Court of Appeal, Fourth Appellate District, Division Three
Nos. G042878/G042893/G042883/G042880/G042889

Case No. S180365/S180468/S180560/S180749/S180803

SUPREME COURT OF THE STATE OF CALIFORNIA

EN BANC

IN RE ENFORCEMENT AGAINST DANA POINT SAFE HARBOR COLLECTIVE OF CITY OF DANA POINT CITY COUNCIL SUBPOENA

CITY OF DANA POINT, Petitioner,

v.

DANA POINT SAFE HARBOR COLLECTIVE, Respondent.

IN RE ENFORCEMENT AGAINST THE POINT ALTERNATIVE CARE OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,

v.

THE POINT ALTERNATIVE CARE, INC., Respondent.

IN RE ENFORCEMENT AGAINST HOLISTIC HEALTH OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,

v.

HOLISTIC HEALTH, Respondent.

IN RE ENFORCEMENT AGAINST BEACH CITIES COLLECTIVE OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,

v.

BEACH CITIES COLLECTIVE, Respondent.

IN RE ENFORCEMENT AGAINST DANA POINT BEACH COLLECTIVE OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,

v.

DANA POINT BEACH COLLECTIVE, Respondent

CITY OF DANA POINT'S ANSWER BRIEF ON THE MERITS

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ (SBN 143901)
JENNIFER FARRELL (SBN 251307)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1931

Telephone: 714-641-5100
Attorneys for Petitioner
CITY OF DANA POINT

Court of Appeal, Fourth Appellate District, Division Three
Nos. G042878/G042893/G042883/G042880/G042889

Case No. S180365/S180468/S180560/S180749/S180803
SUPREME COURT OF THE STATE OF CALIFORNIA
EN BANC

IN RE ENFORCEMENT AGAINST DANA POINT SAFE HARBOR COLLECTIVE OF CITY OF DANA POINT CITY COUNCIL SUBPOENA

CITY OF DANA POINT, Petitioner,
v.
DANA POINT SAFE HARBOR COLLECTIVE, Respondent.

IN RE ENFORCEMENT AGAINST THE POINT ALTERNATIVE CARE OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,
v.
THE POINT ALTERNATIVE CARE, INC., Respondent.

IN RE ENFORCEMENT AGAINST HOLISTIC HEALTH OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,
v.
HOLISTIC HEALTH, Respondent.

IN RE ENFORCEMENT AGAINST BEACH CITIES COLLECTIVE OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,
v.
BEACH CITIES COLLECTIVE, Respondent.

IN RE ENFORCEMENT AGAINST DANA POINT BEACH COLLECTIVE OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,
v.
DANA POINT BEACH COLLECTIVE, Respondent

CITY OF DANA POINT'S ANSWER BRIEF ON THE MERITS

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ (SBN 143901)
JENNIFER FARRELL (SBN 251307)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1931

Telephone: 714-641-5100
Attorneys for Petitioner
CITY OF DANA POINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

Page(s)

STATE CASES (CONT.)

Page(s)

STATE CASES (CONT.)

STATE STATUTES

Page(s)

STATE STATUTES (CONT.)

RULES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION.

This case addresses a very narrow procedural issue – whether an order compelling compliance with a legislative subpoena issued under Government Code section 37104 is appealable as a final judgment. Although appellate courts throughout the State have reached a wide range of different and often contradictory conclusions on the issue, this Court should find that such orders are ***not appealable*** because: (1) there is no statute that specifically provides that orders enforcing legislative subpoenas are appealable; (2) such orders do not qualify as "final judgments"; and (3) strong public policy concerns weigh in favor of non-appealability.

II. BACKGROUND.

The instant Petition for Review ("Petition") stems from a trial court order enforcing five legislative subpoenas ("Subpoenas") issued by the Dana Point City Council ("Council" or "City Council") pursuant to Government Code section 37104 ("Section 37104").[1] The Subpoenas were served on five businesses commonly known as "medical marijuana dispensaries" that were operating within the City's jurisdiction – Holistic Health, Dana Point Beach Collective, Beach Cities Collective, Dana Point Safe Harbor, and The Point Alternative Care, Inc. (collectively, the

[1] The Government Code authorizes cities to issue subpoenas in connection with matters within their jurisdiction that their city councils decide to investigate. (Gov. Code §§ 37104-37109.)

"Dispensaries"). (Clerk's Transcript ("CT") 39-44.)[2] It is worth noting that while the five Respondents who have petitioned this Court are medical marijuana dispensaries, the issue before the Court has nothing to do with the emerging case law related to marijuana dispensaries.

The Subpoenas were issued in connection with the City Council's investigation into whether or not to change its Zoning Code to permit medical marijuana dispensaries in the City. In particular, after receiving a request to amend its Zoning Code in this fashion,[3] and after witnessing the controversy that erupted in several other cities confronted with the same issues, the Council decided to conduct an investigation into how the

---

[2] It should be noted that because the cases were not consolidated at either the trial or appellate court level, five separate clerk's transcripts were prepared on appeal. For ease of reference, the citations contained in this Answer Brief on the Merits are to the clerk's transcript prepared in *City of Dana Point v. Beach Cities Collective* (Superior Court Case No. 30-2009-00298208).

[3] 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. (*See e.g.,* Dana Point Municipal Code ("DPMC") §§ 9.11.020(b) [uses not expressly permitted in commercial districts are prohibited], 9.13.020(c)] [mixed use districts], 9.15.020(b) [professional/administrative districts], and 9.17.020(b) [industrial/business districts]; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 [where zoning code did not specifically list marijuana dispensary as a permitted use, it was prohibited]; *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 [same].)

Dispensaries operate before deciding whether to amend its Zoning Code to permit this land use.[4]

In connection with this investigation, the Subpoenas issued sought various ***categories*** of business and other corporate records[5] that would assist City staff in determining whether the Dispensaries were operating in compliance with the regulations contained in the Compassionate Use Act (Health & Saf. Code § 11362.5) (the "CUA"), the Medical Marijuana Program (Health & Saf. Code § 11362.7 *et seq.*) (the "MMP"), and the Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use[6] (the "A.G. Guidelines"). Contrary to the Dispensaries' contentions, the Subpoenas did not seek the medical records of or any medical information related to any individual who purchased marijuana from the Dispensaries. (CT, 203 ["The City has

---

[4] Note that the Dispensaries were operating in the City in a manner the City contends violations its Zoning Code, which is now the subject of separate litigation.

[5] The City's subpoena, like most legislative (and civil) subpoenas, sought various categories of documents (rather than a list of specific, identifiable documents) that related to the various medical marijuana regulations. This fact is relevant in the current case because it further supports the likelihood of additional proceedings to determine whether certain specific documents fit within those categories and therefore were subject to production.

[6] The A.G. Guidelines were promulgated in August 2008 in accordance with Health & Safety Code section 11362.81(d) which directed the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." It contains several guidelines that are relevant (and in some cases, essential) to determining whether a cooperative or collective is operating lawfully. (A.G. Guidelines, p. 8-11.)

specifically not sought copies of medical marijuana recommendations, patient medical files, and information related to the medical condition for which the marijuana was recommended].) Rather, the Subpoenas were narrowly drawn and mimicked nearly the exact same language contained in the Attorney General Guidelines pertaining to how cooperatives and/or collectives might operate lawfully. (CT, 39-44.)

When the Dispensaries refused to comply with the Subpoenas, the City filed the appropriate papers seeking the Superior Court's assistance in enforcing the Subpoenas. After several hearings on the matter, and extensive briefing, the trial court issued a final order on November 2, 2009 directing the Dispensaries to comply with the Subpoenas. (CT, 198-205.) On the same day, the court also entered a protective order limiting the City's disclosure and use of members names contained within the documents produced by the Dispensaries. (CT, 195-197.)

Despite the trial court's order regarding the validity of and compliance with the Subpoenas, all of the parties, including the judge, the Honorable Judge Glenda Sanders, acknowledged that there would likely be additional proceedings to further determine whether certain, specific documents were encompassed within the categories of documents requested in the Subpoenas, and therefore subject to production. For instance, at the October 22, 2009 hearing on the matter, Judge Sanders stated:

> . . . each of you, in producing documents needs to deal with the subpoena in the way you would deal with a response when the court compels further production [i.e., to discovery], so you must take the request and either produce the documents or produce them subject to the protective order or say you will produce them when a protective order is in place and if for some reason you believe that they do not need to be produced in order to comply with my order, then you need to state why." (Reporters Transcript ("RT"), 83:25-84:10.)

In addition, at the same October 22, 2009 hearing, in response to concerns from counsel for the Dispensaries regarding their inability to produce documents that allegedly do not exist, Judge Sanders stated:

> You can state that. You can't force someone to do that. You can't force someone to do that, that is impossible, and we'll deal with it the way we always deal with production of documents, if the document doesn't exist, I can't make you produce it . . . (RT, 85:6-10.)

Instead of complying with Judge Sander's order, the Dispensaries all filed separate appeals. On December 22, 2009, the Court of Appeal issued an order on its own motion inviting both the City and Dana Point Beach Collective (Court of Appeal Case No. G042889), to file letter briefs addressing whether the trial court's order enforcing the subpoenas was an appealable order.[7] The City filed a letter brief, although inexplicably, and despite requesting and receiving several extensions of time, Dana Point Beach Collective never filed such a brief.

---

[7] A copy of the Court's order is attached to this Answer Brief on the Merits.

On January 29, 2010, the Court of Appeal issued the order that is the subject of the instant Petition.[8] In its order, the Court of Appeal deemed ***all*** of the Dispensaries' notices of appeal to be petitions for extraordinary writ and ordered the Dispensaries to file their extraordinary writs within fifteen (15) days.[9] (*Ibid.*) The Dispensaries ***all*** subsequently filed motions to reinstate the appeal, which were denied, and ultimately all filed Petitions for Review. On March 10, 2010, this Court granted the Petitions for Review on the following narrow, procedural issue: "Is an order compelling compliance with a legislative subpoena issued under Government Code section 37104 appealable as a final judgment?"[10]

III. ARGUMENT.

It has long been recognized that a legislative body may conduct an investigation in order to assist its decision-making regarding legislative or other appropriative matters. (*Barenblatt v. United States* (1959) 360 U.S. 109, 111-112.) As the United States Supreme Court observed in *McGrain*

---

[8] Note that the Court of Appeal issued five identical orders – one for each of the five cases on appeal. Because all five orders are identical, and in order to not exceed the page limitation contained in Cal. Rules of Court, Rule 8.520(h), only one copy of the Court's order is attached to this Answer Brief on the Merits.

[9] Although the Court of Appeal only requested briefing from the City and Dana Point Beach Collective on the issue of whether the trial court's order was appealable, the Appellate Court, on its own motion, ultimately dismissed all of the five Dispensaries' appeals.

[10] A copy of this Court's order is attached to this Answer Brief on the Merits. In addition, on April 14, 2010, this Court consolidated all of the five cases for all purposes.

v. Daugherty (1927) 273 U.S. 135, the legislative "power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function." (*Id.* at 174; see also *Barenblatt, supra,* 360 U.S. at 111 ["The scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate . . . ."]; see also *In re Battelle* (1929) 207 Cal. 227, 240 *et seq.*; cf. *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1216-1218.)

In furtherance of their "essential" and "far-reaching" investigatory and legislative powers, courts have similarly recognized that legislative bodies (such as cities) also possess broad subpoena powers which are only subject to a limited and deferential review by the courts. (*Watkins v. United States* (1957) 354 U.S. 178, 187 [the legislative subpoena power is broad]; *In re Battelle, supra,* 207 Cal. at 241 ["[T]he inherent and auxiliary power reposed in legislative bodies to conduct investigations in aid of prospective legislation has already been held to carry with it the power in proper cases to require and compel the attendance of witnesses and the production of books and papers by means of legal process and to institute and carry to the extent of punishment contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence . . . ."]; *Connecticut Indemnity Company, et al v. Superior Court* (2000) 23 Cal.4th 807, 814 ["We begin with the proposition that a court's authority to second-guess the legislative

determinations of a legislative body is extremely limited."]; *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 [It is a "well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers."]; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 462 [courts are not authorized to second-guess the motives of a legislative body and, if reasonable, legislation will not be disturbed].)

A city's specific authority to issue subpoenas is set out in Government Code section 37104 *et seq.*, which provides that a "legislative body may issue subpoenas requiring the attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." (*See id.*, § 34000 [defining "legislative body" to include a city council]; see also Cal. Const., art. XI, § 7 ["A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."].) Cities, however, do not have the authority to enforce a subpoena if the party to whom it is issued fails to comply. Instead, the city must report the failure to the court. (Gov. Code § 37106.) The court is authorized to order that the subpoena be enforced and may use its powers of contempt to ensure enforcement occurs in the same manner it enforces a subpoena in a civil trial. (Gov. Code § 37109.)

Although this limited and deferential standard of review is well established, there is nothing contained within Section 37104 *et seq.* (or any analogous statutory scheme) that addresses the proper procedure by which an appellate court is to review a trial court's order (i.e., via writ or appeal) compelling compliance with a legislative subpoena.

This Court should find that such orders are ***not appealable*** because: (1) no statute specifically provides that orders enforcing legislative subpoenas are appealable; (2) such orders do not qualify as "final judgments"; and (3) strong public policy concerns weigh in favor of non-appealability.

A. The Law is Clear That an Order or Judgment is Not Appealable Unless Expressly Authorized By Statute.

Subject to certain narrow constitutional limitations, ***there is no right to appeal.***[11] (*Lindsey v. Normet* (1972) 405 U.S. 56, 77; *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634.) This Court has repeatedly

---

[11] The Dispensaries contend that if this Court holds that an order enforcing a subpoena issued pursuant to Section 37104 is not appealable, they will be deprived of their "right" to appellate review. This contention, however, is entirely without merit, not only because the Dispensaries would always be able to seek appellate review by filing an extraordinary writ, but also because cases have consistently and repeatedly recognized that there is no inherent right to appellate review; rather this right is entirely statutory and subject to the control of the legislature. (*Trede v. Superior Court, supra,* 21 Cal.2d at p. 634 [there being no constitutional right of appeal, "the appellate procedure is entirely statutory and subject to complete legislative control"]; *Superior Wheeler C. Corp. v. Superior Court* (1928) 203 Cal. 384, 386 ["right of appeal is statutory and may be granted or withheld"].)

and consistently held that ***the right to appeal is wholly statutory***. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 34-35 ["a judgment or order is not appealable unless expressly made so by statute"]; *Skaff v. Small Claims Court* (1968) 68 Cal.2d 76, 78 ["a party possesses no right of appeal except as provided by statute"]; *People v. Keener* (1961) 55 Cal.2d 714, 720, disapproved on other grounds; *People v. Butler* (1966) 64 Cal.2d 842, 844 ["an order is not appealable unless declared to be so by the Constitution or by statute"]; *People v. Valenti* (1957) 49 Cal.2d 199, 204, disapproved on other grounds in *People v. Sidener* (1962) 58 Cal.2d 645, 647 ["the right of appeal is statutory and a judgment . . . is not appealable unless it is expressly made so by statute"]; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 728 ["the Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable"]; *Trede v. Superior Court, supra,* 21 Cal.2d at p. 634 [there being no constitutional right of appeal, "the appellate procedure is entirely statutory and subject to complete legislative control"]; *Superior Wheeler C. Corp., supra,* 203 Cal. at 386 ["right of appeal is statutory and may be granted or withheld"].) Because there is no statute that expressly authorizes the appeal of a trial court order enforcing a subpoena issued pursuant to Section 37104, and

further because such orders do not qualify as "final judgments," such orders are ***not appealable***.

1. No Statute Expressly Authorizes the Appeal of an Order Enforcing a Section 37104 Subpoena.

As set forth above, unless expressly made appealable by statute, a court "order" – i.e., a "direction . . . made or entered in writing, and not included in a judgment" – ***is not appealable***. (*Caruso v. Snap-Tite, Inc.* (1969) 275 Cal.App.2d 211, 213; Civ. Proc. Code § 1003 ["Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order."].)

Sections 37104 through 37109 govern the issuance and enforcement of city council subpoenas. There is no language contained in any of these provisions that expressly authorizes the appeal of an order compelling compliance with a legislative subpoena. Similarly, there is nothing contained in any of the analogous code provisions relating to subpoenas issued by any other state, local, or other governmental agency relating to the appealability of such orders. (Gov. Code §§ 11180 *et seq.* [state administrative subpoenas], Gov. Code §§ 25170 *et seq.* [subpoenas issued by boards of supervisors], Gov. Code § 31110.2 [subpoenas issued by county civil service commissions]; Health & Saf. Code § 34318(b) [subpoenas issued by local housing authorities], Rev. & Tax Code § 454

[subpoenas issued by county tax assessors], Rev. & Tax Code § 1609.4 [subpoenas issued by local boards of equalization].)

Moreover, an order made enforcing a subpoena issued pursuant to Section 37104 is ***not one of the orders expressly listed*** as appealable in the general provision relating to appealable judgments and orders – Code of Civil Procedure section 904.1 ("Section 904.1"). Specifically, Section 904.1, subdivision (a), states that an appeal may be taken from the following:

> (1) From a judgment,[12] except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9) and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.
> (2) From an order made after a judgment made appealable by paragraph (1).
> (3) From an order granting a motion to quash service of summons or granting a motion to stay the action on the ground of inconvenient forum, or from a written order of dismissal under Section 581d following an order granting a motion to dismiss the action on the ground of inconvenient forum.
> (4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.
> (5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.
> (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.
> (7) From an order appointing a receiver.
> (8) From an interlocutory judgment, order or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.
> (9) From an interlocutory judgment in an action for

[12] Code of Civil Procedure section 577 defines judgment as ". . . the final determination of the rights of the parties in an action or proceeding."

> partition determining the rights and interests of the respective parties and directing partition to be made.
> (10) From an order made appealable by the provisions of the Probate Code or the Family Code.
> (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds Five Thousand Dollars ($5,000).
> (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds Five Thousand Dollars ($5,000).
> (13) From an order granting or denying a special motion to strike under Section 425.16.

Accordingly, because neither Section 37104 *et seq.* nor Section 904.1 nor any other statutory provision dictates that a court order enforcing a legislative subpoena is appealable, it necessarily follows that such orders are ***not appealable***. (*Caruso, supra* 275 Cal.App.2d at 213 [unless expressly made appealable by statute, a court "order" – i.e., a "direction . . . made or entered in writing, and not included in a judgment" – is not appealable].)

2. An Order Enforcing a Subpoena Issued Pursuant to Section 37104 is Not a "Final Judgment."

In addition to the foregoing, an order compelling compliance with a legislative subpoena does not qualify as a "final judgment." Under the "one final judgment rule" (as codified in Code of Civil Procedure sections 904.1(a)(1) and 577), an appeal may be taken only from a final ***judgment*** that terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 697.) Under California law, there is ordinarily only ***one***

"final judgment" in an action. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) This Court has adopted a general test to determine whether a particular decree is interlocutory or final:

> [W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory. (*Lyon v. Goss* (1942) 19 Cal.2d 659, 669-70.)

This Court has explained the "sound reasons" behind the one final judgment rule:

> "[P]iecemeal disposition and multiple appeals tend to be oppressive and costly. . . . Interlocutory appeals burden the courts and impede the judicial process in a number of ways: (1) They tend to clog the appellate courts with a multiplicity of appeals. . . . (2) Early resort to the appellate courts tends to produce uncertainty and delay in the trial court. . . . (3) Until a final judgment is rendered, the trial court may completely obviate an appeal by altering the rulings from which an appeal would otherwise have been taken. . . . (4) Later actions by the trial court may provide a more complete record which dispels the appearance of error or establishes that it was harmless. (5) Having the benefit of a complete adjudication . . . will assist the reviewing court to remedy error (if any) by giving specific directions rather than remanding for another round of open-ended proceedings. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, fn. 9.)

Applied to the current case, the foregoing "sound reasons" behind the "one final judgment rule" compel the conclusion that orders enforcing legislative subpoenas are ***not appealable as final judgments*** because:

- An order compelling compliance with a legislative subpoena is not the "final determination of the rights of the parties" in that, even if a court determines that a subpoena is valid and thus enforceable under Section 37104, a court will still likely have to determine whether a specific document or set of documents must be produced, if for instance, a party claims such documents either do not exist or are otherwise protected from disclosure.[13]

- Permitting appeal would unnecessarily "clog the appellate courts with a multiplicity of suits" because the appellate courts would be burdened with hearing the appeal of an order compelling compliance with a subpoena ***in addition to*** a petition for an extraordinary writ if the court ultimately holds a party in contempt for failing to comply with a valid subpoena. (See e.g., *Bishop v. Merging Capital, Inc.* (1996) 49 Cal.App.4th 1803, 1808 [noting that any ruling rendered prior to contempt proceedings would equate to an "advisory opinion" as to whether the appellate court would uphold the contempt ruling on appeal].)

---

[13] For instance, in this case, all of the parties involved, including the court, presumed that there would be future hearings on whether certain, specific documents requested in the City's subpoena would have to be produced. (CT, 83:25-84:10, 85:6-10.)

- The appeal of such an order would cause "uncertainty and delay in the trial court" because the appeal would be taken before the court had the ability to make more specific rulings regarding the production of a specific document or set of documents – which either may not exist, may be protected from disclosure, or may not need to be produced in order to comply with the subpoena.[14]
- The need for an appeal may be "obviated" if, for instance, a party is never harmed (i.e., never held in contempt) for failing to comply with the order – either because contempt proceedings are not initiated or because the trial court ultimately rules that certain documents do not need to be produced.
- Later actions by the trial court would likely provide a "more complete record" regarding the required production or non-production of the particular documents.
- Complete adjudication of the matter (including the contempt proceedings, if any) would assist the appellate court in

[14] In order to be held in contempt for violating a court order (such as a subpoena), it must be shown that the individual in question had actual knowledge of and *willfully disobeyed* the order. (*Connecticut v. Superior Court* (1987) 196 Cal.App.3d 774, 784.) It goes without saying that courts typically refrain from holding individuals and entities in contempt for failing to produce documents that do not actually exist.

identifying the purported errors of the trial court in that, as discussed above, the trial court will have made more specific rulings pertaining to the production of specific documents.

Unfortunately, the wide range of conclusions that the appellate courts in this State have reached as to whether analogous orders compelling compliance with administrative subpoenas issued pursuant to Government Code section 11180 *et seq.* qualify as final judgments do not provide much, if any, clarification on the issue.

For instance, in *Bishop v. Merging Capital, Inc.*, the Court of Appeal for the Second District, Division Five addressed whether an order enforcing a subpoena issued by the California Department of Corporations pursuant to Government Code section 11180 *et seq.* was appealable. ((1996) 49 Cal.App.4th 1803, 1805.) The court ultimately concluded that such orders were ***not appealable*** because the witness is not actually aggrieved (and thus a judgment is not final) until the witness disobeys the court order and is found in contempt. (*Id.* at 1808-1809 ["In sum, if, and when, appellants' refusal to comply with the trial court's order results in an adverse consequence to them, they may seek the intervention of the appellate court, by appeal or by writ, as may be appropriate under the circumstances. Until that time, they have no cause to complain."]; see also *Barnes v. Molino* (2nd Dist. 1980) 103 Cal.App.3d 46, 51 ["An order

made under section 11188 is not one of the orders listed as appealable in Code of Civil Procedure section 904.1. It is not a judgment within the definition of Code of Civil Procedure section 577. . . The order does not fit the description of any of the other matters listed in . . . section 904.1."]; *People ex rel. Franchise Tax Board v. Superior Court* (2nd Dist. 1985) 164 Cal.App.3d 526, 535 [dismissing appeal of order to enforce compliance with subpoena because proper procedure required petitioners to file a writ of mandate].)

In contrast, in *Millan v. Restaurant Enterprises Group, Inc.,* the Court of Appeal held that an order enforcing a subpoena issued by the Division of Labor Standards Enforcement pursuant to Government Code section 11180 *et seq.* was appealable as a final judgment in a special proceeding. ((4th Dist. 1993) 14 Cal.App.4th 477, 484-485.) In so holding, the court relied primarily, if not solely, upon the fact that California courts had regularly considered appeals from such orders ***without addressing the appealability issue.*** (*Id.* at 485; see also *Franchise Tax Board v. Barnhart* (1st Dist. 1980) 105 Cal.App.3d 274, 277; *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Limited* (3rd Dist. 2008) 165 Cal.App.4th 841; *People ex rel. Preston DuFauchard v. U.S. Financial Management, Inc.* (4th Dist. 2009) 169 Cal.App.4th 1502.) It is well-established, however, that a case is not

authority for an issue it has not considered. (*People v. Toro* (1989) 47 Cal.3d 966, 978, fn.7.)

To date, only one published case has addressed whether orders enforcing subpoenas issued pursuant to Section 37104 are appealable. (*City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234 ("*Patel*").) In *Patel*, the Sixth District held that an order directing several hotel operators to comply with subpoenas issued by the city pursuant to Section 37104 was appealable as a final judgment. (*Id.* at 239.) In so holding, the Sixth District acknowledged the split of authority regarding the appealability of administrative subpoenas, and ultimately concluded without much analysis, that the "better view" of the two approaches was the one taken by *Millan* – that is, that orders requiring compliance with subpoenas issued pursuant to Section 37104 are appealable as final judgments. (*Id.* at 241-242.) The City submits that *Patel* is flawed for a number of reasons and should be specifically overruled by this Court.

The City asserts *Patel* ***incorrectly concluded*** that the appeal of an order enforcing a subpoena issued pursuant to Section 37104 is authorized by statute. (*Supra,* 155 Cal.App.4th at 240-243.) In reaching this conclusion, the *Patel* Court appears to have relied almost primarily upon cases that "assumed" but did not expressly consider the appealability of such orders. (*Id.* at 241, citing *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 748 ["*Vacaville* did not consider appealability"] and

Millan, supra, 14 Cal.App.4th at 484-485 ["Millan relied primarily upon the fact that many cases . . . had considered appeals from such orders without addressing the appealability issue."].)

Contrary to the *Patel* Court's conclusion, orders pursuant to Section 37104 are ***not*** expressly designated as appealable pursuant to Section 904.1 or any other statute. Indeed, the *Patel* Court itself recognized such orders are likely to be followed by subsequent contempt proceedings. Hence, the City submits they cannot constitute "final judgments." (*Id.* at 242; see e.g., *Barnes v. Molino* (1980) 103 Cal.App.3d 46, 51 ["An order made under section 11188 is not one of the orders listed as appealable in Code of Civil Procedure section 904.1. It is not a judgment within the definition of Code of Civil Procedure section 577. . . The order does not fit the description of any of the other matters listed in . . . section 904.1."].)

Patel additionally failed to take into account the adverse public policy implications of its decision. For instance, the interests of judicial economy and efficiency are clearly hampered by permitting individuals to seek the intervention of the appellate court before they suffer harm (in the form of an unfavorable contempt proceeding). (See, e.g., *Bishop v. Merging Capitol, Inc., supra,* 49 Cal.App.4th at 1808-1809.) If, as *Patel* holds, individuals were permitted to appeal both the court order enforcing the subpoena and subsequently appeal or writ the decision of a related

contempt proceeding, appellate courts would be clogged with costly, duplicative appeals. (See, e.g., *Morehart, supra,* 7 Cal.4th at 741, fn.9.)

Simply put, *Patel* is irreconcilable with Supreme Court precedent establishing that ***a judgment or order is not appealable unless expressly made so by statute.*** (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 709, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 34-35 ["a judgment or order is not appealable unless expressly made so by statute"]; *Skaff v. Small Claims Court* (1968) 68 Cal.2d 76, 78 ["a party possesses no right of appeal except as provided by statute"]; *People v. Keener* (1961) 55 Cal.2d 714, 720, disapproved on another point in *People v. Butler* (1966) 64 Cal.2d 842, 844 ["an order is not appealable unless declared to be so by the Constitution or by statute"]; *People v. Valenti* (1957) 49 Cal.2d 199, 204, disapproved on another point in *People v. Sidener* (1962) 58 Cal.2d 645, 647 ["the right of appeal is statutory and a judgment . . . is not appealable unless it is expressly made so by statute"]; *Modern Barber Col. v. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 728 ["the Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable"]; *Trede v. Superior Court, supra,* 21 Cal.2d at p. 634 [there being no constitutional right of appeal, "the appellate procedure is entirely statutory and subject to complete legislative control"]; *Superior Wheeler*

C. Corp., supra, 203 Cal. at 386 ["right of appeal is statutory and may be granted or withheld"].)

B. Strong Public Policy Considerations Favor the Non-Appealability of an Order Enforcing a Subpoena Issued Pursuant to Section 37104.

As discussed above, it is well established that the power of the legislative body to conduct and enforce compliance with investigations is ***essential*** to its ability to perform its legislative functions. (*McGrain, supra,* 273 U.S. at 174 [the legislative "power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function."]; *In re Battelle, supra,* 207 Cal. at 241 ["[T]he inherent and auxiliary power reposed in legislative bodies to conduct investigations in aid of prospective legislation has already been held to carry with it the power in proper cases to require and compel the attendance of witnesses and the production of books and papers by means of legal process and to institute and carry to the extent of punishment contempt proceedings in order to compel the attendance of such witnesses and the production of such documentary evidence . . . ."]; cf. *Dibb v. County of San Diego, supra,* 8 Cal. 4th at 1216-1218.)

In light of this, courts have consistently recognized that the legislative subpoena power is broad and subject only to a limited and deferential standard of review. (*Watkins, supra,* (1957) 354 U.S. at 187 [the legislative subpoena power is broad]; *Barenblatt, supra,* 360 U.S. at

111 ["The scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate . . . ."]; *Connecticut Indemnity, supra,* 23 Cal.4th at 814 ["We begin with the proposition that a court's authority to second-guess the legislative determinations of a legislative body is extremely limited."]; *Western States Petroleum, supra,* 9 Cal. 4th at 572 [It is a "well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers."]; *Lockard, supra,* 33 Cal.2d at 462 [courts are not authorized to second-guess the motives of a legislative body and, if reasonable, legislation will not be disturbed].

If a trial court's order enforcing compliance with a legislative subpoena can be appealed, however, this "essential" power to investigate will effectively be eviscerated (particularly in the context of city councils) because any investigation could be endlessly delayed by strategic litigation.

This is because city council members typically have limited four year terms, with staggered elections every two years. (See e.g., Gov. Code § 34906.) It is common in California for term limits to exist, and accordingly many council members are limited to two terms in office (or a total of eight years). (See e.g., Gov. Code § 36502(b) [allowing cities to adopt term limits].) Hence, every two years it is possible (if not a near

certainty in cities such as Dana Point where term limits exist) that a change will occur in a city council's makeup.

Keeping the foregoing time frames in mind, there is a very good possibility that by the time all of the appeals, writs, and petitions are resolved, the makeup a city council may have changed such that there is a new majority on the council who may not be interested in pursuing the investigation. The result would be that, in many cases, the subject of the investigation (whether a hotel operator or a medical marijuana dispensary) could effectively control the scope and pace of the legislative investigation by challenging each subpoena, and then appealing every related judgment or order. If nothing else, persons to whom subpoenas are issued by any elected body (including the State Legislature), and who would prefer not to comply, will be incentivized to bring a judicial challenge, especially in cases where the subpoena is issued within a year to a year and a half of an election in the hopes that newly elected legislators will more favorably view their position combined with the knowledge they may very well be able to tie the matter up in the courts until after the election is decided. Neither law, nor equity, nor sound public policy (as determined by the Legislature in crafting Section 37104) supports such a result.

The instant case demonstrates the abuse that may occur if *Patel* is followed. The City Council issued the Subpoenas in July 2009, and since

that time has been attempting to complete an investigation of the underlying subject matter in order to decide whether to change its Zoning Code. Three months later, in November 2009, an order to produce the documents which were the subject of the Subpoena was secured. The Dispensaries subsequently appealed, and on December 3, 2009, the trial court stayed its order pending the appeal. If the Dispensaries are allowed to proceed with their appeal, it is not unrealistic to think that as much as a year may pass before the Court of Appeal decides the issue. Upon the conclusion of the instant appeal (perhaps a year or more from now), and assuming no more additional petitions for review are granted by this Court, if the City prevails, contempt proceedings are likely to follow. The Dispensaries could then file a writ challenging that order and delay a final decision even further.[15]

In the meantime, in November 2010 (nearly a year and a half after the Subpoenas were issued) an election will occur in the City due to the fact the terms of three of the five council members who expressed a desire to investigate the issue at hand will have expired. Should any one of these Council members not run for re-election, or not be re-elected, that legislator will have been denied the opportunity to participate in the

[15] In fact, at least one of the five Dispensaries, Holistic Health, has unequivocally stated that it will not produce the records sought in the Subpoena under any circumstance and will continue to fight against each and every court order compelling it to do so.

investigation he/she directed should occur. Indeed, should all three of these Council members not run, or not be re-elected, it is at least possible the investigation will be terminated by newly elected legislators, thus denying the entire current Council the right to conduct the instant investigation.

IV. CONCLUSION

In light of all of the foregoing, this Court should find that orders compelling compliance with legislative subpoenas are not appealable as final judgments.

Dated: May 24, 2010

Respectfully submitted

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ
JENNIFER FARRELL

By: _____
Jennifer J. Farrell
Attorneys for Petitioner
CITY OF DANA POINT

CERTIFICATE OF COMPLIANCE

(California Rules of Court, Rule 8.204)

I certify that pursuant to California Rules of Court, Rule 8.204, that the foregoing City of Dana Point's Answer Brief on the Merits is proportionally spaced, has a typeface of 13 points or more and contains 6,387 words, as calculated by the word-processing system used to prepare the brief, which was MSWord, version 2007.

Dated: May 24, 2010

RUTAN & TUCKER, LLP

By: _____

Jennifer Farrell
Attorneys for Petitioner
CITY OF DANA POINT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF DANA POINT, Plaintiff and Respondent, v. DANA POINT BEACH COLLECTIVE, Defendant and Appellant.	G042889 (Super. Ct. No. 30-2009-00298206) O R D E R

The parties are invited to file letter briefs no later than January 8, 2010, addressing this court's jurisdiction to hear the appeal. The letter briefs should address whether appellant appeals from an appealable order.

SILLS, P.J.

SILLS, P. J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANA POINT SAFE HARBOR COLLECTIVE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

CITY OF DANA POINT,

Real Party in Interest.

G042878

(Super. Ct. No. 30-2009-00298200)

ORDER

THE COURT:*

The court finds the appeal in this case is not from an appealable order and deems the notice of appeal filed on November 10, 2009, to be a petition for extraordinary writ. (*Olson v. Cory* (1983) 35 Cal.3d 390; *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) Petitioner, Dana Point Safe Harbor Collective, has 15 days from the date of this order to file a petition for extraordinary writ. Any informal response shall be filed within 5 days thereafter. No extensions of time will be granted absent a showing of extraordinary good cause.

On the court's own motion and for good cause, the previous briefing schedule on appeal is hereby VACATED and any request for an extension of time to file a brief is MOOT.

G042878
City of Dana Point v. Dana Point Safe Harbor Collective

Superior Court of Orange County

William Evans
Evans, Brizendine and Silver
5826 E. Naples Plaza
Long Beach, CA 90803

The Superior Court of California, County of Orange
Attn: Hon. Glenda Sanders
700 Civic Center Dr., W.
Santa Ana, CA 92701

Patrick A. Munoz
Rutan & Tucker
611 Anton Blvd Ste 1400
Costa Mesa, CA 92628-1950

Court of Appeal, Fourth Appellate District, Division Three - No. G042883

S180560

IN THE SUPREME COURT OF CALIFORNIA

En Banc

IN RE ENFORCMENT AGAINST HOLISTIC HEALTH OF CITY OF DANA POINT CITY COUNCIL

CITY OF DANA POINT, Petitioner,

v.

HOLISTIC HEALTH, Respondent.

The petition for review is granted.

The issue to be briefed and argued is limited to the following: Is an order compelling compliance with a legislative subpoena issued under Government Code section 37104 appealable as a final judgment?

Pending further order of this court, enforcement of the superior court's November 2, 2009 order requiring petitioner to comply with the legislative subpoena issued by the City of Dana Point in Orange County Superior Court case number 30-2009-00298196, entitled *In Re Enforcement against Holistic Health of City of Dana Point City Council Subpoena*, and the writ proceedings currently pending in the Court of Appeal, Fourth Appellate District, Division Three, in case number G042883, entitled *Holistic Health v. Superior Court*, are hereby stayed.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Moreno
Associate Justice

Corrigan
Associate Justice

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On May 24, 2010, I served on the interested parties in said action the within:

CITY OF DANA POINT'S ANSWER BRIEF ON THE MERITS

by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 24, 2010, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Connie B. Reinglass
(Type or print name)

Connie B. Reinglass
(Signature)

SERVICE LIST

William D. Evans, Esq. Richard C. Brizendine, Esq. Evans, Brizendine & Silver 5826 East Naples Plaza Long Beach, CA 90803	Telephone: 562.439.9001 Facsimile: 562.439.9002 Attorneys for **DANA POINT SAFE HARBOR COLLECTIVE** (S180365; G042878; 30-2009-00298200)
Lee J. "Petros" Petrohilos 1851 East First Street, #857 Santa Ana, CA 92705	Telephone: 714.542.3110 Facsimile: 714.200.0698 Attorney for **THE POINT ALTERNATIVE CARE, INC.** (S180468; G042893; 30-2009-00298187)
Christopher Glew, Esq. 1851 East First Street, #840 Santa Ana, CA 92705	Telephone: 714.648.0004 Facsimile: 714.648.0501 Attorney for **THE POINT ALTERNATIVE CARE, INC.** (S180468; G042893; 30-2009-00298187)
Alison Minet Adams, Esq. 12400 Ventura Blvd., #701 Studio City, CA 91604	Telephone: 818.358.2507 Attorney for **HOLISTIC HEALTH, INC.** (S180560; G042883; 30-2009-00298196)
Jackie-Lynn Adams, Esq. The Law Office of Jacek Lentz 1055 Wilshire Blvd., #1996 Los Angeles, CA 90017	Telephone: 213.250.9200 Facsimile: 213.250.9161 Attorney for **BEACH CITIES COLLECTIVE** (S180749; G042880; 30-2009-00298208
Garfield Langmuir-Logan, Esq. Logan Retoske, LLP 31351 Rancho Viejo Rd., #202 San Juan Capistrano, CA 92675	Telephone: 949.489.1251 Attorney for **DANA POINT BEACH COLLECTIVE** S180803; G042889; 30-2009-00298206