AOC | Association of Oregon Counties

February 16, 2015

Written Testimony of Rob Bovett
before the
Joint Committee on Implementing Measure 91

Co-Chairs Burdick and Lininger, and Members of the Committee,

First, thank you for the opportunity to testify before the Committee with regard to local control and opt out relating to Measure 91. I'll only spend a few minutes of your time this evening going through the relevant provisions of Measure 91, how I interpret them in light of Oregon legal standards, and my suggested path forward. I have put together a PowerPoint presentation for that purpose. However, as you all know, I have suggestions and opinions with regard to many of the other issues before the Committee. So the purpose of this written testimony is to put all of those in writing, even though I'll only be discussing one this evening.

Second, here is my necessary disclaimer: Much of what I lay out in this written testimony should not be construed as AOC's official position on any of these matters (there simply hasn't been enough time to vet all of these issues through AOC channels). My goal is to lay out my thoughts regarding the implementation of Measure 91. To that end, I've carved this written testimony into two parts, the first dealing with issues that I believe this Committee can and should address, and the second dealing with issues that I believe OLCC has existing authority to act upon, but for which it might be a good idea for this Committee to clarify in omnibus legislation.

Third, attached to this written testimony is my own one-page summary of Measure 91 (Attachment 1). I provide that because it's how I think about the Measure from a 50,000 foot vantage point, and it might be important for the Committee to understand what I'm seeing. I have also spoken with colleagues from both Washington and Colorado, getting their insight into what has gone right in their states, as well as what they would do differently. I also recently returned from a marijuana conference in Colorado, during which I took extra time to visit some retail dispensaries in the Denver area, where I got the opportunity to speak with dispensary operators about their perspective on what's worked, and what needs to be tuned up.

A. Implementing Measure 91 in light of the existing OMMA

Measure 91 did not amend the Oregon Medical Marijuana Act (OMMA). However, Measure 91 will not operate in a vacuum. Lessons learned in both Washington and Colorado have made it clear that the two programs need to operate in harmony to prevent either program from defeating the purposes of the other. So making amendments to both Measure 91 and the OMMA to accomplish that goal is critical. That does not mean we can't fully protect the traditional components of the OMMA for patients. With that in mind, here are 24 legislative concepts, in no particular order:

- **1. Replacing the OMMA's card stacking system for growers with an OLCC license.** It doesn't need to be a separate license. It can be the same license. It's also important to scale the licenses, as described in part B3 below. The original OMMA passed by the voters in 1998 did not have card stacking. That was added by the legislature in 2005, and has mostly worked to ensure adequate supply, especially for dispensaries. However, it also facilitates bleed out. Now the paradigm has changed, and card stacking has outlived its usefulness. Replacing the card stacking system with licensing will help: (1) Ensure that Oregon does not have a supply problem; and (2) prevent leakage, which should put us in better standing with states around the Nation who are currently experiencing an influx of black market marijuana from Oregon's leaky medical marijuana supply system. The number one lesson expressed to me repeatedly by my colleagues from Colorado and Washington is the critical need to license and regulate the medical marijuana supply chain.

- **2. Using the same OLCC licenses, and applicable standards (with the exception of retail), for the OMMA.** A processor or wholesaler licensed by the OLCC should be able to supply retail dispensaries, as well as medical dispensaries licensed by the Oregon Health Authority (OHA), using the same standards and license.

- **3. Possibly accelerating the personal allowance date from its current date of July 1, 2015.** Senator Prozanski has already called for such an acceleration.

- **4. Clarify that licensed producers and retailers can package and label marijuana items without having to get a processor license.**

- **5. Clarify that OLCC does not have to issue a license for a location within 1,000 feet of a school.** Measure 91 prohibits those activities from occurring, but it did so by leaving those particular criminal laws in place. OLCC shouldn't be put in the awkward position of issuing a license for a location that is effectively prohibited by state criminal law.

- **6. Clarify OLCC rulemaking authority to include regulations to protect public health and safety.**

- **7. Provide OLCC with investigative and law enforcement authority, parallel to what they currently have in the context of alcohol.**

- **8. Allow OLCC to possess marijuana for purposes of its enforcement obligations.** For example, minor decoy operations.

- **9. Clarify that OLCC can require physical separation of a licensed location if the premises has more than one category of license, or also has a license to operate a medical marijuana dispensary.**

- **10. Clarify that OLCC can have multiple varieties of processor licenses, with multiple regulatory regimes associated with each (*e.g.*, testers, concentrate manufacturers, edible manufacturers, etc).** I think that OLCC arguably has this authority. *See* B2 below. But clarification would avoid some potential future issues.

- **11. Clarify that OLCC does not have to give notice of intent to inspect books when it suspects wrongdoing.** Measure 91 provides different standards for different licensees. Producers, for example, get no notice. Others get 72 hours notice. If OLCC has no suspicion of wrongdoing, it should give advance notice of inspection to all types of licensees. If it has reasonable suspicion of wrongdoing, no notice should be required.

- **12. Clarify that minors are not allowed on licensed premises.** Measure 91 refers to a posting, and no doubt OLCC will require such posting for all of its licensees. But what if a posting is missing, for whatever reason? This should be clarified.

- **13. Provide for the level of bonding and insurance required of various licensees.**

- **14. Clarify OLCC authority to impose civil penalties.** Violations by licensees are often better addressed in the regulatory system, rather than the criminal justice system.

- **15. Clarify what licensed activities would be subject to the regulatory authority of the Oregon Department of Agriculture**, such as nursery stock laws, labeling laws, consumer protection laws, destruction of putrid substances, commodity sales regulations, unit pricing, seed laws, pesticide laws, regulation of food processing establishments, food safety laws, weights and measures, bakeries, etc.

- **16. Clarify local authority to reasonably regulate time, place and manner.** Unlike the OMMA, Measure 91 refers to the "nuisance aspects," which is a bit nebulous. The two systems should mirror each other in that regard. *See* number 18 below.

- **17. Clarify land use planning issues.** Attached to this Memo is a three page "Issues Paper" that I requested from the Association of Oregon County Planning Directors (Attachment 2). I have been working with Representative Helm on those issues. I think we can get them squared away.

- **18. Clean up the local control and opt out provisions (*this is the topic of my testimony before you this evening*).** *NOTE: In an attachment, I have provided further thoughts on this issue in the context of discussing the currently pending Cave Junction cases (Attachment 3).* At the moment, here is what makes the most sense to me: (1) Allow a clean opt out of any one or more of the four licenses, by action of city and county governing bodies, just like what is enshrined in the Colorado Constitution, and what is effectively the law in the State of Washington by court case law; or (2) if number (1) is simply not acceptable, then allow a clean referral to the voters by action of city and county governing bodies, so the citizens can vote on which of the four types of licensees they want in their community, and provide a temporary stay of licenses in those communities until such an election is held in November of 2016.

- **19. Deal with the local taxation issue (*this is the topic of testimony by my colleague Scott Winkels from the League of Oregon Cities this evening*).** As you know, many cities, and a few counties, adopted local marijuana taxes prior to the passage of Measure 91, hoping they would be grandfathered by operation of law or legislation. A key part of Measure 91, and what separates Measure 91 from the initiative measures in Colorado and Washington, is that

Measure 91 uses single-tier low tax rates that will ensure retail prices are at or below the organized black market, thus potentially enabling Oregon to do what Colorado and Washington have not been able to accomplish, namely drive out the organized black market. To do so means that we have to create a well-regulated system that doesn't leak, with localized enforcement, and low prices. Because of disparate impacts in various parts of Oregon, as well as disparate resources, this Committee should consider allowing local taxation of marijuana, at capped rates, such that, when combined with the state tax, the retail marijuana products will still be priced at or below the organized black market.[1] An alternative would be to fiddle with the Measure 91 state tax distribution formula to ensure adequate local resources to do what OLCC needs locals to do.

- **20. Modify the taxation point.** Currently, Measure 91 taxes bud, leaves, and clones as those items leave the grower. However, if OLCC adopts a seed-to-sale tracking system, or some variation, and if growers decide to grow for both the retail and medical systems, as I suspect many will, it might make more sense to have some flexibility as to when the tax is actually imposed or collected. For example, taxation at the point of retail sale.

- **21. Not for 2015: Broaden the scope of what local governments can do with their share of the distributed tax revenue.** Currently, Measure 91 limits the use of those funds for local enforcement of Measure 91. In some future legislative session, if the organized black market is successfully driven out and there is little remaining need for local enforcement along those lines, it makes sense to expand the scope of permissible uses.

- **22. Find a better formula for distribution of tax revenues to local governments than either of the formulas in Measure 91.** For the first biennium, it's based on population. Seldom does population work well in situations where there is disparate impact from community to community. For future biennia, it's based on the number of licensees within each local jurisdiction as a percentage of total licensees in the state (in two categories). On its surface, that makes sense if the perspective is to provide a disincentive from opting out of any of the four classes of OLCC licensed businesses. But it doesn't take into account local variance. For example, let's say Weed Mart sites a mega store in Gotham City, and nobody wants to compete with that. And let's say Weed Mart skips Emerald City, so up springs 10 small retailers. Both cities sell approximately the same volume. But Emerald City gets 10 times the amount of funding, even though both have similar needs related to enforcement of Measure 91 (*i.e.*, driving out the organized black market).

- **23. Clarify OLCC authority to regulate, and provide for the sale, of seeds.** This seems to have been inadvertently skipped over by Measure 91.

[1] Among members of AOC, I think Josephine County provides a good example. Josephine County has been in severe financial distress for some time, primarily due to the disappearance of shared federal timber revenues. The resulting negative impact on public services is well documented. However, Josephine County also happens to be a major producer of marijuana. Indeed, over six percent of its entire population now holds a medical marijuana card, in part to facilitate card stacking for its growers. One might, therefore, wonder what the voters of Josephine County would think about locally taxing marijuana. We need not wonder. On the same ballot as Measure 91, the voters of Josephine County were asked that very question (Measure 17-65). The result: 76.51% Yes; 23.49% No.

- **24. Fixing an unintended technical loophole in Measure 91 that could arguably allow meth and heroin dealers to deduct business expenses from their state income tax returns** (not that any would likely try – but we probably should fix that).

B. Implementing Measure 91 within existing OLCC authority

In my opinion, OLCC already has authority to do the following, but clarifying legislation certainly would not hurt:

- **1. Phasing in licenses.** Unless altered by legislation, OLCC must start taking applications for the four types of business licenses in January of 2016. What makes sense to me is to phase in the issuance of those licenses throughout 2016, and into early 2017, such that producers are licensed first, followed by processors, wholesalers, and then finally retailers. This should avoid any supply problem, and create a more orderly rollout of retail marijuana in Oregon. I would strongly encourage the Committee to spell that out in any omnibus legislation passed this session.

- **2. Multiple categories of licensees.** Although there are only four categories of licenses, there should be different classes of licenses within each category. For example, a processor might be an edible manufacturer, or might be a concentrate manufacturer. A different regulatory framework is needed for each. Likewise, I would strongly encourage the Committee to spell that out in any omnibus legislation passed this session.

- **3. Scaled licenses.** OLCC has long encouraged local and small distilleries, which has fostered innovation, local economic development, and broader consumer choice. Hopefully, OLCC will take a similar approach with regard to marijuana. License fees should be established on a sliding scale, such that small entry level licensees are fostered. To that end, OLCC should also consider capping the size of certain licenses, for example limiting the number of plants that can be grown at a single site or by a single licensee, or both.

- **4. Uniform tracking system.** OLCC is currently seeking proposals for a seed-to-sale system. There may be some complications at the front end with a full seed-to-sale system, but uniform tracking will be vital to ensuring that leakage is prevented, both internal and external. For example, it is important to public safety that concentrates be tracked to ensure that concentrates sold at dispensaries are only acquired through OLCC licensed concentrate manufacturers. Tracking must also be applied to both the retail and medical systems, so that law enforcement knows with certainty whether someone is operating within the legal system, or not.

- **5. Uniform standards for inspections, testing, processing, products, labeling, and sales.** For example, OLCC rules should establish a standard serving size for edibles, in terms of THC content, as well as maximum serving sizes per individual product (so a candy bar might have a total of 100 milligrams, divided into 10 serving size squares of 10 milligrams each). Colorado recently implemented rules to fix this issue, which had gotten a bit out of control. By way of another example, OLCC rules should also establish the permissible methods of manufacturing concentrates by licensees.

Finally, let me add that I very much look forward to working with this Committee and OLCC on these issues, as well as other issues stemming from implementation of Measure 91. We have a golden opportunity to set this up right, learning valuable lessons from other states, accomplishing the goals of Measure 91, while minimizing any negative consequences.

Again, thank you for the opportunity to testify before the Committee, and also provide my thoughts and suggestions as laid out in this written testimony.

Sincerely,

Rob Bovett
Legal Counsel
Association of Oregon Counties

ATTACHMENT 1

Brief Outline of Oregon Ballot Measure 91 (Marijuana Legalization)

Personal Allowances

- Effective July 1, 2015, a person 21 or older can:
  - Have in their household (not readily seen from a public place), up to:
    - 8 ounces of useable marijuana (dried marijuana flowers and leaves);
    - 4 marijuana plants;*
    - 1 pound of solid homemade marijuana products; and
    - 4½ pounds of liquid homemade marijuana products.
  - Have, outside of their household, up to 1 ounce of useable marijuana.
  - Deliver to another person 21 or older, for noncommercial purposes, up to:
    - 1 ounce of homegrown marijuana;*
    - 1 pound of solid homemade marijuana products;* and
    - 4½ pounds of liquid homemade marijuana products.*

  * *But not in a household or location that is within 1,000 feet of a school*.
- No consumption in public.

Retail Regulation and Taxation

- The Oregon Liquor Control Commission (OLCC) will regulate all other production, processing, and sales of retail marijuana and marijuana products. By January of 2016, OLCC will start accepting applications for the following businesses (a person can hold more than one license):
  - Producers;
  - Processors;
  - Wholesalers; and
  - Retailers.
- Local governments can adopt reasonable time, place and manner regulations of the nuisance aspects of businesses that sell marijuana to consumers. Specific findings are required.
- Local opt out of marijuana businesses through local initiative petition signed by 10 percent of voters and approved at a general election (November of an even numbered year).
- Taxation of retail marijuana, as it leaves the grower, at the following rates:
  - $35 per ounce for flowers (bud);
  - $10 per ounce for leaves; and
  - $5 per immature plant (clone).
- Distribution of net tax revenue, after covering OLCC expenses:
  - 40 percent to schools;
  - 25 percent for substance abuse treatment and prevention services;
  - 15 percent to the Oregon State Police; and
  - To assist local law enforcement in performing it duties under the measure, 10 percent to cities and 10 percent to counties.
    - Before July 1, 2017, distributed based on population.
    - After July 1, 2017, distributed based on proportion of marijuana businesses.

Other

- The measure does not affect:
  - The rights of employers or landlords.
  - The Oregon Medical Marijuana Act (OMMA).

ATTACHMENT 2

ISSUES PAPER:
IMPACTS ON LAND USE PLANNING RESULTING FROM THE IMPLEMENTATION OF MEASURE 91 (2014)

Issue #1: Personal use of marijuana.

Background:
Measure 91 permits households to grow and maintain certain amounts of marijuana and/or marijuana products as an outright permitted use.

Issue:
Planners understand that buildings for growing marijuana could be considered as accessory buildings to residential uses or as agricultural buildings in those zones that allow them. There should not really be a need to modify rules in the EFU zones but there could be a concern in non resource zones, especially in rural residential zones where many counties allow agricultural uses and buildings. Counties generally allow most farm uses to occur in rural residential zones but commonly prohibit the more intense farm uses that cause significant conflict, such as commercial livestock operations. It is our understanding that marijuana plants emit a very unpleasant odor that might overwhelm a residential housing area. We are not sure that special rules should be put in place for marijuana grow operations in non resource zones but we do see the potential for significant conflict between growers and their neighbors.

Options:

a. Treat any personal use marijuana grow operation the same as any other agricultural operation (no action option).
b. Consider, at either the state or local level, rules that require marijuana to be grown indoors with filtering to preclude the odor impact on neighbors in non resource zones.

Issue #2: Primary Farm Dwellings

Background:
Measure 91 directs OLCC to issue licenses to 'producers' of marijuana which we interpret to mean growers of marijuana. We are also assuming that growing recreational marijuana for profit constitutes a farm use. Currently, a farmer who demonstrates that they have made $80,000 of gross revenue for a two year period (on high value farmland) on his/her farm products will qualify to construct a primary farm dwelling on the parcel or tract. This will essentially make <u>every</u> farm parcel potentially eligible to site a dwelling, in two years, if the parcel is used to grow marijuana, due to the high value of that crop. Planning Directors see this as a real problem that could negate many years of protecting our agricultural land base. Thought should be given to developing rules or legislation to prevent speculators from utilizing Measure 91 to urbanize our resource land.

Options:

a. Increase the required gross income requirements for marijuana to make it a more level playing field relative to other crops.
b. Legislate that marijuana is not a farm crop or agricultural commodity (modification of ORS 215.203 required). Possibly use SIC codes to distinguish between marijuana and hemp.
c. Legislate that marijuana sales cannot be used to qualify for a dwelling.
d. Take no action.

Issue #3: Water Resources

Background:
It has been estimated that a marijuana plant consumes up to 6 gallons of water per day depending upon whether it is outside or inside, its size, and how it is grown. Large grow operations could use a significant amount of water, which could be of concern, especially to groundwater limited areas of the State. This is currently seen as a large issue in California where growers have, in some instances, completely dried up creeks. Although (very) rough estimates are that marijuana uses less water than some tree fruits (pears), the addition of large grow operations could severely impact the availability of water for current agricultural operations in late summer when water from snow melt becomes scarce.

Options:

a. Legislate or develop rules to preclude marijuana growing in groundwater limited areas.
b. As part of OLCC rulemaking, make water availability part of the decision making on whether to issue a license for a grow operation.
c. Take no action.

Issue #4: Processing of marijuana

Background:
Measure 91 directs OLCC to issue licenses for the procession of marijuana. Current law allows processing of farm products on a farm site with some limitations to size, etc. We have not identified a land use problem that must be addressed that would require that the processing of marijuana be treated any differently than other farm crops. However, there is a general consensus that processing of marijuana should otherwise be restricted to industrial zones and specifically prohibited in any zones that allow residential use. We also assume that a 'processing' license from OLCC would also include manufacturing operations, where marijuana is not just processed for smoking but transformed into different products such as oils and edibles; for those with multiple types of industrial zones, this might be an issue as to which industrial zone subset where a manufacturing operation could be sited.

Options:

a. Take no action; processing of marijuana would be treated the same as any other processing in all zones.
b. Take no action in resource zones; processing of marijuana would be treated the same as other processing. But prohibit processing of marijuana in all zones that allow for residential use (aside from dwellings allowed for security purposes in industrial zones). Specifically, prohibit marijuana processing operations from being considered a home occupation.

Issue #5: Wholesale operations

Background:
Measure 91 directs OLCC to issue licenses for marijuana wholesaling. If marijuana is considered a farm/agricultural crop then there is general consensus that it should be treated the same (like a fruit packing house/storage/wholesale operation). Generally, wholesale operations not performed on the same farm as where the product is grown would be expected to occur on industrial zoned land, as that is where most commercial wholesale/storage operations occur. We would not want to see wholesale operations in residential zones, although most of our codes don't allow for wholesale operations in those zones anyway.

Options:

a. Take no action; allow counties to interpret their own codes to handle this issue.
b. Specifically prohibit marijuana processing as a home occupation.

Issue #6 Retail operations

Background:
Measure 91 directs OLCC to license marijuana retail sales operations. We would like to see rulemaking that restricts OLCC from issuing retail licenses to any retail sales applicant that is not located in a zone that currently allow for commercial activities.

Options:

a. Take no action and assume OLCC will not check whether or not a retail sales license applicant's retail operation is in a zone that allows for commercial uses.
b. Ask OLCC to add language in their new rulemaking that ensures that the retail sales are only allowed in those zones that allow for commercial uses.

Issue #7 Land Use Compatibility Statements (LUCS)

Background:
We would strongly recommend that OLCC develop a LUCS and require that applicants for all four types of marijuana licenses be required to submit a LUCS to OLCC that has been signed off by the local government planning staff as part of their license application. This is primarily to protect the applicant from spending a significant amount of money to acquire a marijuana license only to find out that their land is not eligible for the type of license s/he was issued. It will also reduce conflict at the planning counters from groups of folks who are not as amenable as our current clients.

As a side note – we have all experienced similar problems with folks acquiring liquor licenses from OLCC before checking with planning staff.

ATTACHMENT 3

Cave Junction and the Federal Question

Disclaimer: This attachment unavoidably contains the legal opinions and conclusions of Rob Bovett, Legal Counsel for the Association of Oregon Counties (AOC). As such, <u>nobody</u> is entitled to rely upon these opinions other than AOC. Other persons should obtain their own legal opinion from their own attorney.

I believe there is a great legal risk to significant portions of Measure 91 and the Oregon Medical Marijuana Act. That risk is due to the current status of marijuana at the federal level. Thus far, states that have adopted medical or retail marijuana dispensaries have avoided this risk by ensuring, though statute, constitution, or case law, that local jurisdictions have full authority to opt out of one or more categories of state licensed marijuana businesses.

I further believe that the details of the Measure 91 local opt out, and potentially recent Oregon legislation relating to medical marijuana dispensaries, may cause this risk to be realized in Oregon. I freely acknowledge that very few, if any, persons representing marijuana industry clients agree with my analysis. That is perfectly fine. But I feel a continuing obligation to lay out the issue, as I see it. But I won't belabor it. Hence why I've relegated this issue to this final Attachment, and limited it to two pages, and will only mention it at the conclusion of my testimony and PowerPoint presentation this evening.

2013 Oregon House Bill 3460 provided for the licensing and regulation of medical marijuana dispensaries. 2013 Oregon Senate Bill 863, the so-called "GMO bill," passed as part of the "grand bargain" in the 2013 Special Session, preempted local authority to deal with seed and seed products. 2014 Oregon Senate Bill 1531 clarified local authority to opt out of dispensaries, for local jurisdictions that adopted a moratorium by May 1, 2014 (however, SB 1531 expires that clarification on May 1, 2015).

In my opinion, none of the recent state legislation described above preempts local authority to opt out of medical marijuana dispensaries. However, due to recent events in the City of Cave Junction, we are now actively litigating those issues.[2] There are two questions in the Cave Junction cases: (1) Whether the recent state legislation described above preempts local authority to opt out; and (2) if state law is preemptive, whether federal law is, in turn, preemptive.[3] The Association of Oregon Counties (AOC) and the League of Oregon Cities (LOC) are the only parties in the Cave Junction cases that answer the first question in the negative, thus avoiding the federal question altogether, which I believe is the best possible outcome.[4]

---

[2] *City of Cave Junction v State of Oregon*, Josephine County Circuit Court case 14CV0588 (now pending at the Oregon Court of Appeals) ("Cave Junction I"); *Providing All Patients Access v City of Cave Junction*, Josephine County Circuit Court case 14CV1246 (now pending in the Circuit Court) ("Cave Junction II").

[3] Based primarily on application of the analysis contained in *Emerald Steel Fabricators v BOLI*, 348 Or 159, 230 P3d 518 (2010). That conclusion is consistent with the most recent opinion on this matter from Legislative Counsel (March 3, 2014), as well as the recent decision of the Circuit Court in *Mary Jane's Attic v City of Medford*, Jackson County Circuit Court case 14CV02349 (May 13, 2014). A copy of the LC Opinion is attached to this written testimony.

[4] No other state appellate court has had to squarely face the federal question, as no state has purported to preempt local opt out of state licensed marijuana businesses. California came close, but the California Supreme Court avoided the issue by holding that state law is not preemptive of local opt out. *City of Riverside v Inland Empire Patients Health and Wellness Center*, 56 Cal 4th 729, 300 P3d 494, 156 Cal Rptr 3d 409 (2013).

For the sake of argument, let's play out one potential outcome in the *Cave Junction* cases in the Oregon appellate courts: State law is preemptive, and federal law is not, in turn, preemptive. I think that is an unlikely outcome, but what then?

Under that scenario, a local jurisdiction that did not want marijuana dispensaries would be forced to issue business licenses, or otherwise accept, dispensaries within their jurisdiction. However, I anticipate that such a local jurisdiction might file a case in federal district court seeking an injunction shutting down the entire dispensary program as a violation of federal law, a case which I project that local jurisdiction would win (this is what I have referred to as the "nuclear option"). In essence, the local jurisdiction would be asking the federal court to stop the state from issuing licenses to commit a federal crime.

I don't think the nuclear option is in anyone's best interest. Forcing such a situation comes with great risk for substantial portions of the Oregon Medical Marijuana Act (OMMA),[5] as well as medical marijuana patients and local jurisdictions that affirmatively want dispensaries.

However, with the exception of AOC and LOC, there are no parties seeking to avoid the federal question in the Cave Junction cases. I think that is fraught with all of the risk summarized above. Instead, I believe the best way to convince more local jurisdictions to allow and embrace marijuana businesses is to demonstrate that they are operating without significant problems in numerous areas of Oregon, under a well regulated system.

Thus far, AOC and LOC have prevailed in the first Cave Junction case, and thus avoided answering the federal question. But both the City and the State have appealed. The second Cave Junction case has yet to be argued or decided, although briefing is complete.

In the meantime, Measure 91 has passed. Unlike Colorado and Washington, Measure 91 *possibly* severely limits local opt out of retail marijuana businesses. Measure 91 provides for opt out through local initiative, signed by 10 percent of local voters, and approved at a general election (*i.e.*, November of an even-numbered year). It is less than clear that this opt out method is exclusive.

I have little doubt that some local jurisdiction, with a strong voter mandate against Measure 91, if forced to accept a retail or medical marijuana business, and not having a local initiative brought before its voters, will simply go to federal court and seek an injunction prohibiting the OLCC and OHA from issuing any marijuana business license, as being in violation of federal law. I think that local jurisdiction wins, and would be an unfortunate but foreseeable consequence of recent legislation, as well as the manner in which Measure 91 was crafted.

In my humble opinion, when carrying out progressive marijuana initiatives that promote medical or retail marijuana dispensaries, it is a mistake to force such businesses on communities that don't want them, and a potential huge legal setback for the movement to legalize, tax, and regulate marijuana. To that extent, I think the ongoing litigation of the Cave Junction cases, and the potentially narrow Measure 91 opt out, are directly contrary to those efforts.

[5] Excluding the possession and affirmative defense provisions of the OMMA. *See, e.g., Ter Beek v City of Wyoming*, 495 Mich 1, 846 NW2d 531 (2014) (the federal Controlled Substances Act does not preempt state medical marijuana act immunity from state and local marijuana prohibitions). I believe a similar outcome would occur with regard to Measure 91: The personal allowance provisions would survive, as they are essentially state law exceptions to state criminal laws, something that is beyond the reach of Congress. The business licensing scheme is where the risk lies.

Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 3, 2014

Senator Ted Ferrioli
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: *Emerald Steel Fabricators, Inc. v. BOLI*

Dear Senator Ferrioli:

You asked us the following questions related to the Oregon Supreme Court's ruling in *Emerald Steel Fabricators, Inc. v. BOLI*:[1]

1. What is the holding of *Emerald Steel*?

2. How does the holding articulated in *Emerald Steel* apply to the Oregon Medical Marijuana Act (OMMA) generally and to ORS 475.314 (1) specifically?

3. In consideration of the answers to the above questions, would a court require a local government to permit the transfer of medical marijuana under ORS 475.314 (1)?

I. What is the holding of *Emerald Steel?*

Emerald Steel concerned a person's authority to use medical marijuana under ORS 475.306 (1) and whether that grant of authority required an employer, under ORS 659A.112, to reasonably accommodate the person's use of medical marijuana as an employee. A summary of the laws pertinent to the case are as follows: ORS 659A.112 makes it unlawful for an employer to discriminate against an employee on the basis of a disability. ORS 659A.124 (1) provides that "the protections of ORS 659A.112 do not apply to any . . . employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct." ORS 659A.122 (2) defines "illegal use of drugs" as the use of drugs that are unlawful to possess or distribute under the federal Controlled Substances Act (CSA). However, ORS 659A.122 (2) also excludes from the definition of "illegal use of drugs" any use authorized by state law. *Emerald Steel* largely turned on whether the authorized use of medical marijuana under ORS 475.306 (1) is properly authorized under state law for purposes of these labor and employment statutes. Specifically, the court examined whether ORS 475.306 (1) is preempted by the CSA.

In pertinent part, ORS 475.306 (1) provides:

[1] 348 Or. 159 (2010).

> A person who possesses a registry identification card issued pursuant to ORS 475.309 may engage in . . . the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition.

In contrast, the CSA prohibits manufacturing, distributing, dispensing or possessing any controlled substance in a manner that is not authorized by the CSA.[2] Congress placed marijuana in Schedule I.[3] As a Schedule I drug, marijuana does not have any acceptable use other than as part of a Food and Drug Administration preapproved research project.[4]

In *Emerald* Steel, the court explained that the central objectives of the CSA are "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances" and "to prevent the diversion of drugs from legitimate to illicit channels."[5] The court then described the relationship between ORS 475.306 (1) and the CSA as follows: "[The] state law authorizes what federal law prohibits."[6] The court then turned to the doctrine of preemption by conflict, under which a court will find that federal law preempts a state law in two circumstances. First, when complying with both a state law and a federal law is physically impossible. Second, when complying with a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law.[7] In consideration of the second circumstance, the court explained that a state law that authorizes a use that a federal law prohibits stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law. The court stated:

> [W]hatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the Supremacy Clause requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law. Doing so means that ORS 475.306(1) is not enforceable. Without an enforceable state law authorizing employee's use of medical marijuana, that basis for excluding medical marijuana use from the phrase "illegal use of drugs" in ORS 659A.122(2) is not available.[8]

In short, the court held that ORS 475.306 (1) is preempted by the CSA and, thus, is unenforceable. For that reason, the court ruled that the employer was not required to permit the employee's use of medical marijuana.

II. How does the holding articulated in *Emerald Steel* apply to the OMMA generally and to ORS 475.314 (1) specifically?

Under the rule of law established by *Emerald Steel*, any matter before a court that concerns an activity authorized under the OMMA and prohibited by the CSA would be resolved

[2] 21 U.S.C. 841(a)(1) and 844(a).
[3] *Id*. at 812(c).
[4] *See* 21 U.S.C. 823(f) (recognizing the exception for use of Schedule I drugs).
[5] 348 Or. at 173 (citing *Gonzales v. Raich*, 545 U.S. 1, 12-13 (2005)).
[6] 348 Or. at 176.
[7] *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).
[8] 348 Or. at 186.

in the same manner: A court would find the authorization to be preempted and unenforceable.[9] The same applies to ORS 475.314 (1). Under that provision, a properly registered medical marijuana facility functions as a place for:

> [The authorized] transfer of usable marijuana and immature marijuana plants from:
>
> (a) A registry identification cardholder, the designated primary caregiver of a registry identification cardholder, or a person responsible for a marijuana grow site to [a] medical marijuana facility; or
>
> (b) A medical marijuana facility to a registry identification cardholder or the designated primary caregiver of a registry identification cardholder.

In the same manner that the authority to use medical marijuana under ORS 475.306 (1) stands as an obstacle to the prohibition on possessing marijuana under the CSA, the authority to transfer medical marijuana under ORS 475.314 (1) stands as an obstacle to the prohibition on distributing and dispensing marijuana under the CSA. As a result, we believe a court would find that ORS 475.314 (1), insofar as that provision authorizes the transfer of medical marijuana, is preempted by the CSA and unenforceable.[10]

III. In consideration of the answers to the above questions, would a court require a local government to permit the transfer of medical marijuana under ORS 475.314 (1)?

The answer to this question is no. We believe a court would not require a local government to permit the transfer of medical marijuana under ORS 475.314 (1). If a court rules that ORS 475.314 (1) is in conflict with the CSA, that ruling would enable local governments to refuse to act in accordance with those aspects of the OMMA authorizing the transfer of medical marijuana between medical marijuana users, their caregivers, persons responsible for marijuana grow sites and medical marijuana facilities. Just as the employer in *Emerald Steel* did not have to permit the employer's employee to use medical marijuana, a local government would not have to permit a medical marijuana facility—by, for instance, refusing to issue a business license—to be located in an area that is subject to the local government's jurisdiction. This issue cannot be definitively resolved, however, until a local government refuses to issue a business license or refuses to take some other definitive administrative action with respect to a medical marijuana facility located or proposed to be located within the local jurisdiction and that administrative action is fully adjudicated in the court system.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the

[9] It is important to note that many provisions of the OMMA do not "authorize" an activity but function as an affirmative defense to criminal liability in Oregon. In *Emerald Steel*, the court indicated that such provisions are not preempted because "Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so." 348 Or. at 180.

[10] It should be noted that the remainder of ORS 475.314 does not authorize conduct that the CSA prohibits. It sets forth criteria for registering with the Oregon Health Authority (*see* ORS 475.314 (2) to (4)), requires the Oregon Health Authority to register medical marijuana facilities that meet those criteria (*see* ORS 475.314 (5)), establishes conditions by which a registered medical marijuana facility may operate (*see* ORS 475.314 (6), (7) and (9)) and provides for the regulation of registered medical marijuana facilities (*see* ORS 475.314 (8), (10) and (11)). Many of these provisions, particularly those related to registration and operation, relate to the establishment of an affirmative defense to state criminal liability (*see, e.g.,* ORS 465.309 (1)(b)).

Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Mark B. Mayer
Deputy Legislative Counsel