

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF
CALIFORNIA et al.,

Plaintiffs and Respondents,

v.

WILDOMAR PATIENTS
COMPASSIONATE GROUP, INC.,

Defendant and Appellant.

WILDOMAR PATIENTS
COMPASSIONATE GROUP, INC.

Plaintiff and Appellant,

v.

MATTHEW MASSI as Planning Director,
etc.

Defendant and Respondent.

E052728

(Super.Ct.Nos. RIC10022903 &
RIC10022476)

OPINION

APPEAL from the Superior Court of Riverside County. John W. Vineyard,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of J. David Nick and J. David Nick for Plaintiff, Appellant and
Defendant.

Julie Hayward Biggs, City Attorney, Burke, Williams & Sorenson, Stephen A.
McEwen and Joseph P. Byrne for Plaintiffs, Respondents and Defendants.

Best Best & Krieger, Jeffrey V. Dunn and Lee Ann Meyer for League of
California Cities & California State Association of Counties as Amicus Curiae on behalf
of Plaintiffs, Respondents and Defendants.

The trial court granted plaintiff and respondent City of Wildomar's (City) request
for a preliminary injunction against defendant and appellant Wildomar Patients
Compassionate Group, Inc. (defendant) from operating a medical marijuana dispensary
(MMD) within the boundaries of the City. The court also denied defendant's request for
issuance of a writ of mandate to compel the City's planning director to cease attempts at
forbidding defendant from operating the MMD. On appeal, defendant contends the court
erred in concluding that state law did not preempt the City's local ordinances barring its
operation of an MMD. Specifically, defendant maintains that state law gave it the right
to open an MMD and precludes application of statutory and local nuisance ordinances to

MMDs.¹ Defendant further argues the court erred in denying its request for a writ of mandate. We affirm the judgment.

STATUTORY AND REGULATORY BACKGROUND²

In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the “Compassionate Use Act of 1996.” (Health & Safe. Code, § 11362.5, hereinafter the “CUA.”)³ The CUA is intended to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana” (§ 11362.5, subd. (b)(1)(A).) The CUA is also intended to “ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.” (§ 11362.5, subd. (b)(1)(B).) In addition, the CUA is intended to “encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.” (§ 11362.5, subd. (b)(1)(C).) The CUA “provides a limited defense from prosecution for cultivation and possession of

¹ The issues raised in this appeal are currently before the California Supreme Court in *City of Riverside v. Inland Empire Patient’s Health and Wellness Center, Inc.* (2011) 200 Cal.App.4th 885, review granted January 18, 2012, S198638.

² We deny Amici Curiae League of California Cities & California State Association of Counties’ request for judicial notice of legislative intent materials as unnecessary to our resolution of the issues on appeal. (Evid. Code, § 452.)

³ All further statutory references are to the Health and Safety Code unless otherwise indicated.

marijuana”; it is narrow in scope. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1170 (*Kruse*); *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929-930.) It does not create a statutory or constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by MMDs. (*Kruse*, at pp. 1170-1171; *Ross*, at pp. 926-927.) In 2003, the Legislature added the Medical Marijuana Program (MMP). (§§ 11362.7-11362.83.) The purposes of the MMP include “[promoting] uniform and consistent application of the [CUA] among the counties within the state’ and ‘[enhancing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.’ [Citation.]” (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864 (*Hill*)). The MMP “includes guidelines for the implementation of the [CUA]. Among other things, it provides that qualified patients and their primary caregivers have limited immunity from prosecution for violation of various sections of the Health and Safety Code regulating marijuana including [section 11570,] the ‘drug den’ abatement law. (§§ 11362.765, 11362.775.)” (*Ibid*, fn. omitted)

With regard to “drug den” abatement, the MMP “provides a new affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana. [Citation.]” (*Kruse, supra*, 177 Cal.App.4th at pp. 1171-1172.) For instance, section 11362.775 of the MMP provides: “Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to

cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.’” (*Kruse*, at p. 1172, fn. omitted.) In addition, section 11362.765 provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

FACTUAL AND PROCEDURAL HISTORY

In December 2009, defendant entered into a one-year lease agreement for property located within the City. In March 2010, defendant submitted an application to the City for a business license to operate a MMD. On March 5, 2010, defendant commenced operations as a MMD.

Section 17.12.040 of the City’s municipal code specifies: “When a use is not specifically listed as permitted or conditionally permitted in a zone classification, the use is prohibited unless . . . the planning director makes a determination that the use is substantially the same in character and intensity as those uses permitted or conditionally permitted in the zone classification. In no event, however, shall a [MMD] as defined in this section be considered a permitted or conditionally permitted use in any zone classification. A [MMD] is prohibited in all zone classifications and no permit of any type shall be issued therefore.”⁴ Section 17.12.050 of the City’s municipal code dictates:

⁴ Both the City in its filings and the trial court in its final order, refer to the City’s ordinances regarding MMDs as contained in sections 9.12.040 and 9.12.050; however, the City fails to cite to the record to support its enumeration of the applicable code section. Defendant, on the other hand, cites to excerpts from the City’s code that support its enumeration. We have looked online and found defendant’s citations to the City’s

[footnote continued on next page]

“A [MMD] dispensary is any facility or location . . . where medical marijuana is made available to, distributed to, or distributed by, one or more of the following: a primary caregiver, a qualified patient, or a patient with an identification card as those terms are defined in . . . Section 11362.5 et seq.”

On March 8, 2010, a City code enforcement officer inspected defendant’s property. The code enforcement officer noted numerous violations of the City’s code including a lack of handicap parking, noncompliance with ADA requirements, inadequate fire extinguishers, improper ingress and egress for traffic, improper ingress and egress for occupants, lack of emergency lighting, lack of identifying signage, and lack of emergency exit signage. On March 8, 2010, the City issued a cease and desist letter demanding that defendant discontinue operations as a MMD. The letter specifically noted the code violations observed by the inspecting code enforcement officer. On March 9, 2010, defendant temporarily ceased operations with the intent that the City would then enact an ordinance to permit the operation of a MMD. On September 8, 2010, the city council declined to amend existing ordinances; thus, keeping the current prohibition with respect to MMDs. On September 15, 2010, the City returned defendant’s \$45 business license application fee and noted it would not be accepting applications for the operation of MMDs. In its petition for writ of mandate filed November 22, 2010, defendant indicated its intent to reopen its MMD.

[footnote continued from previous page]
code to be the correct enumeration. (<http://www.cityofwildomar.org/uploads/files/title17/17-012.pdf> (as of March 15, 2012.))

On December 1, 2010, the City filed a complaint for a preliminary and permanent injunction to abate a public nuisance. The City noted defendant recommenced operation as a MMD on or about November 29, 2010. The City's complaint incorporated three causes of action: (1) violations of the City's municipal code, including defendant's failure to operate without a certificate of occupancy, operation of a non-conforming use, and operation of a MMD in direct contravention of the express provisions of the City's municipal code; (2) nuisance per se pursuant to Civil Code sections 3479, 3480, 3491, and 3494; and (3) declaratory relief.

On December 2, 2010, defendant filed an ex parte application for an order to show cause (OSC) why its requested writ of mandate should not issue. The City responded that defendant's MMD posed a nuisance as two burglaries had occurred within the previous 45 days, and the facility was not "substantially the same in character and intensity as those uses permitted or conditionally permitted in [that particular] zone classification," (Wildomar Mun. Code, § 17.12.040) because it contained "coded lock mechanisms on each internal door, surveillance cameras, metal detection devices, and welded steel security bars throughout the building."

On December 6, 2010, the trial court denied the City's request for a temporary restraining order reasoning, "I don't believe there's enough of a showing of irreparable harm to the City in this case. I tend to agree as well, I know there were two burglaries on the property, which is persuasive, but I'm not sure I also [would] shut down a pharmacy . . . because people break in and sometimes take legal drugs." The court denied

defendant's request for issuance of a writ "as of today" and set a hearing on the City's request for preliminary injunction.

On December 20, 2010, the trial court held a hearing on the City's request for a preliminary injunction. The court reasoned "neither . . . the [CUA] nor the [MMP] restricts the City's power to enact land use or zoning laws affecting [MMDs], nor do they limit the City's ability to enforce existing local laws against businesses." The court further opined, "My belief in reading this is that the [CUA] provides a limited defense from prosecution for cultivation and possession of marijuana. It doesn't preclude the City in this case from prohibiting these dispensaries in their cities." "I don't see that either the [CUA] or the [MMP] restricts [the City's] ability to enact land use zoning or zoning laws affecting medical marijuana dispensaries. I also do not believe they limit the City's ability to enforce existing local laws."

The trial court ruled the City's ordinances were not preempted by state law. It found the City was likely to prevail in its action and would suffer harm if its zoning regulations were not enforced. Thus, the court granted the City's requested preliminary injunction finding: (1) MMDs are not a permitted use in any zoning district in the City, and are not substantially similar to any permitted use, and are therefore prohibited; (2) defendant operated unlawfully without a valid certificate of occupancy; (3) defendant's MMD was in express violation of the provisions of the City's municipal code; (4) defendant's MMD was a nuisance pursuant to the provisions of Civil Code sections 3479 and 3480; and (5) defendant's MMD was a nuisance per se by virtue of its violation of the City's express municipal code barring MMDs. The court dismissed defendant's

request for preliminary injunction against the City and, therefore, implicitly denied its petition for writ of mandate.

DISCUSSION

A. PREEMPTION

Defendant contends the trial court erred in granting the City’s request for a preliminary injunction because state law encapsulated in the CUA and the MMP preempts local regulation to the extent that municipalities cannot ban the operation of MMDs outright. We hold the court acted appropriately in granting the City’s request.

“We review an order granting a preliminary injunction for abuse of discretion. [Citation.] Two interrelated factors bear on the issuance of a preliminary injunction—the likelihood of the plaintiff’s success on the merits at trial and the balance of harm to the parties in issuing or denying injunctive relief. [Citation.]” (*Hill, supra*, 192 Cal.App.4th at p. 866.) “Whether local ordinances are unconstitutional or preempted by state statutes is a question of law subject to our de novo review. [Citations.]” (*Hill*, at p. 867; see *Kruse, supra*, 177 Cal.App.4th at p. 1168.)

“[T]he “general principles governing state statutory preemption of local land use regulation are well settled” [Citations.]’ [Citation.] Under article XI, section 7 of the California Constitution, ‘[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.’ “If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” [Citation.]’ [Citation.] There are three types of conflict that give rise to preemption: ““A conflict exists if the local legislation ““duplicates, contradicts, or

enters an area fully occupied by general law, either expressly or by legislative implication.””” [Citations.]’ [Citation.]” (*Kruse, supra*, 177 Cal.App.4th at p. 1168.)

““Generally a municipal zoning ordinance is presumed [to] be valid [citation], and will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible . . . objective.’ [Citation.]” (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 713.) Thus, this court must presume City’s zoning ordinance banning MMDs is valid unless defendant demonstrates the ordinance is unlawful based on state law preemption of City’s zoning ordinance.

“““[L]ocal legislation enters an area that is ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to ‘fully occupy’ the area [citation], or when it has impliedly done so””” (*Kruse, supra*, 177 Cal.App.4th at p. 1169.) This court rarely finds implied preemption: “We are reluctant to invoke the doctrine of implied preemption. ‘Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances.’ [Citation.]” (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.) “Indeed, preemption will not be implied where local legislation serves local purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes. [Citation.] There is a presumption against preemption” (*Ibid.*) ““The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. [Citation.]’ [Citation.]” (*Kruse*, at p. 1168.)

The parties primarily exposit *Hill, supra*; *Kruse, supra*; and *Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734 (*Qualified*), in support of their respective positions. Defendant argues the appellate court in *Qualified* implicitly recognized that local ordinances banning MMDs outright were preempted when it noted that the appellate courts' decisions in *Kruse* and *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 (Fourth Dist., Div. Two) were limited to temporary moratoriums. (*Qualified*, at p. 754, fn. 4.) While *Qualified* did make such an observation, it also noted, "We do not decide whether the CUA or the MMP[] preempts the city's ordinance because we conclude the issue is not properly before us." (*Id.* at p. 753.) Rather, the *Qualified* court determined only that the MMP was not an unconstitutional amendment of the CUA and that the CUA and MMP were not preempted by *federal* law. (*Id.* at pp. 749, 757-758.)

In *Kruse*, the appellate court held neither the CUA nor the MMP preempted local regulation of MMDs. (*Kruse, supra*, 177 Cal.App.4th at pp. 1175-1176.) It further held that neither act "compels the establishment of local regulations to accommodate medical marijuana dispensaries." (*Id.* at p. 1176.) Although the city in *Kruse* had implemented only a *temporary* moratorium on the establishment of MMDs within the city, rather than an outright ban, that moratorium had been extended at least twice: from a 45-day freeze, to an additional 10-month suspension, to an additional one-year cessation. (*Id.* at p. 1160.) Thus, the difference between an indefinite, continually renewing moratorium, and an outright ban, would appear, at best, semantic. The result was, in effect, a ban on MMDs that was upheld on appeal.

In *Hill*, the municipality sought a temporary restraining order and preliminary injunction against a MMD operating without having applied for a license, conditional use permit, or zoning permit. No local ordinance specifically banning or regulating MMDs was at issue. (*Hill, supra*, 192 Cal.App.4th at p. 865.) The trial court granted a preliminary injunction barring the defendant from operating a MMD without first obtaining the proper permits and licenses. However, the defendant appealed, arguing the CUA and MMP preempted any attempt by local governments to regulate MMDs. (*Id.* at pp. 863-864.) The appellate court disagreed, finding the MMP explicitly authorized the implementation of local ordinances regarding the regulation *or establishment* of MMDs within their jurisdictions. (*Id.* at p. 868.) While not dispositive of the issue presented here, *Kruse* and *Hill* are extremely persuasive authority for the City’s position that the MMP authorizes municipalities to establish ordinances banning MMDs outright.

The language of the MMP itself, provides: “Nothing . . . shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location *or establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.” (§ 11362.768, subd. (f), italics added.) Similarly, subdivision (g) of the same statute provide: “Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.” (Italics added.) Thus, the CUA and MMP do not expressly mandate that MMDs shall be permitted within every city and county, nor do the CUA and MMP prohibit cities and counties from banning MMDs. The operative provisions of the CUA

and MMP do not speak to local zoning laws. Although the MMP provides limited immunity to those using and operating lawful MMDs, the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting MMDs.

Therefore, the City's ordinance banning MMDs is not preempted by state law. The CUA and MMP do not expressly or impliedly preempt local prohibitions on MMDs. Moreover, nothing in the CUA or MMP suggests that cities are required to accommodate the use of medical marijuana and MMDs, by allowing them within every city. Nothing stated in the CUA and MMP precludes cities from enacting zoning ordinances banning MMDs within their jurisdictions. Zoning ordinances banning MMDs are not inconsistent with the CUA and MMP.

Here, the trial court acted within its discretion in granting the preliminary injunction. First, the City established, as a matter of law that it was likely to win at trial because neither the CUA nor MMP preempted its valid enactment of an ordinance banning MMDs within its jurisdiction. This is because while the CUA and MMP provide limited, qualified immunity from criminal sanctions against users and providers of medical marijuana, they do require that a city permit the operation of MMDs within their jurisdictions. (*Kruse, supra*, 177 Cal.App.4th at p. 1176.) Indeed, as noted above, the MMP expressly provides for local ordinances regulating the operation, location, *and establishment* of MMDs. (§ 11362.768, subs. (f) & (g).) Second, the City established potential harm by demonstrating that the flaunting of its ordinances by one entity would likely erode adherence by others to the City's municipal code. Moreover, the City

demonstrated that defendant's MMD differed dramatically from other types of businesses in the area and that it had attracted some degree of crime. Thus, the trial court acted properly in granting the preliminary injunction.

B. NUISANCE

Defendant contends the MMP expressly forbade application of civil nuisance law to the operation of MMDs; thus, the trial court erred in granting the City's request for a preliminary injunction based on nuisance. We hold the court acted appropriately in granting the preliminary injunction based, in part, on a determination that defendant's MMD constituted a nuisance.

As discussed above, the provision of the MMP codified at section 11362.765, subdivision (a) provides that the individuals described in the act "shall not be subject . . . to *criminal* liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Italics added.) While all the other enumerated statutes are definitively criminal in nature, section 11570 itself is entitled "Nuisance" and provides: "Every building or place used for the purpose of *unlawfully* selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." (Italics added.) Again, as noted above, section 11570 is commonly known as the "drug den" abatement law. (*Hill, supra*, 192 Cal.App.4th at p. 864.) Section 11570 has repeatedly been deemed "quasi-criminal" in nature, effect, and character. (*Qualified, supra*, 87 Cal.App.4th at p. 755; *Hill*, at p.

869, fn. 5.) In *Hill*, the appellate court held: “The limited statutory immunity from prosecution under the ‘drug den’ abatement law provided by section 11362.775 does not prevent [local government] from applying [their own] nuisance laws to MMD[]s that do not comply with its valid ordinances.” (*Hill*, at p. 868.)

In *Kruse*, the appellate court determined that the defendants “operation of a nonenumerated and therefore expressly prohibited use, without obtaining a business license. . . created a nuisance per se” (*Kruse, supra*, 177 Cal.App.4th at p. 1165.) In other words, the defendants’ operation of a MMD without the City of Claremont’s approval constituted a nuisance per se because it was in direct violation of the City of Claremont’s municipal code; thus, it could properly be enjoined. Moreover, no showing of harm is required for a cause of action for nuisance per se. (*Id.* at p. 1166.) A code violation constitutes a nuisance per se subject to abatement where the conduct constitutes a violation of a valid and enforceable city ordinance. (*Id.* at pp. 1163-1164.)

Similarly, in *City of Corona v. Naulls, supra*, 166 Cal.App.4th 418, this court held that the defendant’s failure to comply with the City of Corona’s requirements for obtaining a valid business license and operation of the MMD in violation of the City of Corona’s municipal code constituted a nuisance per se: “‘[T]he expression of certain things in a statute necessarily involves exclusion of other things not expressed’ [Citation.]’ [Citation.]” (*Id.* at pp. 427, 433.) “[W]here a particular use of land is not expressly enumerated in a city’s municipal code as constituting a *permissible* use, it follows that such use is *impermissible*.” (*Id.* at p. 433.)

Here, the trial court properly found that defendant's operation of the MMD was a nuisance per se because it violated the *civil* provisions of Civil Code sections 3479 and 3480 unprotected by the CUA and MMP, was a nonconforming use in that it was not expressly permitted by the City's municipal code, and it violated the express provisions of the City's municipal code against the operation of MMDs. Moreover, as discussed above, the City proved potential harm in allowing the non-permitted use to continue due to the danger that other businesses would be enticed into disregarding the City's regulatory code were it to go unenforced; defendant's MMD differed substantially from other businesses in the area; and had been the object of at least some crime. Thus, the court's finding that defendant's operation of a MMD was a nuisance per se independently supported its issuance of a preliminary injunction.

C. DEFENDANT'S PETITION FOR WRIT OF MANDATE

Defendant contends the trial court erred when it denied defendant's request for issuance of a writ of mandate. We find no error.

"A party may seek a writ of mandate 'to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station'" [Citation.] In order to obtain writ relief, a party must establish "'(1) A clear, present and usually ministerial duty on the part of the respondent . . . ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty'" [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868.)

Here, defendant cannot legitimately argue it had a clear right to an exercise of the City planning director's ministerial duty with respect to withdrawing the cease and desist

letter he issued, or the ordinance prohibiting MMDs. First, defendant made no showing that withdrawing ordinances was a ministerial duty of the City planning director; indeed, it made no showing the City planning director had any authority at all to “withdraw” a city ordinance. Second, as discussed above, the City’s enforcement of its ordinances was not preempted by the CUA or MMP. Thus, defendant had no right to the withdrawal of a cease and desist letter issued in proper exercise of the City’s enforcement of its municipal code. The trial court committed no error in dismissing defendant’s petition for writ of mandate.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal. The stay previously issued in this matter shall be lifted upon issuance of the remittitur.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.