

Counties May Reenact Essential Features of an Ordinance Previously Repealed by Referendum After a "Material Change in Circumstances"

Kern County's ordinance banning marijuana dispensaries was validly reenacted because a "material change in circumstances" had occurred since the County previously repealed a similar ordinance in response to a referendum petition. [County of Kern v. Sierra Holistic Exchange Service](#), No. F077887 (5th Dist., March 6, 2020). In 2011, the County banned medical marijuana dispensaries. Opponents of the ban presented a valid referendum petition. In response, the County Board of Supervisors repealed the



2011 ordinance.

In 2016, the County adopted an urgency measure

placing a moratorium on new medical marijuana dispensaries. Later that year, California voters passed Proposition 64, a statewide initiative legalizing recreational marijuana. In 2017, the County adopted an ordinance declaring the operation of both recreational and medical marijuana dispensaries a public nuisance. The County brought nuisance abatement proceedings against the defendant marijuana dispensaries. Defendants argued that both the 2016 and 2017 ordinances violated the Elections Code by reenacting an "essential feature" of the 2011 ordinance despite the successful referendum petition. The appellate court disagreed and crafted a new rule for determining the circumstances under which a county may reenact essential features of an ordinance repealed by referendum. **The Material-Change-in-Circumstances Test** Elections Code section 9145, which governs county referenda procedures, does not provide a time limit for reenacting ordinances previously repealed by referenda. This contrasts with Elections Code section 9241, which prohibits cities from reenacting a protested ordinance within a year after the ordinance was disapproved by the voters. Analyzing the two statutes, the appellate court determined that the legislature's silence in section 9145 on the "question of procedure involving the protection of the referendum power" left it to the court to create procedures to protect the power. Using principles of statutory interpretation and weighing various public policy considerations, the court determined that a county board could reenact the essential feature of an ordinance repealed after referendum after a reasonable period of time. The court created a "material-change-in-circumstances" test to determine whether a reasonable amount of time had passed following the successful challenge of an ordinance via referendum. The following standards were provided to guide courts in administering the test:

1. **Materiality:** A change is "material" if an objectively reasonable person would consider the new circumstances significant or important in making a decision about the subject matter of the ordinance
2. **Scope of the Inquiry:** The court declined to provide specific factors or indicia that should be considered and instead concluded that courts should analyze the change considering the "totality of the circumstances."
3. **Burden of Proof:** The court placed the burden of proving whether or not a material change in circumstances had occurred on the county.

Applying the Test to the County's 2016 Moratorium and 2017 Ban on Dispensaries Turning to the County's ordinances regulating marijuana dispensaries, the court concluded a material change in circumstances had occurred since repeal of the 2011 ban in response to the referendum petition. **2016 Moratorium Validly Enacted** The court considered whether changes in the composition of the Board or voter approval of a measure restricting medical marijuana dispensaries to industrial zones indicated a shift in voter attitudes toward marijuana dispensaries but found the evidence inconclusive. Likewise, neither the passage of the Medical Marijuana Regulation and Safety Act in 2015 nor changes in case law were sufficient to establish a material change in circumstances surrounding county-level regulation of marijuana dispensaries. However, the court found that additional information contained in findings supporting the 2016 moratorium represented a material change in circumstances. These included the increased amount of County resources spent on new dispensaries (*e.g.* police responding to dispensary robberies) and information about the negative effects of legalization in Colorado, including increased traffic incidents and hospitalizations. Because circumstances had materially changed, the court held, the 2011 referendum no longer barred the County from adopting a moratorium. **2017 Ban Validly Enacted** Next, the court analyzed whether changes in marijuana regulation following the 2016 moratorium also constituted a material change in circumstances and concluded that they did. The court reasoned that Proposition 64 and the Medical and Adult-Use Cannabis Regulation and Safety Act of 2017 constituted a material change viewed in light of the totality of the circumstances. Based on these changes, the Board could reasonably infer that a larger number of dispensaries would increase the strain on County resources and cause the negative impacts documented in the Colorado legalization report. Thus, the 2017 ban was likewise valid notwithstanding the earlier referendum.

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