

Legal Sidebar

Cities Try, and Fail (So Far), to Prevent Federal Marijuana Enforcement

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To paraphrase Mark Twain, reports of the death of federal marijuana enforcement appear to have been exaggerated. While federal authorities have created a perceived safe harbor for the operation of marijuana businesses in states that have legalized the drug, the Department of Justice (DOJ) is still [punishing](#) violations of the Controlled Substances Act (CSA) when a business's activities threaten certain core federal [interests](#), such as preventing the distribution of marijuana to children and combating the involvement of criminal enterprise. One tool the DOJ has used to close down offending dispensaries, grow facilities, and retail shops is civil [forfeiture](#)—a legal process by which the government may seize and liquidate a wide array of property “used or intended to be used to facilitate a violation of the CSA.” Once a decision to initiate a forfeiture proceeding has been made, there appears to be very little that states or localities, that actively support the operation of marijuana businesses, can do to prevent federal authorities from enforcing federal law.

Two recent California cases demonstrate how a pair of cities have attempted to prevent the federal government from seizing and shuttering marijuana businesses operating within each city's boundaries. In each case, the federal government initiated a forfeiture action against an operating dispensary: in the Berkeley case, the forfeiture action was initiated because the dispensary was operating in proximity to a preschool; and in the Oakland case, it appears that the forfeiture action was initiated because of the dispensary's [“large” size](#). In response, the city in which the dispensary is located filed suit in an effort to oppose the action, and in each case the federal district court dismissed the city's claim.

In [United States v. Real Prop. & Improvements Located at 2366 San Pablo Ave.](#), the district court found that the City of Berkeley lacked standing to contest a forfeiture proceeding against Berkeley Patients Group, a medical marijuana dispensary. Under Ninth Circuit precedent, a party satisfies the standing requirement for participation in a forfeiture proceeding only by [showing](#) a “colorable interest in the property, which includes an *ownership* or a *possessory* interest.” The city [admitted](#) that it had no ownership stake in the facility, but argued that it had other “non-possessory” interests in the continued operation of the dispensary, such as maintaining “safe and affordable distribution of medical cannabis to patients...within the City of Berkeley,” and a strong interest in the “substantial loss of tax revenue” that would result from the closing of the dispensary. The dispensary [reportedly](#) had provided hundreds of thousands of dollars in tax revenue to the city. The district court rejected both arguments and dismissed the city's claim.

Rather than directly intervene in a forfeiture proceeding, the City of Oakland filed a separate claim in federal district court under the Administrative Procedure Act (APA), challenging DOJ's general authority to pursue forfeiture against Harborside Health Center, an Oakland medical marijuana dispensary that paid over \$1 million in city taxes last year. That challenge was dismissed in [City of Oakland v. Holder](#), on the grounds that the claim did not satisfy the requirements for judicial review under the APA. The APA permits only the [review](#) of “final agency action for which there is no other adequate remedy in court.” The court determined that the decision to initiate a forfeiture proceeding was not a final action, as the mere filing of the action does not result in any legal consequences. Moreover, in an important holding, the court held that there was an existing and alternative “adequate” remedy: contesting the forfeiture proceeding directly, as was done by the City of Berkeley in *2366 San Pablo Ave.* The fact that Oakland likely could not (absent a possessory interest in the forfeited property) avail itself of that process, did not “render the remedy...inadequate.” It simply “demonstrate[d] that the interests Plaintiff has identified —while significant and wide reaching—are too far removed from the defendant property to give it standing...”

Both cases are currently on appeal to the Ninth Circuit.