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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MALINDA TRAUDT, Plaintiff and Appellant, v. CITY OF DANA POINT, Defendant and Respondent.	G044130 (Super. Ct. No. 30-2010-00373287) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, B. Tam Nomoto Schumann, Judge. Appeal dismissed.

Schwartz Law and Jeffrey M. Schwartz for Plaintiff and Appellant.

Rutan & Tucker, A. Patrick Muñoz, Douglas J. Dennington and Jennifer Farrell for Defendant and Respondent.

* * *

Malinda Traudt appeals from a judgment of dismissal after the trial court sustained, without leave to amend, the City of Dana Point's demurrer to Traudt's

declaratory judgment complaint. Traudt filed suit to obtain a court declaration that Dana Point (City) zoning ordinances that did not expressly recognize medical marijuana dispensaries as permitted uses constituted a zoning ban on dispensaries and that state law, specifically the Compassionate Use Act (CUA) (Health & Saf. Code, § 11362.5)[1] and the Medical Marijuana Program Act (MMPA) (§ 11362.7 et seq.), preempts cities from adopting zoning bans on dispensaries. Traudt alleged declaratory judgment on the zoning question was necessary to: (1) vindicate a statutory right of access to medical marijuana at dispensaries under state law, which provides for cooperative and collective cultivation of medical marijuana (§ 11362.775), (2) to ensure that medical marijuana patients receive equal legal protection to access their medication at a dispensary as authorized by state law, similar to patients using other legal medications, and (3) to ensure a right of privacy and autonomy for patients to make personal medical decisions to access marijuana at a dispensary as authorized by state law.

As we explain, an individual medical marijuana patient is not the proper party to challenge generally applicable zoning provisions because — whatever the contours of the right to engage in cooperative or collective medical marijuana activity (see, e.g., § 11362.775) — the Legislature invested this right in cooperative and collective groups and entities, not in individuals. We therefore conclude that, similar to the rule for shareholder actions in corporate law, an individual dispensary stakeholder or patron does not have standing to challenge an alleged infringement of a right belonging to the group as a whole. The group, as a whole or through its duly appointed agents, must determine how to assert or defend its rights. Traudt concedes she holds no ownership or

[1] All further statutory references are to the Health and Safety Code unless otherwise specified.

control in the dispensary to which she belongs,[2] or in any other dispensary. She therefore lacks standing to challenge the City's asserted zoning ban on dispensaries and, consequently, her lack of standing requires that we dismiss her appeal.

I

FACTUAL AND PROCEDURAL BACKGROUND

Traudt's condition is tragic and presents perhaps the most compelling case imaginable for individual standing. She is blind and suffers from cerebral palsy, epilepsy, and acute cognitive delays. Her complaint reflects she lived life as a "smiling, happy girl" until she developed osteoporosis in her 20's, which "devastated her body." Her bones became "so brittle that her femur (the strongest bone in the body) broke and portions of her tailbone . . . disintegrated," causing her "chronic and intolerable pain, far beyond anything she had previously experienced or can handle." Her doctor prescribed pain medications to no avail, including OxyContin, which immediately caused her kidneys to "begin shutting down" and resulted in a high fever and her lungs filling with fluid, leading to pneumonia. Her breathing became very shallow and her physician recommended that her mother, Shelly White, "contact hospice to arrange for Malinda's final hours. Shelly began planning her daughter's funeral."

As reflected in Traudt's complaint, "[i]n a last-ditch effort to keep Malinda alive while managing her pain, Shelly and Malinda's pain specialist agreed to try replacing Malinda's pain medication with medical marijuana." According to the complaint, "[a]lmost immediately, Malinda's fever subsided, she stopped vomiting, and her suffering lessened. Within three days, she began to recover." Traudt's complaint identifies her as "a 'last resort patient,' one for whom traditional pain medications have completely failed." Her condition "is irreversible," "her health is declining," and "[n]o

[2] Traudt's dispensary, Beach Cities Collective, is challenging the City's zoning ban and nuisance abatement measures in separate litigation.

medication, pharmaceutical or natural, can reverse that decline." Nevertheless, "[t]hrough the continued use of medical marijuana, Malinda's kidneys regained function, she became lucid, she was able to eat, and she began smiling again. Her pain became manageable and her quality of life improved significantly."

Traudt's mother has attempted to grow medical marijuana for her daughter's needs, but "due to the elements, insects, disease, mold, and Shelly's lack of experience, her efforts, thus far, have been unsuccessful." Traudt lives with her mother in San Clemente, near its border with Dana Point. Choosing among six dispensaries operating in Dana Point at the time of Traudt's complaint, "Shelly chose the Beach Cities Collective . . . in part because she could push Malinda there and back in her wheelchair, making it a fun outing."

Traudt also obtains medical marijuana from a dispensary or dispensaries in Los Angeles County. Traudt herself cannot endure the trip because of her fragile health and increased pain when riding in her mother's van for longer than 15-20 minutes. Nor can Traudt's mother make the drive, since she "needs to be near Malinda constantly, to monitor her health and stand ready to use their Portable Suction Machine or other devices and techniques to manage the frequent problems that suddenly develop in Malinda's precarious condition." Accordingly, Traudt's mother "never leaves Malinda for the approximately two hours required to drive to Los Angeles, obtain medicine, and return."

On March 10, 2010, the City filed a nuisance abatement action seeking to shut down the Beach Cities Collective (Beach Cities). Approximately a week later, Traudt filed this action, alleging the City was "attempting to close all of the collectives in Dana Point," including Beach Cities. As noted, Traudt premised her declaratory judgment action on claims of preemption under California medical marijuana law and that those state laws afforded her a right of access to medical marijuana through a dispensary. In a separate lawsuit, Traudt sought and was denied permission to intervene on behalf of Beach Cities as an additional party in the City's nuisance abatement action

against the dispensary. In the action presently before us in this appeal, the trial court granted the City's demurrer to Traudt's declaratory judgment complaint, and she now appeals entry of judgment in the City's favor.[3]

II

DISCUSSION

We conclude Traudt lacks standing to challenge a zoning ordinance said to ban cooperative or collective entities engaged in the production and distribution of marijuana to their members for medicinal purposes (medical marijuana). These entities are commonly known as medical marijuana dispensaries, which the Attorney General has concluded may operate lawfully under state law, provided they do so in conformity with the CUA and MMPA. (See Cal. Atty. Gen., "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" (Aug. 25, 2008), available at <http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf> (as of Sept. 15, 2011) (A.G. Guidelines or Guidelines).) Specifically, while "dispensaries, as such, are not recognized under the law," "a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law . . . ." (Guidelines, at p. 11.)

Traudt argues that state law authorizing medical marijuana dispensaries preempts any local regulation purporting to ban those entities. In particular, in her first amended complaint for declaratory relief, she sought a permanent injunction preventing the City from shutting down, under its "total ban," her preferred collective and "all medical marijuana collectives in Dana Point . . . ." The City acknowledged in its demurrer that it was "attempting to 'shut down' the dispensaries," as Traudt alleged, having filed complaints seeking "abatement, injunction, equitable relief and civil penalties against each of six dispensaries, including Beach Cities Collective, operating in

[3] Traudt's appeal from denial of intervention in the nuisance action is separately pending before us (G043831).

violation of its zoning regulations." According to the City, its zoning regulations established an implied ban on medical marijuana dispensaries. The City explained: "The Dana Point Zoning Code does not list medical marijuana dispensaries as a permitted use within any zoning district in the City. As such, this land use is prohibited."

The City did not demur to Traudt's declaratory judgment action on standing grounds, "but lack of standing constitutes a jurisdictional defect and therefore may be raised at any time, even for the first time on appeal" (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751 (*Qualified Patients*)), as the City does now.

Here, Traudt does not have standing to challenge application of Dana Point's zoning code to property she does not own or lease at the locations where Beach Cities Collective has sought to operate, nor does she have standing to challenge the zoning provisions affecting dispensaries generally. The reason is simple: she is not a dispensary. More particularly, she herself is not the cooperative or collective entity in which the Legislature has vested the right to control lawful access to medical marijuana when a qualified patient or primary caregiver does not grow his or her individual supply of the drug. Whatever the contours of a right to ensuring medical marijuana is available through a dispensary, the right is a group or corporate one. The Legislature has declared, for example, that a primary purpose of the MMPA is to "[e]nhance the access of patients and caregivers to medical marijuana *through* collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(3).) Specifically, the MMPA affords protections to those who "*associate* within the State of California in order *collectively or cooperatively* to cultivate marijuana for medical purposes . . . ." (§ 11362.775, italics added.) As we explain, the group basis of the right to associate and collectively or cooperatively produce medical marijuana restricts to the group the right of standing in zoning challenges.

The A.G. Guidelines provide some insight into the corporate, rather than individual, nature of the right to contend that one or more medical marijuana dispensaries may open or remain open for business despite a zoning ban. The Guidelines observe, for

example, that "[n]o business may call itself a 'cooperative' (or 'co-op') unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code." (A.G. Guidelines, at p. 8; Corp. Code, § 12200 et seq.; Food & Agr. Code, § 54001 et seq.; see generally David C. Gurnick, Consumer Cooperatives: What They Are and How They Work (Aug. 1985) 8 L.A. Lawyer, Vol. 8, No. 5, p. 22 (hereafter Gurnick); A. James Roberts III, Understanding Agricultural Cooperatives (1984) 4 Cal. Lawyer, Vol. 4, No. 2, p. 13 (hereafter Roberts).)

Agricultural cooperatives consist of three or more natural persons who are engaged in the production of horticultural and related products (Food & Agr. Code, § 54004), and who "form an association pursuant to this chapter for the purpose of engaging in" agriculture-related activities (Food & Agr. Code, § 54061). Those activities include "[t]he production, marketing, or selling of the products of its members," including specifically the "harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization of any product of its members," and financing these and similar activities. (*Ibid.*) As a business "association" (Food & Agr. Code, § 54002), general corporate law applies to agricultural cooperatives (Food & Agr. Code, § 54040), and they must file articles of incorporation in the same manner prescribed for general corporations (Food & Agr. Code, § 54082). The constituent persons who associate to form an agricultural cooperative are known as "members," and they may or may not own stock in the association (Food & Agr. Code, § 54003).

Similarly, consumer cooperatives consist of members who associate and form a corporation "for any lawful purpose provided that it shall be organized and shall conduct its business primarily for the mutual benefit of its members *as patrons of the corporation*." (Corp. Code, § 12201, italics added.) The benefits of the corporation, including any goods or services it provides (Corp. Code, § 12243), "shall be used for the general welfare of the members or shall be proportionately and equitably distributed to some or all of its members or its patrons, based upon their patronage [citation] of the

corporation . . .” (Corp. Code, § 12201). (Cf. Roberts, *supra*, 4 Cal. Lawyer at p. 59 [agricultural cooperatives similarly “are obligated to distribute the primary benefits of their operation on the basis of use or patronage”].) No stock need issue in a consumer cooperative; instead, a “[s]hareholder” is simply a “member” of the cooperative. (Corp. Code, §§ 12238, 12247, 12401.) Like an agricultural cooperative, a consumer cooperative must file articles of incorporation and operate subject to general corporate law (Corp. Code, §§ 12214, 12300, 12301, 12310).

As recognized in the A.G. Guidelines, a dispensary may organize and operate under the MMPA as a “collective” instead of as a consumer or agricultural cooperative. (Guidelines, *supra*, at p. 8; see § 11362.775 [providing that qualified persons may associate to cooperatively *or* collectively produce marijuana].) But the right afforded by the MMPA to engage in collective medical marijuana activities — whatever the lawful scope of those activities — is by definition a group right, rather than an individual one. The MMPA does not define a “collective,” but it is necessarily a group venture rather than an individual undertaking; the Guidelines note as examples “‘a business, farm, etc., jointly owned and operated by the members of a group.’” (A.G. Guidelines, at p. 8 [citing dictionary definition of collectives]; cf. Gurnick, *supra*, 8 L.A. Lawyer at p. 26 [advocating cooperative, corporate form over more “nebulously constituted organizations”].)

Whether organized as a collective or as a cooperative under California law, the MMPA requires that group medical marijuana operations must be nonprofit enterprises. (§ 11362.765, subd. (a) [“nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit”]; see Food & Agr. Code, §§ 54033 [properly organized agricultural cooperatives qualify as “nonprofit”]; 54120 [eight percent “dividend[]” permissible on “excess of association income over association expenses”]; see generally Roberts, *supra*, 4 Cal. Lawyer at p. 13 [“These dividends are deemed to be in the nature of interest, and therefore do not adversely affect

the non-profit character of cooperatives organized under the code"]; see also Corp. Code, §§ 12201 [consumer cooperatives are nonprofit entities, "not organized to make a profit" for themselves or their members]; 12244, 12451 [co-op distributions or refunds permissible; annual distributions on contributed capital limited to 15 percent]; Gurnick, *supra*, 8 L.A. Lawyer at p. 34.) The fact that dividends or distributions *may* be authorized for individual members of consumer or agricultural cooperatives, and that cooperatives and collectives are organized to provide particular goods or service benefits to their individual members does not convert the group nature of the association's activities into an individual right that confers individual standing to resist a zoning ban. Rather, the group right under the MMPA to engage in cooperative or collective marijuana production remains a right that belongs to the body as a whole, not to an individual.

Thus, we conclude the rules governing corporate standing are pertinent here. "Because a corporation exists as a separate legal entity, the shareholders have no direct cause of action or right of recovery against those who have harmed it. The shareholders may, however, bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so." (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) Indeed, an express code section provides for member derivative actions in consumer cooperatives to vindicate interests belonging to the cooperative as a whole. (Corp. Code, § 12490 [members' derivative actions].) In the context of corporation law generally, individual stockholders and members may not maintain an action in their own behalf concerning enterprise rights or interests because "'such an action would authorize multitudinous litigation and ignore the corporate entity.'" (*Grosset*, at p. 1108, fn. 5.)

These concerns are apt here. The parties note, and we are well aware, that a plethora of litigation has erupted in this jurisdiction and statewide involving dispensaries challenging various aspects of local legislation concerning medical marijuana, including zoning bans on dispensaries. As the City observes, Beach Cities Collective, of which

Traudt is a member and where she seeks in particular to ensure nearby access to medical marijuana, is itself "actively engaged in defending against the City's nuisance abatement proceedings on its own" in other litigation. To recognize standing in every member of every dispensary to assert claims concerning the cooperative or collective right to produce marijuana would have the practical effect of swamping the courts with a multitude of separate, serial, overlapping cases, needlessly impeding the administration of justice and increasing the risk of inconsistent results.

More to the point, the gravamen of the standing question is that "the party who asks relief from a court must be one who is in some way aggrieved by the act complained of" and, specifically, "must show some character of actual or potential interference with *his* rights of person or property." (*Silva v. City of Cypress* (1962) 204 Cal.App.2d 374, 377, italics added [petitioner lacked standing to challenge zoning variance].) Traudt's declaratory judgment action requires an "actual controversy relating to the legal rights and duties *of the respective parties* . . . ." (Code Civ. Proc., § 1060, italics added.) As discussed, however, the Legislature has vested in cooperative or collective entities control over access to lawful medical marijuana when a qualified person does not grow his or her own individual supply of the drug. (Compare § 11362.775 [providing for cooperative and collective production of marijuana] with §§ 11362.5, subd. (b)(2)(d) & 11362.765, subd. (b)(1) [providing for individual cultivation, transportation, and possession of medical marijuana].) We may not ignore or dilute the Legislature's policy decision and authorize individual members to pursue individual actions as Traudt has done here, particularly where the dispensary is itself engaged in litigation over the same issues. It is not our place to unhinge litigation rights from a cooperative or collective dispensary's control, or to clone and bestow those rights on a multitude of individual dispensary members.

Traudt glosses her declaratory judgment claim with invocations of constitutional protection for individual rights, but as noted at the outset, her asserted right

to medical marijuana at a dispensary and her corresponding demands for due process of law, equal protection, and medical self-determination are founded here in the *statutory* right of collective or cooperative production of marijuana. As we have explained, that right and the corresponding right to resist allegedly unlawful local infringements belong — by the very statutory authority Traudt relies on — to groups organized as cooperative or collective medical marijuana dispensaries, and not to any lone individual. We emphasize that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal" (*Warth v. Seldin* (1975) 422 U.S. 490, 500 (*Warth*)), and we express no opinion on the merits of Traudt's zoning challenge. Rather, standing "often turns on the nature and source of the claim asserted," and "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . ." (*Ibid.*) But as we have explained, the right to challenge a zoning ban said to establish a particular group endeavor as a per se nuisance does not belong to Traudt.

Furthermore, in addition to the requirement that one's own interests and not another's must be injured, other considerations of prudence and justiciability inform our standing decision. "[P]rudential considerations defining and limiting the role of the courts . . . are threshold determinants of the propriety of judicial intervention." (*Warth, supra*, 422 U.S. at pp. 517-518.) Those limits on justiciability include the requirement that the plaintiff's asserted injury is redressable. (*Qualified Patients, supra,* 187 Cal.App.4th at p. 751.) "The courts of this state are not authorized to issue advisory opinions" (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1046 (*Torres*)) and, accordingly, it must be possible in the case at hand to redress the plaintiff's asserted injury.

But Traudt concedes that while she is a member of the Beach Cities Collective, she has no ownership interest or other control over how it or any other dispensary or potential cooperative or collective association of qualified persons will react to a decision on the merits. In other words, a decision in Traudt's favor will not

ensure that any particular dispensary will open or remain open, since these business decisions are for each cooperative or collective to decide. Additionally, the parties inform us that several dispensaries have closed as a result of the City's nuisance violation prosecutions. They also inform us that the present landlord and one of two co-owners of Beach Cities Collective have stipulated they will not continue to allow the dispensary to operate in its present location, or to open at another location. These facts highlight the tentative and uncertain redressability of Traudt's claim and the tangential nature of her interest, dependent as it is on third party dispensary operators and other factors. Thus, even if Traudt were to prevail, a favorable decision may not benefit her because she has no voice in the decision of any dispensary to open or remain open. While an opinion might or might not benefit other parties not before the court, we do not, as noted, issue advisory opinions. Traudt's reliance on a general claim of public interest in the questions at hand is therefore misplaced.

Ripeness presents similar justiciability concerns. "'[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.' [Citation.]" (*Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 25-26.) Here, because of her tangential relation to the dispensary as a member with no ownership, operational, or other informed interest, Traudt presents no information regarding the manner in which it operates. Accordingly, there is no concrete set of facts concerning the dispensary against which to evaluate the medical marijuana laws, or to determine whether it or other similar dispensaries may open, remain open, or must be closed consistent the Legislature's intent in the CUA and MMPA. (See *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.* (2003) 115 Cal.App.4th 8, 20, fn. 6 ["In an emerging area of the law, we do well to tread carefully and exercise judicial

restraint, deciding novel issues only when the circumstances require"].) In other words, the redressability of Traudt's claims are wholly speculative in this proceeding.

Traudt's reliance on *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520 for an asserted "public interest" standing exception is misplaced. In *Torres*, another panel of this court explained it "disagree[d] with *Stocks*' analysis of the standing issue," including the court's reliance in *Stocks* "on the purported 'public interest' litigation exception to support its conclusion." (*Torres*, *supra*, 13 Cal.App.4th at p. 1046.) The *Torres* court observed, "This exception is usually applied in cases where an association sues on behalf of its members" (*ibid.*), which was inapposite there, and similarly is here. Here, Traudt as an individual seeks, in effect, to represent an association or group of persons cooperatively and collectively vested with the right to make medical marijuana available through dispensaries. But there is no showing these groups require Traudt as a stand-in or surrogate because they are incapable of representing themselves. As *Torres* also explained in disagreeing with *Stocks*, "California decisions, like the federal courts, generally require a plaintiff to have a personal interest in the litigation's outcome," and we therefore may not issue advisory opinions. (*Ibid.*) So it is here. We therefore conclude Traudt lacks standing to pursue this appeal.

III

DISPOSITION

The appeal is dismissed on grounds that Traudt lacks standing. In the interests of justice, each side shall bear its own costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.