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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF TEMECULA, Plaintiff and Respondent, v. COOPERATIVE PATIENTS SERVICES, INC., Defendant and Appellant.	E053310 (Super.Ct.No. RIC1103777) OPINION

APPEAL from the Superior Court of Riverside County. Craig G. Riemer, Judge. Affirmed.

Law Office of J. David Nick and J. David Nick for Defendant and Appellant.

Peter M. Thorson, City Attorney; Richards, Watson & Gershon, T. Peter Pierce and Christopher L. Hendricks, for Plaintiff and Respondent.

Best Best & Krieger, Jeffrey V. Dunn and Lee Ann Meyer, for League of California Cities & California State Association of Counties as Amici Curiae.

I. INTRODUCTION

Defendant Cooperative Patients Services, Inc. (CPSI) appeals from the trial court's order granting a preliminary injunction, which bans CPSI from, among other things, operating a medical marijuana dispensary[1] at any location in plaintiff City of Temecula (Temecula). CPSI contends the municipal ordinance on which Temecula relies is preempted by state law, specifically, the Medical Marijuana Program Act (Health & Saf. Code,[2] §§ 11362.7–11362.83 (MMPA) and the Compassionate Use Act of 1996 (CUA), approved as Proposition 215 and codified in section 11362.5. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

CPSI applied for a license to operate a business in a commercial zone in Temecula. In the statement of operations that accompanied its application, CPSI stated it runs a "Therapeutic Cannabis (Medical Marijuana) Patients' Resource Center." Temecula issued a business license, which expired on January 31, 2011. The business license stated, "Medical marijuana dispensaries are not permitted by the Temecula Municipal Code. Nothing in this business license is intended nor shall it be construed to authorize a medical marijuana dispensary or any other use or action that violates any

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[1] In this opinion, we use the term "medical marijuana dispensaries" broadly to include cooperatives, collectives, and dispensaries, despite any technical differences that may exist between them.

[2] All further statutory references are to the Health and Safety Code unless otherwise indicated.

provision of the Temecula Municipal Code." Upon CPSI's application, Temecula renewed the license for another year.

Temecula's Municipal Code defines "medical marijuana dispensary" as "a facility or location, whether fixed or mobile, which provides, makes available or distributes marijuana to a primary caregiver, a qualified patient or a person with an identification card issued in accordance with California [law]." Temecula prohibits medical marijuana dispensaries in its commercial zoning districts. A violation of any provision of the Municipal Code "shall be deemed a public nuisance which may be abated by the city attorney in a civil judicial action. [Citation.]" CPSI's property is located in the Service Commercial zone.

After learning that marijuana was being dispensed from CPSI's premises, Temecula filed a complaint to abate CPSI's dispensary as a public nuisance and sought to prohibit CPSI's landlord, Evergreen Ventures, Inc. (Evergreen) from continuing to allow the dispensary to operate. The trial court issued a temporary restraining order prohibiting CPSI and Evergreen from selling or making marijuana available at the property and from operating a business without a valid business license or certificate of occupancy. The trial court also required CPSI and Evergreen to show cause why a preliminary injunction should not issue on the same terms.

Following briefing, presentation of evidence and a hearing, the trial court issued a preliminary injunction (1) prohibiting CPSI from operating a marijuana dispensary in Temecula and from operating any business at the property without valid permits, and

(2) prohibiting Evergreen from allowing CPSI to operate a marijuana dispensary or conduct an unpermitted business at the property.

III. DISCUSSION

A. Request for Judicial Notice

Under Evidence Code section 452, subdivision (b), and section 453, Amici Curiae League of California Cities & California State Association of Counties have requested this court to take judicial notice of various legislative history documents connected to Assembly Bill No. 2650 (2009-2010 Reg. Sess.). We reserved ruling on the request for consideration with the merits of the appeal. We now grant the request.

B. Standard of Review

The trial court evaluates two interrelated factors in determining whether to issue a preliminary injunction: "the likelihood that the plaintiff will prevail on the merits at trial," and "the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) We review the trial court's evaluation and weighing of those factors for abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) In this case, whether Temecula is likely to prevail on the merits turns on a question of law: whether Temecula's ban on medical marijuana dispensaries is preempted by state law. We review that question de novo. (*Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 808-809.)

C. Preemption

CPSI contends that provisions of Temecula's Municipal Code prohibiting medical marijuana dispensaries in the city conflict with state law and are unconstitutional and void.[3]

1. General Preemption Principles

The general principles governing state statutory preemption of local land use regulation are well settled. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 (*Big Creek Lumber*); *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1168 (*Kruse*).) 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." (Cal. Const., art. XI, § 7 (2012).) "'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.'" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Three types of conflict give rise to state law preemption: a local law (1) duplicates state law, (2) contradicts state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication. (*Kruse, supra*, at p. 1168; *Action Apartment Assn., Inc. v. City of*

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[3] Preliminarily, we note that our Supreme Court has granted a petition for review in a case raising the issue of preemption of local ordinances regulating or banning the operation of medical marijuana dispensaries and related activities. (*City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.* (2011) 200 Cal.App.4th 885 [Fourth Dist., Div. Two], review granted Jan. 18, 2012, S198638.)

Santa Monica (2007) 41 Cal.4th 1232, 1242.) "'[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute. [Citation.]'" (*Kruse, supra,* at p. 1169, quoting *Big Creek Lumber, supra,* 38 Cal.4th at p. 1149.)

2. California Medical Marijuana Laws

In determining whether Temecula's zoning ordinance banning medical marijuana dispensaries is preempted by state law, we first consider the scope and purpose of California's medical marijuana laws, specifically the MMPA and the CUA.

The declared purposes of the CUA were (1) "[t]o 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 in the treatment of . . . any . . . illness for which marijuana provides relief" (§ 11362.5, subd. (b)(1)(A)); (2) "[t]o 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)); and (3) "[t]o 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 is narrow in scope—it provides a limited defense from prosecution for cultivation and possession of marijuana. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929-930 (*Ross*); *Kruse*, *supra*, 177 Cal.App.4th at p. 1170.) However, the CUA does not create a statutory or constitutional right to obtain marijuana or allow the sale or nonprofit distribution of marijuana by medical marijuana dispensaries. (*Ross*, *supra*, at p. 926; *Kruse*, *supra*, at pp. 1170-1171; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773-774 (*Urziceanu*).)

In 2003 the Legislature added the MMPA for the purposes of "'[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 MMPA "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. [Citations.]" (*Hill*, *supra*, at p. 864, fn. omitted.)

With regard to "drug den" abatement, the MMPA "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 p. 1171.) For instance, section 11362.775 of the MMPA 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,[4] or 11570[5]." In addition, section 11362.765 provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

Generally a municipal zoning ordinance is presumed to be valid. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 713 [Fourth Dist., Div. Two].) CPSI argues that, while cities and counties may zone where medical marijuana dispensaries may be located, Temecula cannot lawfully ban all medical marijuana dispensaries from the city. This court must presume Temecula's zoning ordinance banning medical marijuana dispensaries in Temecula is valid unless CPSI demonstrates the ordinance is unlawful based on state law preemption of the zoning ordinance.

3. Federal Preemption of State Law

CPSI argues that under *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734 (*Qualified*), local municipalities cannot enact a total ban of medical

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[4] These statutes criminalize possession of marijuana (§ 11357); cultivation of marijuana (§ 11358); possession of marijuana for sale (§ 11359); transportation of marijuana (§ 11360); maintaining a place for the sale, giving away, or use of marijuana (§ 11366); and making available premises for the manufacture, storage, or distribution of controlled substances (§ 11366.5).

[5] Section 11570 provides that premises used for unlawful manufacture, storage, or distribution of controlled substances are "nuisance[s] which shall be enjoined, abated, and prevented, and for which damages may be recovered . . . ."

marijuana dispensaries based solely on federal law preemption. The court in *Qualified* stated: "The city may not justify its ordinance solely under federal law [citations], nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance. The city's obstacle preemption argument therefore fails." (*Qualified*, *supra*, at p. 763, fn. omitted.) In other words, the city cannot rely on the proposition that federal law, which criminalizes possession of marijuana, preempts state law allowing limited use of medical marijuana and medical marijuana dispensaries.

We agree that under *Qualified*, federal preemption of state medical marijuana law is not a valid basis for upholding Temecula's zoning ordinance banning medical marijuana dispensaries. The key issue in determining whether Temecula's zoning ordinance is legally enforceable is whether state medical marijuana statutes, such as the CUA and MMPA, preempt Temecula's zoning ordinance banning medical marijuana dispensaries. If the local ordinance is not preempted by state law, the ordinance is valid and enforceable.

4. State Law Preemption of Local Law

We reject the proposition that local governments, such as Temecula, are preempted by the CUA and MMPA from enacting zoning ordinances banning medical marijuana dispensaries. Temecula's zoning ordinance does not duplicate, contradict, or enter an area fully occupied by state law legalizing medical marijuana and medical marijuana dispensaries. (See *Kruse*, *supra*, 177 Cal.App.4th at p. 1168; *Action Apartment Assn., Inc. v. City of Santa Monica*, *supra*, 41 Cal.4th at p. 1242.)

(a) Duplicative and contradictory rules

A duplicative rule is one that mimics a state law or is "'coextensive' with state law." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067 (*O'Connell*); *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1327 [Fourth Dist, Div. Two].) A contradictory rule is one that is inimical to or cannot be reconciled with a state law. (*Habitat Trust for Wildlife, supra*, at p. 1327; *O'Connell, supra*, at p. 1067-1068.)

Temecula's ordinance regulating medical marijuana dispensaries does not "mimic" or duplicate state law and can be reconciled with the CUA and MMPA. As discussed above, the CUA is narrow in scope and merely provides medical marijuana users and care providers with limited criminal immunity for use, cultivation, and possession of medical marijuana. (*Kruse, supra,* 177 Cal.App.4th at pp. 1170-1171.) It does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. (*Ibid.*) The MMPA merely implements the CUA and also provides immunity for those involved in lawful medical marijuana dispensaries. Neither the CUA nor the MMPA provides individuals with inalienable rights to establish, operate, or use medical marijuana dispensaries. The state statutes do not preclude local governments from regulating medical marijuana dispensaries through zoning ordinances. The establishment and operation of medical marijuana dispensaries is thus subject to local zoning and business licensing laws. There is nothing stated to the contrary in the CUA or MMPA. The CUA and MMPA do not expressly mandate that medical marijuana dispensaries shall be permitted within every

city and county, nor do the CUA and MMPA prohibit cities and counties from banning medical marijuana dispensaries. The operative provisions of the CUA and MMPA do not speak to local zoning laws. (*Kruse*, *supra*, at pp. 1172-1173, 1175.) Although the MMPA provides limited immunity to those using and operating lawful medical marijuana dispensaries, the MMPA does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting medical marijuana dispensaries.

CPSI argues that Temecula's ordinance banning medical marijuana dispensaries is invalid because it is inconsistent with the MMPA, which provides limited immunity for operating and using medical marijuana dispensaries. For instance, section 11362.775 of the MMPA provides immunity for a nuisance claim arising from a violation of section 11570, which encompasses operating a medical marijuana dispensary. Section 11570 provides for civil nuisance liability, as follows: "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . 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.) Section 11362.775 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*." (Italics added.)

Section 11570, unlike the other statutes listed in section 11362.775, does not provide criminal sanctions. Nevertheless, CPSI argues that under *Qualified*, *supra*, 187 Cal.App.4th at pages 753 through 754, section 11362.775 provides immunity from a nuisance claim for operating a medical marijuana dispensary in violation of section 11570. The court in *Qualified* stated: "Sections 11362.765 and 11362.775 of the MMPA immunize operators of medical marijuana dispensaries . . . from prosecution under state nuisance abatement law (§ 11570) 'solely on the basis' that they use any 'building or place . . . for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . .'" (*Qualified*, *supra*, at pp. 753-754.)

CPSI claims that section 11362.775 demonstrates the Legislature's intent to bar cities from declaring medical marijuana dispensaries a nuisance and banning them. CPSI argues that by enacting section 11362.775, which refers to section 11570, the Legislature expressly prohibits cities from bringing civil nuisance claims under Civil Code section 3482 for operating medical marijuana dispensaries. (*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.) Civil Code section 3482 provides that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance."

CPSI asserts that because section 11362.775 exempts an operator of a medical marijuana dispensary from liability for nuisance, Temecula's zoning ordinance, banning medical marijuana dispensaries and declaring them a nuisance, is preempted by state law. We disagree. Here, Temecula has obtained a preliminary injunction based on CPSI's

zoning violation and not "solely on the basis" it used the premises for operating a medical marijuana dispensary. Although section 11362.775 allows lawful medical marijuana dispensaries, a municipality may limit or prohibit medical marijuana dispensaries through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. Protection under Civil Code section 3482 is applied very narrowly, only "where the alleged nuisance is *exactly* what was lawfully authorized." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1532, italics added.) CPSI's reliance on Civil Code section 3482 is misplaced since, here, the Legislature did not expressly prohibit cities from enacting zoning regulations banning medical marijuana dispensaries or from bringing a nuisance action enforcing such ordinances. Therefore, Temecula's zoning ordinance banning medical marijuana dispensaries does not duplicate or contradict the CUA and MMPA.

(b) Expressly occupying the field

Local legislation impermissibly enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area. (*Kruse, supra*, 177 Cal.App.4th at p. 1169.) Here, the CUA and MMPA do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning medical marijuana dispensaries, to the exclusion of all local law.

In *Kruse*, the court stated that the CUA did not expressly preempt the city's zoning ordinance which temporarily prohibited medical marijuana dispensaries: "The CUA does not expressly preempt the City's actions in this case. The operative provisions of the CUA do not address zoning or business licensing decisions. The statute's operative

provisions protect physicians from being 'punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes' (§ 11362.5, subd. (c)), and shield patients and their qualified caregivers from criminal liability for possession and cultivation of marijuana for the patient's personal medical purposes if approved by a physician (§ 11362.5, subd. (d)). The plain language of the statute does not prohibit the City from enforcing zoning and business licensing requirements applicable to defendants' proposed use." (*Kruse, supra,* 177 Cal.App.4th at pp. 1172-1173.)

The *Kruse* court further explained that the city's temporary moratorium on medical marijuana dispensaries was permissible because: "The CUA does not authorize the operation of a medical marijuana dispensary [citations], nor does it prohibit local governments from regulating such dispensaries. Rather, the CUA expressly states that it does not supersede laws that protect individual and public safety: 'Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . .' (§ 11362.5, subd. (b)(2).) The CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries, enacted as an urgency measure 'for the immediate preservation of the public health, safety, and welfare.' [Citation.]" (*Kruse, supra,* 177 Cal.App.4th at p. 1173.)

The *Kruse* court also concluded the city's zoning ordinance was not expressly preempted by the MMPA. The *Kruse* court noted: "The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances." (*Kruse, supra,* 177 Cal.App.4th at p. 1175.) Furthermore, "[m]edical marijuana dispensaries are not mentioned in the text or history of the MMP. The MMP

does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries. Rather, like the CUA, the MMP expressly allows local regulation. . . . Nothing in the text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries." (*Ibid.*) As in *Kruse,* the CUA and MMPA do not expressly preempt Temecula's zoning ordinance regulating medical marijuana dispensaries, including banning them.

5. Impliedly Occupying the Field

Temecula's zoning ordinance banning medical marijuana dispensaries is not impliedly preempted by state law, since Temecula's ordinance does not enter an area of law fully occupied by the CUA and MMPA by legislative implication. (*Kruse, supra,* 177 Cal.App.4th p. 1168.) "'"[L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature . . . has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." [Citation.]' [Citation.]" (*Id.* 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.] '"In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme."' [Citations.] 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 . . . ." (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.)

(a) Complete coverage

The subject matter of the Temecula zoning ordinance banning medical marijuana dispensaries has not been "'so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern . . . .'" (*Kruse*, *supra*, 177 Cal.App.4th at p. 1169.) As stated in *Kruse*, neither the CUA nor MMPA "addresses, much less completely covers, the areas of land use, zoning and business licensing. Neither statute imposes comprehensive regulation demonstrating that the availability of medical marijuana is a matter of 'statewide concern,' thereby preempting local zoning and business licensing laws." (*Kruse*, *supra*, at p. 1175.) The *Kruse* court further noted that the CUA "does not create 'a broad right to use marijuana without

hindrance or inconvenience' [citation], or to dispense marijuana without regard to local zoning and business licensing laws." (*Kruse*, *supra*, at p. 1175.)

CPSI cites *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277; *O'Connell*, *supra*, 41 Cal.4th 1061; and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, for the proposition the MMPA preempts Temecula's ordinance banning medical marijuana dispensaries. These cases are factually inapposite. They do not concern medical marijuana, the CUA, the MMPA, or local ordinances regulating or banning medical marijuana dispensaries. While these cases address general preemption principles, they are not dispositive of the issues raised in the instant case.

(b) State law tolerating local action

The CUA and MMPA do not provide "'"'general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action . . . .'"'" (*Kruse, supra,* 177 Cal.App.4th at pp. 1169, 1176, *Sherwin-Williams, supra,* 4 Cal.4th at p. 898.) Because the state statutory scheme (the CUA and MMPA) expresses an intent to permit local regulation of medical marijuana dispensaries, preemption by implication of legislative intent may not be found here. (*Kruse, supra*, at p. 1176.) In *Kruse,* the court explained that the CUA and MMPA did not preclude local action regarding medical marijuana, "except in the areas of punishing physicians for recommending marijuana to their patients, and according qualified persons affirmative defenses to enumerated penal sanctions. (§§ 11362.5, subds. (c), (d), 11362.765, 11362.775.) The CUA expressly provides that it does not 'supersede legislation

prohibiting persons from engaging in conduct that endangers others' (§ 11362.5, subd. (b)(2)), and the MMP expressly states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article' (§ 11362.83)." (*Kruse*, *supra*, at p. 1176.)

In addition, after *Kruse* was decided, the Legislature added section 11362.768 in 2010. Section 11362.768 states: "(f) Nothing in this section 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. [¶] (g) 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." With regard to this new provision, the court in *Hill* noted that "the Legislature showed it expected and intended that local governments adopt additional ordinances" regulating medical marijuana. (*Hill*, *supra*, 192 Cal.App.4th at p. 868.) As the *Hill* court noted regarding this statute, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local government may regulate dispensaries." (*Ibid.*) The *Hill* court added that a local government may zone where medical marijuana dispensaries are permissible (*Hill*, *supra*, at p. 870) and apply nuisance laws to medical marijuana dispensaries that do not comply with valid ordinances. (*Id.* at pp. 868, 870.)

Preemption by implication of legislative intent may not be found here where the Legislature has expressed its intent to permit local regulation of medical marijuana dispensaries and where the statutory scheme recognizes local regulations. (*Kruse, supra,* 177 Cal.App.4th at p. 1176.)

(c) Balancing adverse effects and benefits of local law

CPSI has also not established the third indicium of implied legislative intent to "fully occupy" the area of regulating medical marijuana dispensaries. CPSI has not shown that any adverse effect on the public from Temecula's ordinance banning medical marijuana dispensaries outweighs the possible benefit to the city. (*Kruse, supra,* 177 Cal.App.4th at p. 1169.) CPSI argues that allowing Temecula to ban medical marijuana dispensaries would lead to nonuniform application of the law, with medical marijuana dispensaries concentrated in limited areas or not existing in entire regions of the state. We recognize that, as CPSI stresses, the Legislature intended in enacting the MMPA to promote uniform application of the CUA and enhance access to medical marijuana through medical marijuana dispensaries (See Historical and Statutory Notes 40, Pt. 2 West's Ann. Health & Saf. Code (2007 ed.) foll. § 11362.7, pp. 365-366; stats. 2003, ch. 875, §§ 1 & 3.) Nevertheless, nothing in the CUA or MMPA suggests that cities are required to accommodate the use of medical marijuana and medical marijuana dispensary, by allowing medical marijuana dispensaries within every city. Nothing stated in the CUA and MMPA precludes cities from enacting zoning ordinances banning medical marijuana dispensaries within their jurisdictions. Furthermore, those who wish

to use medical marijuana are not precluded from obtaining it by means other than at a medical marijuana dispensary in Temecula.

As concluded in *Kruse, supra,* 177 Cal.App.4th at page 1176 and *Sherwin-Williams, supra,* 4 Cal.4th at page 898, "neither the CUA nor the MMP provides partial coverage of a subject that '"is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit"' to the City. [Citation.] '[A] local ordinance is not impliedly preempted by conflict with state law unless it "mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates." [Citation.] That is because, when a local ordinance "does not prohibit what the statute commands or command what it prohibits," the ordinance is not "inimical to" the statute. [Citation.]' [Citation.] Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP." (*Kruse,* at p. 1176.)

CPSI urges this court to disregard *Kruse* and *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 (*Naulls*), because these cases are not dispositive for reasons noted in *Qualified, supra,* 187 Cal.App.4th 734. We agree that *Kruse* and *Naulls* are factually distinguishable from the instant case, because *Kruse* and *Naulls* involved temporary medical marijuana dispensary moratoriums, whereas this case involves a permanent ban. Nevertheless, the analysis in *Kruse* addressing the issue of preemption is applicable in the instant case.

IV. DISPOSITION

The preliminary injunction is affirmed. Costs are awarded to Plaintiff and Respondent.

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HOLLENHORST
J.

I concur:

RAMIREZ
P.J.

King, J., Dissenting.

I disagree with the conclusion reached by the majority. I would conclude that while a municipality may restrict and regulate the location and establishment of a medical marijuana dispensary, it may not totally ban or prohibit the dispensary's presence based solely on its status as a dispensary.

"In 1996, California voters adopted Proposition 215, the 'Compassionate Use Act of 1996' . . . . The act is intended to 'ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . .'; . . . and '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.' . . . [¶] In 2003, the Legislature added the 'Medical Marijuana Program Act,' . . . The purposes . . . include '[promoting] uniform and consistent application of the [Compassionate Use Act of 1996] among the counties within the state' and '[enhancing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.'" (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864, fn. omitted (*Hill*).)

With these two acts, the Legislature obviously intended to provide for the distribution of marijuana for medical purposes. The Legislature also allowed for some local control.

As part of the "Medical Marijuana Program Act," the Legislature enacted Health and Safety Code former section 11362.83[1] which provides: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." This was clarified seven years later when, in 2010, the Legislature enacted section 11362.768. In its relevant portions, section 11362.768 provides:

"(a) This section shall apply to individuals specified in subdivision (b) of Section 11362.765.

"(b) No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article *shall be located within a 600-foot radius of a school.* [¶] . . . [¶]

"(e) This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license.

"(f) Nothing in this section 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.

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

"(g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011 [the effective date of the statute], *that regulate the location or establishment of* a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." (Italics added.)

In 2011, section 11362.83 was amended to read: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following:

"(a) Adopting local ordinances *that regulate the location, operation, or establishment of* a medical marijuana cooperative or collective.

"(b) The civil and criminal enforcement of local ordinances described in subdivision (a).

"(c) Enacting other laws consistent with this article." (Italics added.)

From this legislative scheme it is evident that while the Legislature has enacted an overall scheme intended to "'ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,'" it has left to local government the authority to restrict and regulate the location of and establishment of medical marijuana dispensaries. (See *Hill, supra,* 192 Cal.App.4th at pp. 867-872 [upholding County of Los Angeles ordinance regulating the location of and conditions of approval of a medical marijuana dispensary].)[2]

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[2] While prior to the enactment of section11362.768 it may have been unclear as to whether local government was able to legislate in the area of medical marijuana, the addition of section 11362.768 and the amendment to section 11362.83 make it

[footnote continued on next page]

With this said, the issue is whether a local government's ability to "restrict" and "regulate" allows the local entity to prohibit or ban the establishment of a dispensary within its jurisdiction. I believe it does not.

The ordinary meaning of the words "restrict" and "regulate" suggest a degree of control that is less than a total ban or prohibition. Restrict is defined: "[T]o confine or keep within limits, as of space, action, choice, intensity, or quantity." (Webster's Encyclopedic Unabridged Dict. of the English Language (1996) p. 1642, col. 1.) To regulate means "to adjust to some standard or requirement, as amount, degree, etc." (*Id.*, p. 1624, col. 3.)

To the extent one may view these words as ambiguous, thus arguably allowing a local entity to ban a medical marijuana dispensary, we look to principles of statutory construction. In construing a statute we are to ascertain the intent of the Legislature. Where a statute is susceptible to more than one reasonable interpretation, "'we look to "extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, . . . and the statutory scheme of which the statute is a part." [Citation.]' [Citations.] The goal is to 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than

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[footnote continued from previous page]
abundantly clear that local government has a say as to the location and establishment of medical marijuana dispensaries. (*Hill, supra,* 192 Cal.App.4th at p. 868; see *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 325 [an amendment which clarifies a prior statute is to "'"'be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose'"'"].)

defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1496, fn. omitted; see *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 ["'Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.'"].)

Here, it is clear that the purpose of the entire statutory scheme is to "'ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . .'; . . . and [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.'" (*Hill, supra,* 192 Cal.App.4th at p. 864.) Its further purpose is to "'[promote] uniform and consistent application of the [Compassionate Use Act of 1996] among the counties within the state' and '[enhance] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.'" (*Ibid.*) Further, to construe the words "restrict" and "regulate" to allow for a total ban of dispensaries would lead to absurd consequences; while the state Legislature is encouraging the distribution of marijuana for medical purposes, construing the statutes so as to allow a local government to ban its distribution would totally thwart implementation of the state's policies. This makes no sense.

Lastly, I don't believe the statutes provide only for criminal immunity. Section 11362.765 precludes liability based solely on section 11570, among other statutes. (§ 11362.765, subd. (a).) Section 11570 provides for enjoining, abating, or preventing a

nuisance. By including section 11570 into section11362.765, the Legislature intended that a local governmental entity may not seek to enjoin, abate or prevent the establishment or existence of a medical dispensary solely on the grounds that it is distributing medical marijuana. Any other construction would render the incorporation of section 11570 into section 11362.765 mere surplusage. (*McCarther v. Pacific Telesis Group, supra,* 48 Cal.4th at p. 110.)

In sum, under the applicable statutes, a local governmental entity may restrict locations of medical marijuana dispensaries. Additionally, a local entity may impose restrictions and regulations on the establishment of medical marijuana dispensaries. The entity may not, however, ban or prohibit a dispensary based solely on its status as a medical marijuana dispensary.

KING
J.