized dispensaries in commercial zones. The effect was to ban all dispensaries, which was essentially the same outcome that would have occurred had the Dispensary Ban Ordinance gone into effect unchallenged. The court was not persuaded by the county's arguments that dispensaries might be allowed under a zoning administrator's determination that a dispensary use was similar to a permitted use, or that a dispensary might be allowed with a use permit. The court found that the "avenues around the prohibition are too tenuous and have yet to be successfully traveled." It was also influenced by the fact that the County was pursuing this litigation, demonstrating "the County's current policy choice towards dispensaries." The court concluded that the repeal of the entire chapter would have implemented the essential feature of the Dispensary Ban Ordinance by (1) establishing a general rule that dispensaries were unauthorized and (2) giving County control over whether any dispensary would be treated as an exception to that general rule. As such, the Board's action violated the election law.

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