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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CITY OF LAKE ELSINORE,

Cross-complainant and Respondent,

v.

R SIDE MEDICAL, LLC,

Cross-defendant and Appellant.

E053545

(Super.Ct.No. RIC10010236)

OPINION

APPEAL from the Superior Court of Riverside County. John W. Vineyard, Judge.

Affirmed.

Lee J. Petros and Christopher Glew for Cross-defendant and Appellant.

Dapeer, Rosenblit & Litvak and William Litvak for Cross-complainant and Respondent.

**I. INTRODUCTION**

Cross-defendant R Side Medical, LLC (R Side) appeals from the trial court's grant of the request of plaintiff City of Lake Elsinore (City) for a preliminary injunction

enjoining R Side from conducting activities or operations related to the distribution of marijuana. R Side contends that the City's municipal code provisions prohibiting the operation of medical marijuana dispensaries in the City were preempted by state law, specifically the Compassionate Use Act of 1996 (CUA) (Health & Saf. Code, § 11362.5) and the Medical Marijuana Program (MMP) (Health & Saf. Code, § 11362.7 et seq.) and deprived R Side of equal protection of the law. We disagree, and we affirm.

## II. FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>

On March 22, 2011, the City, as a cross-complainant,<sup>2</sup> filed an ex parte application for a temporary restraining order and for an order to show cause re: preliminary injunction.<sup>3</sup> In the application, the City alleged that R Side was maintaining a public nuisance per se by operating a marijuana dispensary at various locations in violation of the municipal code.

In support of its application, the City provided declarations stating that R Side applied for a business license to conduct a "Retail/Clothing/Holistic Medicine/Apparel" business at 31641 Auto Center Drive (the Auto Center property). The City's approval of the application expressly stated, "The approval for this business license does not include

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<sup>1</sup> In its opening brief, R Side failed to provide any citations to the record in violation of California Rules of Court, rule 8.204(a)(1)(C).

<sup>2</sup> The original complaint is not included in the record on appeal.

<sup>3</sup> The application named Carlos Stahl as a cross-defendant. However, Stahl was not named on the notice of appeal.

medical marijuana use of any kind.” (Boldface omitted.) R Side nonetheless opened and operated a marijuana dispensary at the Auto Center property, and the City received several complaints about activities there. City inspections of the business showed that marijuana was being sold there, and the City issued a “Notice of Correction/Stop Work, Cease and Desist” order in May 2010.

Without obtaining a new business license, R Side moved its business to 265 San Jacinto Road (the San Jacinto property). City inspections of R Side’s business premises in October 2010 revealed that the locking mechanism on a safety gate violated code requirements, and again, marijuana was being sold there. The City received complaints about the operations there.

Shortly after the inspection, R Side again moved its business to 31760 Casino Drive (the Casino property), again without obtaining a new business license. The building permit for tenant improvements to the Casino property was made by an employee of Stahl; the employee falsely claimed to be the owner/builder/lessee. Construction work was begun before the permit was approved and issued, and the building permit was revoked and a stop work order posted. Subsequent inspections of the Casino property showed that marijuana was being sold there, and a generator was being used as an electrical power source in violation of the City’s electrical code. The City issued an order to vacate, but R Side continued its use and occupancy of the premises.

City law enforcement officers obtained a search warrant for the Casino property and other properties. The ensuing search resulted in the discovery of eight pounds of

marijuana and 378 marijuana plants. Three persons were arrested for conspiracy to sell marijuana in violation of the state's medical marijuana laws. Two days later, R Side reopened the store at the Casino property.

R Side filed a petition for writ of supersedeas and request for stay in this court. (Case no. E053545.) We granted the petition; ordering as follows: "We direct that the preliminary injunction issued by the superior court be stayed pending resolution of the appeal. This order is conditioned upon the prompt prosecution of the appeal by appellant. This order is also conditioned upon appellant's operation in compliance with all applicable code and safety regulations. Should respondent believe that appellant is not so operating, it may apply to the superior court for a new order enjoining operation until such regulations are complied with."

### III. DISCUSSION

#### **A. Request for Judicial Notice**

Plaintiff has requested this court to take judicial notice of various provisions of its municipal code, the California Building Code, and the California Electrical Code and of the California Secretary of State Business Entity Detail for plaintiff. We reserved ruling on the request for consideration with the merits of the appeal. We grant the request. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1488, fn. 3; Evid. Code, §§ 452, subds. (b) & (c), 459.)

## **B. Standard of Review**

“In deciding whether to issue a preliminary injunction, a court must weigh two ‘interrelated’ factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. [Citation.]” (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) On appeal, this court determines whether the trial court’s decision was an abuse of discretion. (*Ibid.*) To the extent the trial court’s assessment of the likelihood of success on the merits depends on legal rather than factual questions, our review is de novo. (*O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463.)

## **C. Preemption**

R Side contends that the City’s municipal code provisions prohibiting the operation of medical marijuana dispensaries in the City were preempted by state law.

On May 6, 2013, the California Supreme Court issued its opinion in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, review granted January 18, 2012, S198638. The court held that “the CUA and the MMP do not expressly or impliedly preempt Riverside’s zoning provisions declaring a medical marijuana dispensary, as therein defined, to be a prohibited use, and a public nuisance, anywhere within the city limits.” (*Id.* at p. 752.)

That decision is binding on us and is dispositive of the preemption issues raised in the current appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450,

455.) The trial court did not abuse its discretion in issuing the preliminary injunction because R Side had no chance of success on the merits.

#### **D. Equal Protection**

R Side further contends the City’s ban on medical marijuana collectives violated R Side’s constitutional rights, specifically, the right to equal protection of the laws because “[t]he City does permit pharmacies, for profit herbal or holistic medication companies (not distributing marijuana), or other institutions selling, for profit, substances with known or presumed medical value.”

In 2006 the City adopted Ordinance 1173, prohibiting medical marijuana dispensaries in all zones. A facial attack to a zoning ordinance must be brought within 90 days of the adoption of the ordinance. (Gov. Code, § 65009, subd. (c)(1)(B)<sup>4</sup>; *County of Sonoma v. Superior Court (Marvin’s Gardens Cooperative, Inc.)* (2010) 190 Cal.App.4th 1312, 1326.) In *County of Sonoma*, the operators of a medical marijuana dispensary brought an action against the county to challenge the ordinance that governed the zoning of such dispensaries. The trial court sustained the operators’ challenge on the ground that the ordinance was discriminatory in nature, and the county brought a petition for writ of mandate. The appellate court held that the challenge to the ordinance was a facial

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<sup>4</sup> “(c)(1) Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision: [¶] . . . [¶]

“(B) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.” (Gov. Code, § 65009, subd. (c)(1)(B).)

challenge that was required to be brought within 90 days of the effective date of the ordinance. (*Id.* at p. 1326; see also *Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, 259-260 [equal protection challenge to local zoning ordinance was facial in nature and subject to 90-day limitations period of Gov. Code, § 65009, subd. (c)(1)(B)].)

Here, similarly, we conclude R Side’s facial attack on the City’s ordinance was barred under Government Code section 65009, subdivision (c)(1)(B).

IV. DISPOSITION

The judgment is affirmed. Costs are awarded to the City.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.