No. S180560

Supreme Court Copy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

HOLISTIC HEALTH, INC.,
a California non-profit corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ORANGE

Respondent

CITY OF DANA POINT,

Real Party in Interest

PETITION FOR REVIEW

Re: Decision of the Court of Appeal, Fourth Appellate District, Division Four, filed February 11, 2010 (Court of Appeal No. G042883)
Orange County Case No. 30-2009-00298196

STAY REQUESTED OF BRIEFING SCHEDULE IN COURT OF APPEAL CASE NUMBER G043883

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CASES

STATUTES

PETITION FOR REVIEW

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California:

Petitioner Holistic Health, Inc., Defendant and Appellant, respectfully petitions for review of the Order of the Court of Appeal, G042893, Fourth Appellate District, Division Three by William Rylaarsdam, Acting P. J. filed February 11, 2010.

STAY REQUESTED:

The Court is requested to stay further proceedings in the Court of Appeal pending its decision on this petition for review.

I. ISSUES PRESENTED FOR REVIEW

1) Whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq*. is appealable as a final judgment in a special proceeding.[1]

Review is requested to resolve inconsistent opinions by the First, Second, Third, Fourth and Sixth District Courts of Appeal

[1] Government Code §37104 provides as follows:
The legislative body may issue subpenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.

regarding appealability of the underlying Superior Court order compelling compliance with a legislative subpoena.

2) Whether the Court of Appeal properly denied consolidation of cases where the Superior Court had consolidated the cases.

II. NATURE OF THE CASE

A. Introduction

This Petition seeks review of an important unsettled issue whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding or whether it may only be reviewed by a petition for extraordinary writ.

The Courts of Appeal and the Superior Courts in this state must choose among conflicting authority on the appealability of Superior Court orders enforcing administrative and analogous legislative subpoenas.

Some courts have held such orders are non-appealable and may only be reviewed by writ. (*See Bishop v. Merging Capital, Inc.*, (1996). 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556.) Other courts, however, have found that the "better view" is that such orders

are appealable as final judgments in special proceedings. (*Millan v. Restaurant Enterprises Group, Inc.*(4th Dist. 1993)14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198.)

Therefore, the question of whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq*. is appealable as a final judgment in a special proceeding, will be a recurring one for California's courts.

This Court should grant review to give guidance to the lower courts in California on this important issue.

The second issue, while of perhaps less general importance is whether, after separate appeals are filed from a court order in a consolidated case, the court of appeal errs when it denies appellants' motions to consolidate the cases for review.

B. Procedural History

The Petitioner, Holistic Health, Inc, (hereinafter "Holistic Health") is a California non-profit organization duly organized under the laws of the State of California. Holistic Health was created pursuant to the guidelines set forth by the California Attorney General as a collective for the cultivation and distribution of marijuana for medical purposes.

On or about June 29, 2009 the Real Party in Interest, caused to be issued a subpoena for the production of Business Records pursuant to California Government Code § 37104. Said subpoena contained a total of 44 production requests. The aforementioned subpoena was served upon the Petitioner on or about July 15, 2009 with a production date of August 10, 2009. . On or about August 17, 2009, Petitioner informally responded to the subpoena indicating that it would not be complying on constitutional grounds.[2]

On August 31, 2009, the Real Party in Interest filed a Petition seeking an Order to Show Cause Re Contempt for Non-Compliance of a legislative subpoena pursuant to California Government Code §37104 et seq. In support of the Order to Show Cause, the Real Party in Interest submitted the "Mayor's Report," which set forth the basis for the issuance of the Subpoena.

One of the demands in the subpoena, to which the Petitioner objected, and which was subject to extensive briefing at the trial court level, was the disclosure of private personal information of third parties and of the members of the collective. The Real Party in interest alleged that these records were sought to determine that the Petitioner

[2] The City and Superior Court have not differentiated in their response or enforcement of the subpoena among the other defendant/appellant/ petitioners.

was in compliance with the Attorney General Guidelines. The Petitioner argued that these were private and privileged records of third party individuals and of patients. Further, these private documents had no bearing on the issue at hand.

Notwithstanding the Petitioner's arguments, on November 2, 2009, the trial Court ordered that the Petitioner's custodian of records, Garrison Williams, produce all documents (including the names and physician information of patient members as well as private information of third parties) and records responsive to the City Subpoena to the City of Dana Point, no later than 5:00 p.m. on December 7, 2009. A copy of the order is attached hereto and incorporated herein by reference as Exhibit "A".

On November 10, 2009, the Petitioner timely filed its Notice of Appeal of the Superior Court's order. On November 17, 2009 the Court consolidated the Dana Point Enforcement cases for all purposes. On December 3, 2009, the Superior Court at the request of all Defendants including Petitioner, found the order to be appealable and stayed its enforcement pending the appeal.

On January 26, 2010 Holistic Health and the appellants in the related cases filed motions to consolidate the cases G042883, G04878, G043880, G042889, and G042893 on appeal.

On January 29, 2010, the Court of Appeal for the Fourth District on its own motion[3], found that the appeal in this case was not from an appealable order and deemed that the Notice of Appeal filed by the Petitioner on November 13, 2009, to be a petition for extraordinary writ and further ordered that the Petitioner had fifteen days from the date of the order to file a petition for extraordinary writ. The Court also denied the motion to consolidate. A copy of the January 29th order is attached hereto and incorporated herein by reference as Exhibit "B".

On February 10, 2010, the Petitioner filed its Motion to Reinstate Appeal, and to Reconsider the Order Denying Consolidation, in the Court of Appeal. On February 11, 2010, the Court of Appeal denied the Petitioner's motion, but allowed an extension up to and including March 12, 2010, for the Petitioner to file its extraordinary writ. A copy of the Court of Appeal order dated

[3] Court records indicate that Dana Point Beach Collective was invited to file a letter brief on the issue of appealability but did not do so. Holistic Health was never served with the City's letter brief on the issue, filed January 8, 2010.

February 11, 2010 is attached hereto and incorporated herein by reference as Exhibit "C".

The Petitioner now seeks review of the Court of Appeal's ruling of February 11, 2010.

III. WHY REVIEW SHOULD BE GRANTED

The California Rules of Court provide for review in this Court "when necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.500 (b)(1).) This case presents an important question of law that will arise frequently in California's lower courts. Current decisions lack uniformity. Despite the ruling in *Millan v. Restaurant Enterprises Group, Inc., supra,* which held that orders enforcing legislative subpoenas *are appealable* as final judgments in special proceedings, the Court of Appeal in *this* case has found that the appeal is *not* from an appealable order.

Petitioner and the other appellants have been denied their statutory right to appeal the Order of November 2, 2009. This right to appeal is critical, because of the potential disclosure of private information that could affect the way these third party individuals are treated. This petition raises a clear ambiguity in the law as it relates to

the appealability of legislative subpoenas. This ambiguity will have a significant impact on a large number of cases.

In the absence of a definitive ruling from this Court, there will be no uniformity of decision as it relates to legislative subpoenas.

Further, by denying consolidation, the Court of Appeal will unnecessarily consume resources, judicial, attorney, and environmental, as well as risk non-uniform decisions as the cases are currently assigned to different panels of the Court of Appeal.

IV. LEGAL DISCUSSION

A. Review is necessary to decide the important question of appealability of legislative subpoena and to secure a uniformity of decision.

Since the question of appealability goes to the jurisdiction of a court, the court has the authority to consider its own jurisdiction and the issue of appealability. *Olson v. Cory* (1983) 35 Cal.3d 390. However, that authority is not unbounded and must yield to a determination by this Court that an order is, or is not, appealable. (*Auto Equity Sales v. County of Santa Clara* (1962) 57 Cal. 2d 450, 455.)

There is a split of authority on the appealability of Superior Court orders enforcing legislative subpoenas issued pursuant to

California Government Code §37104 *et seq*. as well as of administrative subpoenas by government agencies. Some courts have held such orders are non-appealable and may only be reviewed by writ. (*See, Bishop v. Merging Capital, Inc.(supra),* 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556 .)

The Fourth District, where Petitioner and the related cases are being heard, has, however, previously found that the "better view" is that such orders are appealable as final judgments in special proceedings. *Millan v. Restaurant Enterprises Group, Inc.,* (4th Dist. 1993). 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198:

> Moreover, the better view is that "orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings. . . Numerous cases, including cases from our Supreme Court, have decided appeals taken from similar orders on the merits without discussion of the appealability issue. Inasmuch as the Supreme Court is among those courts which have assumed the appealability of such orders, we conclude such an order is appealable . . . The issue on this appeal, whether the subpoena meets constitutional standards for enforcement, is a matter of law and is reviewed *de novo*. *Millan, supra* [internal citations omitted].

B. Applicable Principles of Law as to the Appealability of Legislative Subpoenas

The Sixth Appellate District has expressly found that an order to compel compliance with a legislative subpoena pursuant to Government Code §37104 is appealable as a final judgment. (*City of Santa Cruz v. Patel,*(6th Dist. 2007)155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824.) The Sixth District extensively cited *Millan* with approval extensively in *Patel* while also discussing and rejecting a contrary line of cases from the Second District Court of Appeal in favor of this "better view".

Further the more recent decision by the Third District in *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Ltd.* (2008). 165 Cal.App.4th 841 [81 Cal.Rptr.3d 486] offers strong support for the appealability of a legislative subpoena:

> Confusion exists regarding appealability of orders enforcing administrative subpoenas." (*Id.*, at p. 849; compare e.g., Millan v. Rest. Enters. Group, Inc. (1993) 14 Cal.App 4th 477, [18 Cal.Rptr.2d 198] (*Millan*) [holding that "the better view is that 'orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings . . . .' "], with Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803, 1809 [57 Cal.Rptr.2d 556] (*Bishop*) [concluding that orders compelling compliance with administrative subpoenas are not appealable].) (*Id.*)

Following *Millan* and thus rejecting *Bishop*, the court in *State ex rel. Dept. of Pesticide Regulation* concluded that an order compelling compliance with an administrative subpoena is appealable as a final judgment:

> "[A] judgment is the 'final determination of the rights of the parties in an action or proceeding.' The statutory scheme provides for an original proceeding in the superior court, which results in an order directing the respondent to comply with the administrative subpoena. The court order enforcing the administrative subpoena is tantamount to a superior court judgment in mandamus which, with limited exceptions, is appealable under Code of Civil Procedure § 904.1. Whether the matter is properly characterized as an 'action' or a 'special proceeding', it is a final determination of the parties' rights. It is final because it leaves nothing for further judicial determination between the parties except the fact of compliance or noncompliance with its terms.
>
> The fact that an intransigent respondent may be subject to a contempt order does not mean the court order is not final, because the same possibility exists with injunctions and final judgments which form the basis for contempt citations. The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an order 'nonfinal.' Indeed, the contempt judgment is not appealable but must be reviewed, if at all, by writ, and therefore review of the underlying order can reliably be had only if that order is appealable. [Citation.]" (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 851.).

Thus, *State ex rel. Dept. of Pesticide Regulation* rejected the argument that an order compelling compliance with an administrative subpoena is akin to a nonappealable discovery order:

> "We . . . reject the Department's . . . argument that we should analogize to discovery orders in civil litigation, which are not considered final, appealable orders. Such discovery orders, however, are made in connection with pending lawsuits which have yet to be resolved. A discovery order does not determine all of the parties' rights and liabilities at issue in the litigation. The Department argues the same applies here, because even with the documents, the Department cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested. However, it is possible an administrative hearing may not be requested and, even if it is requested, it will not necessarily end up in court. [Fn. omitted.] In contrast to this case, pending civil litigation in which a discovery order occurs already involves the court and will continue to do so." (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.).

State ex rel. Dept. of Pesticide Regulation, supra, was cited and followed in the more recent case of *The People ex rel. Preston DuFauchard v. U.S. Financial Management,* (2009) 169 Cal.App.4th 1502:

> We agree with the court's analysis in *State ex rel. Dept. of Pesticide Regulation*. In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required

> to gain U.S. Financial Management's compliance with that order. (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure § 904.1, subdivision (a)(1). (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 849.)."

Accordingly, in following the historical rulings from *Bishop* through the present, there has been a clear shift in the treatment of legislative subpoenas. The recent decisions have clearly rejected *Bishop* and are more in line with *Millan*, in concluding that an order compelling compliance with an administrative subpoena is appealable as a final judgment.

It is unclear why this court decided the order was not appealable. Although the order references *Olson v. Cory* (1983) 35 Cal. 3d 390, it appears to do so only in aid of its decision to treat the appeal as a petition for extraordinary writ. That is because in *Olson* the Supreme Court explained that the order in question was not appealable, inter alia, *because it was not a final order*. Here, however, the order was a final order on the only controversy presented to the Superior Court: did the City of Dana Point properly issue and serve a legislative subpoena on Respondents that the Superior Court properly enforced. No further proceedings on this issue could even

occur until such time as the Appellate Court completed its review. In *H.D. Arnaiz , Ltd. v. County of San Joaquin* (2002) 96 Cal. App. 4th 1357 the Court similarly afforded the "relief" or grace it affords appellants here, that is treating the appeal from a non-appealable order as a petition for a writ. However, that case as well gives no hint or clue why this Court believes the order is not appealable.

The question of the appealability of a Government Code § 37104 order was previously decided by the Court of Appeal in *City of Santa Cruz v. Patel* (2007) 155 Cal. App. 4th 134. The procedural posture of that case is nearly on all fours with this one. The City of Santa Cruz issued a legislative subpoena and when Patel failed to comply, the City instituted enforcement. Patel failed to comply with the subpoena. The Superior Court ordered Patel to comply and Patel appealed. Appellant could not provide a better analysis than that of the *Patel* court:

> Before proceeding to the substance of the dispute we must decide whether the superior court's orders are appealable. We conclude that they are. Government Code section 37104 authorizes the legislative body of a city to issue subpoenas "requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." In the event a witness refuses to comply with the subpoena, the mayor may report that

fact to the judge of the superior court. (Gov. Code, § 37106.) "The judge shall issue an attachment directed to the sheriff of the county where the witness was required to appear, commanding him to attach the person, and forthwith bring him before the judge." (Id., §37107.) "On return of the attachment and production of the witness, the judge has jurisdiction." (Id., § 37108.) Refusal to comply with a subpoena could subject the witness to contempt proceedings. In that event, the witness has the same rights he or she would have in a civil trial "to purge himself [or herself] of the contempt." (Id., § 37109.) City issued the subpoenas and obtained enforcement orders according to the foregoing statutory scheme. Appellants claim that the compliance orders are appealable. City does not dispute that claim. There is no case directly holding that these compliance orders are appealable. Because there is a split of authority on the point as it relates to orders compelling compliance with administrative subpoenas (Gov. Code, § 11180 et seq.), we consider the issue in some detail.

B. Analysis There is no constitutional right to an appeal; the right to appeal is wholly statutory. (Trede v. Superior Court (1943) 21 Cal.2d 630, 634 [134 P.2d 745].) Code of Civil Procedure section 904.1 lists the types of rulings that are appealable in this state. A "judgment," other than an interlocutory judgment, is appealable. (Code Civ. Proc., § 904, subd. (a)(1).) Other specified orders are also appealable. An order compelling compliance with subpoenas issued under Government Code section 37104 et seq. is not one of them. Nor are we aware of any case specifically considering the appealability of such orders. City of Vacaville v. Pitamber (2004) 124 Cal.App.4th 739, 748 [21 Cal.Rptr.3d 396] (Vacaville)was an appeal from such an order, but Vacaville did not consider appealability, apparently assuming the order was appealable. The cases differ on the question of whether an analogous order compelling compliance with an administrative subpoena (Gov. Code, § 11180 et seq.) is appealable.

In Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal.App.4th 477, 484-485 [18 Cal.Rptr.2d 198] (Millan), the Fourth District Court of Appeal held that an order compelling compliance with an administrative subpoena issued pursuant to Government Code section 11181 is appealable as a final judgment in a special proceeding. In so holding, Millan primarily relied upon the fact that many cases, including cases from the Supreme Court, had considered appeals from such orders without addressing the appealability issue. (Millan, at pp. 484-485, citing Younger v. Jensen (1980) 26 Cal.3d 397 [161 Cal.Rptr. 905, 605 P.2d 813]; Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669 [156 Cal.Rptr. 55]; Fielder v. Berkeley Properties Co. (1972) 23 Cal.App.3d 30 [99 Cal.Rptr. 791]. See also Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 18 [56 Cal.Rptr.2d 706, 923 P.2d 1].) Of course, a case is not authority for an issue it has not considered. (People v. Toro (1989) 47 Cal.3d 966, 978, fn. 7 [254 Cal.Rptr. 811, 766 P.2d 577].)

Millan also cited as a basis for its holding Wood v. Superior Court (1985) 166 Cal.App.3d 1138, 1140 [212 Cal.Rptr. 811]. (Millan, supra, 14 Cal.App.4th at p. 485.) Wood provides no independent analysis but simply relies upon the observation in Franchise Tax Board v. Barnhart (1980) 105 Cal.App.3d 274, 277 [164 Cal.Rptr. 331], that "[a]n order made under the authority of [Government Code] sections 11186-11188 . . . can be viewed as a final judgment in a special proceeding, appealable unless the statute creating the special proceeding prohibits such appeal."

A line of cases from the Second District Court of Appeal holds that compliance orders made under Government Code sections 11186 through 11188 are not appealable. (Barnes v. Molino (1980) 103 Cal.App.3d 46, 51 [162 Cal.Rptr. 786] [order is not a final determination of parties' rights and does not fit description of appealable orders listed in Code Civ. Proc., § 904.1];

People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal.App.3d 526, 535 [210 Cal.Rptr. 695] [following Barnes]; Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803, 1808-1809 [57 Cal.Rptr.2d 556] (Bishop).) Bishop was of the view that, when a witness is ordered to comply with an administrative subpoena issued under Government Code section 11180 et seq., the witness is not aggrieved until he or she has disobeyed the order and been found in contempt. Prior to that, any ruling the appellate court could make would be purely advisory. "That is to say, if we were to rule in favor of the [respondent], we would simply be advising the appellants that, if the [respondent] pursues contempt proceedings, and the trial court finds [appellants] in contempt, we will uphold that ruling on appeal. Similarly, our decision in favor of appellants would amount to no more than our advice to the [respondent] that contempt proceedings will ultimately prove fruitless." (Bishop, supra, 49 Cal.App.4th at p. 1808.) The appellate court did not consider the order to be a judgment because, under its analysis, the order was not final.

The orders before us compel compliance with legislative subpoenas issued pursuant to Government Code section 37104 et seq. As to these, we believe the better view is that the orders are appealable as final judgments. A judgment is the "final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) The statutory scheme at hand provides for an original proceeding in the superior court, initiated by the mayor's report to the judge, which results in an order directing the respondent to comply with a city's subpoena. Indeed, the compliance order is tantamount to a superior court judgment in mandamus, which, with limited statutory exceptions, is appealable. (Id., § 904.1, subd. (a); Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal.3d 696, 702 [238 Cal.Rptr. 780, 739 P.2d 140].) Whether the matter is properly characterized as an "action" (Code Civ. Proc., §

> 22) or a "special proceeding" (id., § 23), it is a final determination of the rights of the parties. It is final because it leaves nothing for further determination between the parties except the fact of compliance or noncompliance with its terms. (Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc., supra, 43 Cal.3d at p. 703.) (Id.)

Concerning the question of the finality of the order (see also *Collins v. Corie* (1936) 8 Cal. 2d 120), *Patel* concluded that the fact that an intransigent witness may be subject to a contempt order does not mean that the order compelling compliance is not final and that the normal rule is that "injunctions and final judgments which form the basis for contempt sanctions are appealable. . and that if there is a contempt finding, *that* finding would not be appealable. (Id.)

> Therefore, review of the underlying order can reliably be had only if that order is appealable. The superior court's order determined all of the parties' rights and liabilities at issue in the proceedings; the only determination left was the question of future compliance, which is present in every judgment. (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1985) 192 Cal.App.3d 1530, 1537 [243 Cal.Rptr. 505].) We conclude that the orders herein must be deemed final judgments and are, therefore, appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). (*Patel, supra* at 240-244, emphasis added.)

As *Patel* recognizes, appeals are historically more likely to result in full opinions than writs, which are susceptible to postcard

denial. Since this case presents issues of critical importance as cities attempt to deal with increasingly complex zoning and land use issues as well as the conflict between state and federal law on medical marijuana, the public interest as well as that of the litigants would be best served by the kind of full review and opinion provided by appeal. It should also be noted that the Superior Court had ruled in a contested hearing that the order was appealable and thereupon issued a stay.

C. REVIEW SHOULD BE GRANTED TO REDRESS HOLISTIC HEALTH'S DENIAL OF DUE PROCESS

The court's order was in apparent response to appellants' motion to consolidate the cases G042883, G04878, G043880, G042889, and G042893. Although Respondent City of Dana Point filed an opposition to the motions to consolidate, that was filed on January 28, 2010, one day before this order. Therefore the order was entered before Appellants even received, still less had an opportunity to respond to the opposition to the motion to consolidate.

The docket is silent as to these appellants as to any request for briefing on the issue of appealability. Had this court granted the motion to consolidate, service on one of the appellants of this court's invitation to file letter briefs could have been considered service on

all. However, instead Holistic Health was denied the opportunity to make its case for appealability and for appeal over an extraordinary writ as the preferred avenue for review. Consequently, Holistic Health was also not served with Respondent's letter brief on this point and has no idea of the City's position on this issue.

Notice and opportunity to heard, even at the appellate level, and even on motions, is the cornerstone of due process of law. Appellants/Petitioners note that in *Olson v. Cary,* supra, the Supreme Court considered the issue of appealability on its own motion as a jurisdictional question. Here however only one appellant was afforded an opportunity to brief the issue [4] and the others were never informed the Court contemplated this action.

V. THE COURT SHOULD ALSO REVIEW THE ORDER DENYING CONSOLIDATION

These cases were consolidated for hearing and decision. This consolidation will facilitate decision of this matter because all of the challenges to the enforcement of the legislative subpoenas were heard jointly, all of appellants' counsel cooperated on all briefing in the superior court and if the cases are separately heard this will require duplication of briefing and result in a waste of judicial resources. All

4 That appellant is expected to assert that they did not get adequate notice of the court's orders.

"Petitioners" wish to file a joint brief and by separately filed motions join in this request. Moreover, this court necessarily consolidated the cases if it relied on the rejected letter brief submitted by Beach Cities. Further, the cases concern common issues of law and fact both matters involve common issues of law and fact. (See *Primo Team, Inc. v. Blake Construction Co.* (1992) 3 Cal.App.4th 801, 803, fn. 1. [4 Cal.Rptr.2d 701] and *Sharick v. Galloway* (1936) 12 Cal.App.2d 733, 738 [55 P.2d 1196].). By denying consolidation, the Court of Appeal also risks, indeed virtually assures, piecemeal litigation. (*Saxana v. Gaffney* (2008) 159 Cal.App.4th 316, 321.)

VI. CONCLUSION

For the reasons stated above, this Court should grant review to determine the whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding. It should also review and reverse the order denying consolidation.

DATED: February 21, 2010

Respectfully submitted,

ALISON MINET ADAMS,

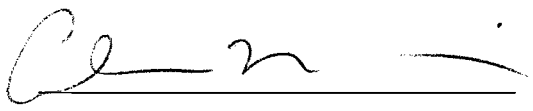
Attorneys for Petitioner

VII. CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

The foregoing brief is proportionately spaced, using 14-point Time New Roman . The Word count of 4971 is based on information provided by Microsoft Word processing program and therefore does not exceed the limits provided by Rule 8.204, California Rules of Court.

I certify that the foregoing is true and correct.

Executed this 21st day of February 2010, at Studio City California.



Alison Minet Adams state bar no 107475

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

In re: Enforcement Against the Point Alternative Care of City of Dana Point City Council's Subpoena.	30-2009-00298187 FINAL RULING Dept. C17

City of Dana Point v. Point Alternative Care; Holistic Health; Safe Harbor Collective; Beach Collective and Beach Cities Collective.

The Mayor of the City of Dana Point in her report to this Court pursuant to Government Code 37106 notifies the Court that:

1. The City has learned that the Respondents are likely operating as marijuana dispensaries within the City's borders;
2. These Respondent Dispensaries have not obtained any authorization from the City to do so;
3. The City has received several complaints from residents and business owners concerning some of these dispensaries;
4. The Respondent Dispensaries are operating beyond the scope of their Occupancy Permits;

5. The Dana Point Municipal Code states that any proposed land use not expressly allowed in a given district is prohibited;

6. Medical marijuana dispensaries are not listed as permitted uses in the City;

7. Based on this information, and against the background of State and Federal Law as well as the AG Guidelines, the City Council authorized her to issue subpoenas pursuant to GC 37104 "for the purpose of gathering information that could assist the City in its investigation as to whether medical marijuana dispensaries located in the City are operating in compliance with applicable law."

GC 37104 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. The issuance of the subpoena is valid if:

1. It is authorized by ordinance or similar enactment;

2. It serves a valid legislative purpose;

3. The witnesses or materials subpoenaed are pertinent to the subject matter of the investigation.

Re 1: Authorized by Ordinance or Similar Enactment

The first requirement is clearly met. Just as the City of Lodi's city council was specifically authorized to issue subpoenas pursuant to GC 37104 so too is the City of Dana Point. This is the "ordinance" or "other enactment" to which the Courts in *Connecticut Indemnity* at 813, and *Wilkerson v. United States 365 U.S.* 339, 408-409 are referring. The facts in Wilkerson were very different from the facts here. In *Wilkerson* the entity that issued the subpoena was the House Committee on Un-American Activities. The respondent challenged that committee's power to issue a legislative subpoena. The Supreme Court determined that the Committee derived its power to issue legislative subpoenas from 2 U.S.C Section 192 which empowered the House of Representatives and its Standing

Committees (including the subject committee) to issue them. Here we are dealing with an entity which is specifically authorized to issue legislative subpoenas pursuant to GC 37104.

The Respondents also appear to suggest that the City of Dana Point cannot issue the subpoenas absent an ordinance similar to the *Vacaville* city ordinance imposing a duty on hotel owners to collect and remit an occupancy tax to the City of Vacaville. This is not correct. There is no authority for the proposition that a legislative entity is only empowered to issue a subpoena in connection with an *existing* ordinance as opposed to an ordinance it might enact after conducting its legislative enquiry. (See *Connecticut Indemnity* at 814 citing *Barenblatt v. U.S.* "The scope of the power of inquiry ...is as penetrating and far reaching as the potential power to enact and appropriate...")

Re 2: Serves a Valid Legislative Purpose

A legislative body may conduct an investigation in order to assist its decision making regarding legislative matters. *Connecticut Indemnity Company v. Lodi 23 Cal. 4th 807.* The investigation cannot be an end in and of itself. Watkins, 354 US 178. The investigation must be for a legislative purpose. Respondents argue that the City, in declaring it was issuing the subpoenas "to investigate whether medical marijuana dispensaries are operating in compliance with applicable law" essentially admits that the subpoenas were issued, not for any legislative purpose, but rather for the improper purpose of determining whether to prosecute them for non compliance with applicable law.

The Court rejects this argument. It is clear from a reading of the Mayor's entire report that the City authorized the issuance of the subpoenas to investigate whether the dispensaries are complying with the law in order to determine how to respond to residents' concerns about the manner in which the dispensaries are conducting

business, whether under existing zoning laws they should be permitted to conduct such businesses, whether the zoning laws need to be amended to accommodate the dispensaries, and if so what amendments are necessary. Mayor's Report Para.s 1-2. The Mayor and the other Council members were elected to legislate on precisely such matters.

In *Vacaville* the court held that the subpoena was properly issued for the purpose of enabling the city to investigate whether a business was violating a tax ordinance. The court ruled that the City Council was considering the valid legislative concern of carrying out the audit of an uncooperative taxpayer to determine compliance with the City's taxing ordinance. The court held that matters relating to the investigation and enforcement of tax measures are proper legislative concerns. The Vacaville City Council met to consider the tax administrator's effort to obtain cooperation with the tax audit. The City Council authorized the mayor to issue the subpoena and to apply to the superior court for enforcement of the subpoena as authorized by GC section 37104. Thus the tax audit and the reluctant taxpayer's refusal to comply with the subpoena were considered by the court in Vacaville to be proper subjects of legislative enquiry by the City Council.

Likewise here the City's concern that the dispensaries may be operating beyond the scope of their occupancy permits is a proper subject of legislative enquiry. The essential facts in the case at bar are indistinguishable from the facts in *Vacaville* and those in *Connecticut Indemnity.* The City, in furtherance of its legislative powers, is entitled to investigate whether dispensaries are operating under the law to determine if they should be allowed to continue operating as dispensaries in city limits, and if so under what conditions.

Because the City's issuance of the subpoenas was, in itself, a proper exercise of legislative power, the potential that the City might also use information gained by the

IT IS SO ORDERED.

Dated: 11-2-09

GLENDA SANDERS

Honorable Glenda Sanders
Judge of the Superior Court

JAN 2 9 2010

Deputy Clerk _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOLISTIC HEALTH, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; CITY OF DANA POINT, Real Party in Interest.	G042883 (Super. Ct. No. 30-2009-00298196) O R D E R

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, Holistic Health, 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.

Petitioner's request to consolidate this case with G042878, G042880, G042889, and G042893 is DENIED.

RYLAARSDAM, J.

RYLAARSDAM, ACTING P. J.

* Before Rylaarsdam, Acting P. J., Moore, J., and Aronson, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HOLISTIC HEALTH, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; CITY OF DANA POINT, Real Party in Interest.	G042883 (Super. Ct. No. 30-2009-00298196) ORDER

THE COURT:*

Petitioner's motion to reinstate the appeal is DENIED. Petitioner's request for reconsideration of the order denying consolidation and reconsideration of the order stating the appeal was from a non-appealable order filed January 29, 2010, is DENIED.

Based on petitioner's representation that it has not yet received the record in this case, the court finds good cause to GRANT petitioner's request for an extension of time to file a petition for extraordinary writ. Petitioner may file a petition for extraordinary

writ no later than March 12, 2010. No extensions of time beyond March 12, 2010, will be granted absent a showing of extraordinary good cause.

Any informal response shall be filed no later than March 22, 2010.

RYLAARSDAM, J.

RYLAARSDAM, ACTING P. J.

* Before Rylaarsdam, Acting P. J., Moore, J., and Aronson, J.

PROOF OF SERVICE

I, Boris M. Young, am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 12400 Ventura Blvd. #701, Studio City, Ca 91604.

This brief has been submitted to this court and to the court of appeal by priority mail pursuant to rule of court rule 8.25(b)(3)(A).

On February 22 2010, I served the foregoing PETITION FOR REVIEW by placing a true copy thereof enclosed in a sealed envelope, as follows:

Court of Appeal 601 W. Santa Ana Blvd. Santa Ana, CA 92701	Clerk of the Superior Court 700 Civic Center Drive West Santa Ana, CA 92701	Rutan & Tucker A. Patrick Munoz Noam I. Duzman Jennifer J. Farrell 611 Anton Blvd., 14th Floor Costa Mesa, CA 92626

I caused such envelopes to be deposited in the mail at Studio City, California or placed for collection and mailing on the date and at the place shown above following our ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the

United States postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing affidavit. The envelopes were mailed with postage thereon fully prepaid.

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

Executed this 22nd day of February, 2010, at Studio City, California.

_____

Boris M. Young