

RISK REVIEW

VOLUME 25, ISSUE 1

MARCH 2011

Medical marijuana: What should you do about zoning?

By William J. Sims, LaSota & Peters, PLC

In November 2010, the voters in Arizona approved the Arizona Medical Marijuana Act (Arizona Revised Statutes (A.R.S.) § 36-2801 et seq.). In April 2011, the Arizona Department of Health Services (ADHS) will begin accepting applications from qualified patients – persons entitled to use medical marijuana – and their caregivers. On May 1, 2011, ADHS will begin accepting applications for medical marijuana dispensaries. What should your city or town do before May 1 from a land use perspective in anticipation of possible medical marijuana users and dispensaries in your city or town?

A.R.S. § 36-2806.01 of the Medical Marijuana Act permits cities, towns and counties to adopt reasonable zoning regulations that limit the use of land for registered medical marijuana dispensaries. The Act also requires an applicant for a medical marijuana dispensary to submit a sworn statement that the applicant is in compliance with any zoning restrictions adopted by your city or town. What options does a city or town have for adopting zoning regulations limiting the use of land for registered medical marijuana dispensaries? What happens if your city or town does not adopt such regulations?



Land use restrictions on medical marijuana dispensaries

Cities and towns have two options:

- (1) Drafting zoning regulations that permit the use of land for medical marijuana dispensaries by right or
- (2) Drafting zoning regulations that permit the use of land for medical marijuana dispensaries only after the city or town has issued a conditional use permit for such use.

The first option is more rigid. If a property owner satisfies the requirements of whatever district a city or town allows medical marijuana dispensaries to be located in, then the property owner would be allowed to locate his or her dispensary in such a district. The limiting factor would be imposed by ADHS. Only about 125 medical marijuana dispensaries will be authorized initially by ADHS with at least one dispensary per county. For the rural counties, there may only be one medical marijuana dispensary. If your city or town decides not to adopt zoning regulations that permit the use of land for a medical marijuana dispensary by right, then ADHS will be the agency that will decide where those dispensaries are to be located.

See **MEDICAL MARIJUANA** on page 5



Medical marijuana: What should you do about zoning?
Page 1

Letter from the President
Page 2

Member Profile:
The City of Eloy
Page 3

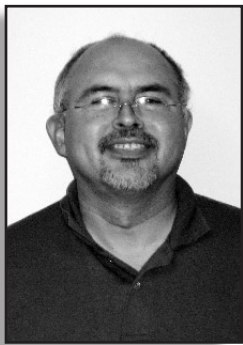
Court upholds deadline for filing notice of claim
Page 4

Personnel Perspectives
Page 5

Bill redefines municipality's ability to assess development fees
Page 6

Court rules jury must decide on timely filing
Page 7

Board of Trustees
Page 8



Rudy Rodriguez
AMRRP President

LETTER FROM THE PRESIDENT

Dear AMRRP Members:

As we move through the first quarter of 2011, it's a time when organizations such as the AMRRP can look back over last year's results while looking ahead at next year's challenges.

Throughout 2010, the soft insurance market continued to pose competitive challenges for our Pool. The availability of cut-rate property/casualty coverage from commercial competitors has made the AMRRP's commitment to stable pricing all the more important. While commercial property/casualty insurers are happy to lure new customers with discount premiums today, those carriers will also be the first to raise rates or to abandon our state's municipalities when the insurance market once again hardens.

The ebb and flow of commercial carriers' profit and loss margins has offered a historically unstable insurance environment for cities and towns. In contrast, the AMRRP's long-term commitment to Arizona municipalities is based on maintaining high quality service and pricing consistency that will keep our organization stable and financially sound for years to come. Clearly, our Members understood and appreciated the Pool's long-term service and underwriting philosophy throughout 2010, a year when the AMRRP was once again able to retain 100 percent of its property/casualty Members in spite of aggressive marketing from several large commercial insurers. In addition, our property/casualty membership increased in the spring of 2010 when the newly incorporated Town of Tusayan joined the AMRRP for its property/casualty coverage.

In the workers' compensation coverage line, SCF Arizona continued to compete aggressively for those AMRRP Members with favorable loss history. In spite of that competition however, not only was our Pool able to retain 100 percent of its workers' compensation Members in 2010, we were able to attract three AMRRP property/casualty Members—the Cities of Benson and El Mirage and the Town of Snowflake—into the Pool's workers' compensation coverage line. Although our competitive rates were undoubtedly a key factor in attracting these Members to the AMRRP's workers' compensation line, I believe our superior claim and loss control services factored heavily into our ability to compete successfully against SCF Arizona and several commercial carriers also vying for new public entity work comp customers.

As you undoubtedly know, we are moving into that time of the year when AMRRP Members begin working on their next fiscal budget, and when municipal managers and council members are being courted and charmed by marketing executives from AMRRP competitors with promises of cheap coverage and great claim and loss control service. In the face of those tempting-but-too-good-to-be-true sales pitches, I would encourage our Members to contact some of their peers in municipalities that aren't currently in the AMRRP. When you speak with your non-AMRRP counterparts, see if you can find out when the last time a competitor's loss control consultants personally visited those municipalities to provide customized training, to perform a mock-OSHA inspection, to tailor a loss control plan that was specifically based on the municipality's loss history or to help put together a safety committee to reduce future losses. Ask if they have access to a PAL or LUAL program to get free legal advice on personnel or land use issues before a claim comes in. Find out if they have an EEOC/ACRD program that will provide cost-free legal representation against personnel complaints. Or inquire about how many times a competitor's claims adjusters and defense attorneys attended a council meeting to personally explain to elected officials why a claim settlement was being encouraged (or why a case was being taken to trial). Finally, to truly gauge the quality of our competitors' service, ask a non-AMRRP member how many times letters or phone calls to their carriers' claims staff were ignored, or how frustrated their own administrative staff became while trying to maneuver an insurance company's automated "customer service" system.

While we all agree that cost is important, it's also good to remember that cheap prices and great service rarely go hand in hand. Moreover, a commercial competitor doesn't really have to focus as much on the long-term benefits of helping your city or town reduce losses and mitigate claim exposures when it has the option of drastically raising its premiums or simply pulling out of the market completely when the claims start to stack up.

For over 23 years, the AMRRP has shown it is the only Arizona insurer dedicated exclusively to helping our state's municipalities achieve long-term risk management success and pricing stability. That commitment led to another successful year in 2010. With your continued support and loyalty, that success will continue throughout 2011 and beyond.

Sincerely,

Rudy Rodriguez
President, AMRRP Board of Trustees

Member Profile: *The City of*



Eloy is a farming community in transition, looking for a new economic base to provide jobs for a rapidly growing population.

Eloy is midway between Phoenix and Tucson at the junction of I-8 and I-10, and with Casa Grande, which is immediately to the west, forms the fourth fastest growing population center in the United States from 2000 to 2007, according to the Economic Development Group of Eloy (EDGE).

In 1902, the Southern Pacific Railroad built a switch west of Picacho, which was named Eloy. In 1918, three entrepreneurs – W. L. Bernard, J. E. Meyer and John Alsdorf – purchased the east half of the Eloy Section, drilled a well and subdivided, calling the community Cotton City. They later bought land to the west and divided it into tracts for raising cotton. In 1919, they filed a petition for a Post Office in Cotton City. However, the U.S. Postal Service rejected the name and called it Eloy. The City of Eloy was incorporated in 1949.

In 2007, Eloy had nearly 14,000 residents – almost double the 7,211 residents counted in the 1990 Census and significantly more than the 10,375 counted in the 2000 Census.

Eloy is located in the Santa Cruz Basin, considered one of the state's most fertile agricultural areas with more than 100,000 irrigable acres. According to the Arizona Department of Commerce, agricultural employment per 1,000 residents in the Eloy ZIP code is 3.6 times higher than both national and state averages.

The City remained a mainly agricultural community until the early 1970s when the first truck stop was built on I-10, which runs diagonally past the community. Garages, gas stations, restaurants and motels sprung up along this stretch of interstate providing a convenient rest stop for travelers and truckers. The Commerce Department reported one gas station provided employment for 100 to 249 workers in 2004 and another station provided employment for 50 to 99.

The privately-run Eloy Detention Center has become a major employer reporting between 250 and 499 jobs in 2004. In addition, the interstates and the Southern Pacific Railroad have made the Eloy/Casa Grande area a natural distribution point to markets in Texas and southern California.

The Commerce Department noted the effects of the rapid growth in its "Economy of Eloy" report, published in 2004. It

says, in part:

"Eloy has a small employment base. Agriculture, the prison, some manufacturing industries and some travel and tourism help drive the economy of Eloy."


EDGE is attempting to change things by promoting Eloy as a great place to do business. According to EDGE, Eloy provides:

- A secure operating environment
- A quality workforce in place today
- An outstanding college system to insure that business workforce needs are met tomorrow
- Strong infrastructure assets
- Attractive operating costs
- Stable, pro-business climate

On the pro-business climate, EDGE says: "Many talk about being business friendly, but few if any, can compare to Eloy's demonstrated and enduring pro-business mentality. We combine a minimalist regulatory approach with consistency and respect to businesses."

The City's current economic situation is summarized in an economic development plan prepared for Eloy by Elliott D. Pollack & Company of Scottsdale: "The Greater Phoenix economic region is going through a particularly harsh recession. The end of the 'housing bubble', one of the root causes of the current economic downturn, had a dramatic impact on the City of Eloy. Speculative housing and land purchases, along with inappropriately easy access to money, resulted in development reaching the community much earlier than originally anticipated."

The Pollack report suggested working with community colleges and other stakeholders to develop training/curriculum programs designed to give the Eloy labor force an advantage. "Skilled labor is key to the development of higher value-added industries," says the report, but it cautions, "This may take time."

"Overall, the City of Eloy has excellent long term development potential," says the Pollack report. "City policymakers have already demonstrated their own understanding of what makes an economy function and have placed much emphasis on economic development." 

Court upholds deadline for filing notice of claim

The Arizona Court of Appeals, Division 2, recently rejected an appeal by claimants that they did not have sufficient time to gather facts to support a notice of claim to Pima County.

The Appeals Court held that the trial court was correct in finding the claimants did not file their notice in a timely fashion under Arizona Revised Statutes (A.R.S.) § 12-821.01, which provides that before filing a lawsuit against a public entity or employee, a plaintiff must file a notice of claim within 180 days after the cause of action has accrued and that the notice of claim must contain “facts sufficient to permit the public entity or the public employee to understand the basis” of the claim.

The automobile accident, which prompted the notice of claim and resulting suit, occurred on Oct. 3, 2006. The claimants filed their notice of claim on July 30, 2007, more than nine months after the accident, and filed their lawsuit on Jan. 4, 2008. The claimants – Taylor, John and Kathy Thompson – had been awaiting a report on the accident by a hired expert.

Taylor Thompson was driving on a road maintained by Pima County outside Tucson on that October day when she felt her car veer off the pavement. She attempted to get back on the pavement, but the car flipped and came to a stop when it hit a cactus. She suffered fractured vertebrae and damage to her spleen and was in a hospital for two days.

On the day of the accident, a deputy sheriff issued a traffic citation to Taylor at the hospital and told Taylor and her mother – Kathy – that the condition of the road might have contributed to the accident. The next day, Taylor’s father – John – and a lawyer looked over the accident scene and took photographs. They observed two potholes and took measurements.

Pima County had apparently been aware of the road’s condition and repaired the road the day after the accident.

Meanwhile, John Thompson hired an accident reconstruction expert who concluded in a report dated Feb. 7, 2007, that road conditions caused the accident.

After the lawsuit was filed, Pima County filed a motion for summary judgment saying the Thompsons had not met statutory deadlines for filing their notice of claim and lawsuit.

The trial court granted summary judgment, finding the Thompsons’ claim had accrued more than 180 days before the filing of their notice of claim. The Thompsons appealed.

“The Thompsons maintain the trial court erred in granting summary judgment because their ‘investigation into the elements of the accident’ was not completed until their accident reconstruction expert submitted his preliminary report of the accident on Feb. 7, 2007,” notes the Court in its written opinion. “They assert, ‘at that time and on that date they had for the first time the facts sufficient to support a valid Notice of Claim against Pima County.’ As we understand the argument, the Thompsons contend a cause of action accrues when a party has sufficient facts necessary to file a valid notice of claim under A.R.S. § 12-821.01(B).”

That portion of the statute says, “a Notice of Claim that does not contain facts sufficient will be denied by the government entity, challenged in court and ultimately defeated. By the time the process is finished, the time for filing or re-filing a valid Notice of Claim will have passed, and the entire claim will be barred as untimely.”

The Court summarized what the Thompson knew about the accident even before the expert submitted a preliminary report in February 2007.

“The Thompsons possessed all the fact necessary to support their cause of action,” the Court says. “They knew Taylor had been injured in a car accident after she had driven over potholes located on a county-maintained road. Even though the Thompsons did not have an expert opinion on causation until February 7, 2007, this does not mean they reasonably should not have known the cause of the accident before that time. Simply put, they did not have to know all the underlying details of how the accident occurred before their cause of action accrued.

“Consequently, there was no genuine issue of material fact as to whether the Thompsons had ‘reasonable notice to investigate whether the injury was attributable to the county’s negligence’ because they unquestionably were aware of the necessary facts underlying their cause of action,” the Court concluded. ❁

Personnel Perspectives

Featuring legal issues from the AMRRP Personal Assistance Lifeline (PAL)

AMRRP Personnel Assistance Lifeline (PAL) Q&A

By Justin Pierce, Jackson Lewis, LLP

Question: We have an employee we'll call "Michael," who has been showing signs of some sort of infection. For the past month his wounds/boils seem to have spread all over his body. He has not been to work for the past few days, and we understand he was just placed in quarantine over the weekend. Michael has not released any information to us about his situation. Because Michael works in a confined space with other employees close by, we're concerned that we need to inform Michael's co-workers about what virus he has so they can use the proper precautions to protect themselves, and so as not to spread this virus. What, if anything, are we allowed to share?

Answer: As an initial matter, since Michael has been quarantined, you'll want to require a doctor's release, which affirms that he is safe to come back to work before you allow

him back in the work environment. In the meantime, you should request additional information from Michael in order to determine if he has an ADA disability that may need accommodating when he returns or if he has a condition that may have compromised the health of others. When you get that information, if Michael has some sort of contagious disease, you'll want to send a notice to employees indicating that they may have been exposed to that disease in the workplace. Obviously, you won't mention Michael's name in the notice (although the employees that work with Michael are likely going to figure it out). The notice should also inform them that if they would like to see a health care provider for testing, you will pay for the testing. Finally, there are certain protocols under OSHA for certain types of diseases, which require that you train on universal precautions. Consequently, because of the numerous potential pitfalls associated with this situation, you should utilize the AMRRP's PAL line in order to talk through a strategy for dealing with it legally. ❁

MEDICAL MARIJUANA

continued from page 1

If your city or town decides to adopt zoning regulations that permit the use of land for a medical marijuana dispensary only after a conditional use permit is issued, that will give your city or town the flexibility to adapt the permit to varying circumstances, but the issuance of such a permit will likely require your elected officials to decide where to locate a medical marijuana dispensary in your city or town.

What happens if your city or town does not adopt medical marijuana dispensary zoning regulations?

The Medical Marijuana Act clearly permits your city or town to adopt zoning regulations in order to limit where medical marijuana dispensaries may be located. If you have such regulations in place when an applicant for a registration applies, the applicant must certify that its application complies with your zoning regulations. For example, for those jurisdictions that have adopted zoning regulations that permit medical marijuana dispensaries in an industrial district, the applicant must be proposing a location for a medical marijuana dispensary in an industrial district and the use must comply with the requirements of your zoning code.

If, however, your city or town has not adopted zoning regulations

limiting the location of medical marijuana dispensaries, then the applicant need not certify that its location complies with local zoning regulations, and if ADHS issues a registration certificate for a dispensary in your city or town, then the applicant may establish his or her medical marijuana dispensary wherever the use otherwise complies with your zoning code – perhaps anywhere except a residential district. Having done that, the applicant will then have a reasonable argument in the future (once your city or town gets around to adopting zoning regulations limiting the location of medical marijuana dispensaries) that its use is a legal non-conforming use not subject to the zoning regulations subsequently adopted.

Impact

The Medical Marijuana Act creates a number of issues for local government. One such issue is land use regulation. The drafters of the Act clearly contemplated that your city or town may decide to enact zoning regulations limiting the use of land for medical marijuana facilities. If your city or town decides to postpone enacting such regulations and if ADHS were to issue a registration certificate for a medical marijuana dispensary in your city or town, you will have difficulty imposing subsequent zoning regulations on the use. ❁

Bill redefines municipality's ability to assess development fees

A bill is moving through the Arizona Legislature that redefines a municipality's ability to assess development fees, which are commonly called impact fees. The fees are payments developers make to municipalities on homes under construction to fund such things as roads, police stations, water-treatment plants or parks. Fee amounts vary by municipality.

"Impact fees have escalated out of control," Senate President Russell Pearce, a Mesa Republican and the bill's primary sponsor, told *The Arizona Republic*. "It's a tax on families trying to get homeownership."

The bill – **Senate Bill (SB) 1525** – would require a municipality to calculate development fees based on land-use assumptions and an infrastructure improvements plan (IIP), which would be developed by "qualified professionals using generally accepted engineering and planning practices."

SB 1525 was passed by the Senate on February 28 by a vote of 16-13-1 and sent to the Arizona House for consideration. In 2009, the Legislature passed a law freezing fees at their current level until June 30, 2012. It has been assigned to the House Government Committee, but no hearing had been scheduled as the *Risk Review* was going to press.

SB 1525 says that a municipality may assess development fees to offset the costs associated with providing infrastructure improvements to a development, including the costs of infrastructure, improvements, real property, engineering and architectural services, financing and professional services required for the preparation or revision of the portion of the infrastructure improvements necessary for the imposition of a development fee. A major revision in this portion of the statute is that SB 1525 changes the phrase "necessary public service" to "infrastructure improvements."

Other provisions of SB 1525 would:

- Limit development fees to a proportionate share of the cost of infrastructure improvements, based on service units, needed to provide infrastructure improvements to a new development.
- Define "service unit" as a standardized measure of consumption, use, generation or discharge attributable to an individual unit

of development calculated pursuant to generally accepted engineering or planning standards for a particular category of infrastructure improvements or facility expansions.

- Require infrastructure improvements made necessary by new development to be based on the same level of service provided to existing development in the service area.
- Prohibit the use of development fees for:
 - a) construction, acquisition or expansion of public facilities not identified in the IIP;
 - b) repair, operation or maintenance of existing or new infrastructure improvements or facility expansions;
 - c) upgrading, updating, expanding correcting or replacing existing infrastructure improvements to serve existing development in order to meet stricter safety, efficiency, environmental or regulatory standards; or
 - d) administrative, maintenance or operating costs of a municipality.
- Prohibit the collection of development fees unless the collection is made in accordance with an IIP and the municipality commits to complete construction and having service available within five years.

Other legislation includes:

House Bill (HB) 2153, which prohibits a city, town or county from adopting an ordinance that mandates the installation of fire sprinklers in a single family detached residence or any residential building containing no more than two dwelling units. It was passed by the House on February 10 by a vote of 38-21 and by the Senate on March 2 by a vote of 19-11. Governor Jan Brewer signed it March 9. The bill states that it does not apply to any ordinance requiring residential sprinklers that was adopted prior to Dec. 31, 2009.

SB 1160, which prevents a city or town from imposing or increasing sales tax on residential renters unless approved by municipal voters. This bill was passed by the Senate by a vote of 25-4 on Feb. 8. In the House, it has received a favorable vote by the Government Committee and is awaiting floor action.

See **BILL REDEFINES** on page 7

Court rules jury must decide on timely filing

In a case that has been all the way to the Arizona Supreme Court then back to the trial court and back to the Arizona Court of Appeals, Division 1, the Appeals Court has decided a jury is required to determine if a notice of claim was filed in a timely fashion and remanded the case to the trial for another go at it.

“When a governmental entity asserts an affirmative defense of non-compliance with Arizona’s notice of claim statute, and a genuine issue of material fact exists concerning compliance, who resolves that factual question, the trial judge or a timely requested jury?” says the Appeals Court’s decision. “We hold that, under these circumstances, the resolution of the factual question is reserved for the jury.”

The case arose from an August 2004 single-car accident in which the driver – James Lee – was injured, and his wife Teresa and two other passengers – Hyeon Bai Kim and Kyung Nim Bea Kim – were killed. Lee filed a complaint against the state in August 2005, alleging that negligent design, construction and maintenance of the road and guardrail contributed to the accident.

The trial court granted a summary judgment to dismiss the case, and the Appeals Court affirmed the decision. Lee contends he filed a notice of claim in a timely fashion, but the Arizona Attorney General’s Office contends it never received the notice. However, the Supreme Court reversed the trial court decision, vacated the Appeals Court opinion and remanded the matter back to the trial court.

“Lee’s proof of mailing and the State’s denial of receipt created a material issue of fact,” the Supreme Court decided. The matter should be decided by a “factfinder,” the Supreme Court said.

The trial court determined it could function as the “factfinder” saying, “The Court finds that it has broad discretion to resolve issues of fact pertaining to preliminary matters that do not go to the merits of the case.” The trial court then set an evidentiary hearing and, following the hearing, dismissed Lee’s complaint with prejudice.

Lee again appealed, and this time the Appeals Court decided the trial court had erred. ❁

BILL REDEFINES

continued from page 6

Provisions would:

- Prohibit a city or town that levies a transaction privilege, sales, gross receipts, use, franchise or other similar tax or fee, however denominated, from imposing or increasing the rate of tax applied to the business of renting or leasing real property for residential purposes unless approved by the qualified electors of the city or town at any regular municipal election.
- Specify that the act does not apply to health care facilities, long-term care facilities or hotel, motel or other transient lodging businesses.
- Stipulate that the requirements of the act apply regardless of whether a city or town has adopted the Model City Tax Code pursuant to statute.
- Set a retroactive date of from and after Dec. 31, 2010.

HB 2003, which prohibits a county, city or town from directly or indirectly charging a fee or seeking reimbursement from the driver, an insurer or any other person for any costs or expenses

for the provision of police, fire or other emergency responder services, personnel, supplies, motor vehicles or equipment in responding to a motor vehicle accident or in the investigation, cleanup or accident report preparation. The bill was passed by the House by a vote of 52-6-2 on Feb. 28. In the Senate, it has received a favorable vote by the Public Safety and Human Services Committee and is awaiting floor action.

HB 2003 says the Legislature finds that the regulation of such emergency response services fees is a matter of statewide concern. Legislative staff reports that at least six states have introduced measures restricting such fees this year and nine other states have previously enacted similar legislation.

HB 2422, which requires a city or town to post estimates of revenues and expenses and final budgets in a prominent place on an official website. It was passed by the House by a unanimous vote on Feb. 14. In the Senate, it received a favorable vote from the Government Reform Committee and is awaiting floor action. ❁

RISK REVIEW

14902 North 73rd Street
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VOLUME 25, ISSUE 1 • MARCH 2011

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RISK REVIEW

is published quarterly by the
**Arizona Municipal Risk Retention Pool
(AMRRP)**

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The AMRRP is a non-profit corporation created in 1987. Its primary purpose is to provide property and casualty coverages to incorporated cities and towns in Arizona. AMRRP is sponsored by the League of Arizona Cities and Towns. AMRRP is governed by a nine member board elected by representatives of participating cities and towns.

Risk Review is published by AMRRP in a continuous effort to inform and educate its member cities and towns. Suggestions for article topics are welcome. Contact AMRRP at the above address and phone number.