

MEMORANDUM

To: Senate Judiciary Committee

From: Jeff Pickett

Re: SB 30/ Colorado courts' construction of "notwithstanding"

Date: February 20, 2015

During the Judiciary Committee hearing on Wednesday, February 18th, Senator Costello asked whether Colorado courts had construed the phrase "notwithstanding any other provision of law" that appears in that state's marijuana provisions. The short answer is "no."

As Senator Coghill noted during the February 18th hearing, Colorado's recreational and commercial marijuana provisions were enacted as an amendment to the state constitution. In language very similar to AS 17.38.020, Article XVIII Section 16(3) provides:

Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado. . . .

The fact that the language appears as an amendment to the state's constitution, as opposed to as an addition to the state's statutes, arguably makes the phrase superfluous since Colorado courts will almost certainly interpret the constitution-based marijuana provisions to trump most other state law irrespective of the phrase.¹

¹ It is clear Coloradoans were concerned about the issue, since they added the following subsection, just to be sure the point was clear:

(8) Self-executing, severability, conflicting provisions. All provisions of this section are self-executing except as specified herein, are severable, and, except where otherwise indicated in the text, shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions.

I found no Colorado state court case that construed the phrase “notwithstanding any other provision of law” in the context of the new marijuana section. A federal bankruptcy court sitting in Colorado has, however, discussed the manner in which the state’s marijuana laws intersect with conflicting federal law, but that analysis is fundamentally different, since there is ample evidence in the Colorado marijuana provisions and history to clearly indicate that federal law preempts the state constitutional amendment.

If anyone is interested, I found a great deal of discussion devoted to the intersection of federal laws regarding marijuana and state laws legalizing marijuana use (whether recreational or medical), but that discussion is beyond the scope of this memo. I’d be happy to share that research or draft an additional memo if any member of the committee would like.