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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF PALM SPRINGS,

Plaintiff and Respondent,

v.

THE HOLISTIC COLLECTIVE et al.,

Defendants and Appellants.

E053736

(Super.Ct.No. INC084561)

OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge.
Affirmed.

Law Offices of J. David Nick and J. David Nick for Defendants and Appellants.

Woodruff, Spradlin & Smart, APC, Jason M. McEwen and Jennifer L. Radaich for
Plaintiff and Respondent.

I

INTRODUCTION

In October 2008, The Holistic Collective and Tom Conway Trust (collectively,

THC) began operating a medical marijuana dispensary (MMD),¹ which THC claims is a collective.² THC's collective is located in the City of Palm Springs (Palm Springs), within the city's retail business zoning district (C-1). In March 2009, Palm Springs adopted Ordinance 1758, which included approval of Palm Springs Zoning Code section 93.22.00,³ which permitted only two medical marijuana collectives and/or cooperatives within the city, and restricted their locations to areas zoned C-M, M-1, or M-2 (manufacturing/service/commercial zones). (P.S.Z.C. § 93:22.00, subd. F.) Thereafter, Palm Springs brought an action against THC, seeking to recover civil penalties against THC and injunctive relief to close down THC's collective. THC appeals from a judgment entered in favor of Palm Springs, after the trial court granted Palm Springs's motion for summary judgment.

THC contends Palm Springs's ordinance regulating MMD's throughout Palm Springs is preempted by state law; specifically, the Compassionate Use Act (CUA)

¹ When referring to MMD's in this opinion, we use the term MMD broadly to include cooperatives, collectives, and dispensaries, despite recognized differences that exist between them.

² It has not been established that THC was operating a collective, as opposed to a dispensary or cooperative. Although THC refers to its operation as a collective, the facts in the record indicate it was, most likely, a dispensary. Since, for purposes of this decision, whether THC was operating a collective, cooperative or dispensary, is not dispositive, we will simply refer to it as an MMD, without making a determination as to the actual nature of the operation.

³ The Palm Springs Zoning Code is referred to in this opinion as P.S.Z.C.

(Health & Saf. Code, § 11362.5)⁴ and the Medical Marijuana Program (MMP) (§§ 11362.7-11362.83). THC also argues that Palm Springs’s ordinance violates state guarantees of equal protection under the California Constitution (Cal. Const. art. I, § 7). We conclude Palm Springs’s ordinance restricting the number and location of MMD’s is not preempted by state law. We also conclude Palm Springs’s ordinance does not unconstitutionally discriminate against qualified medical marijuana users and MMD’s, and affirm the judgment.⁵

II

FACTS AND PROCEDURAL BACKGROUND

Although judgment was entered after the trial court granted Palm Springs’s unopposed motion for summary judgment, THC is challenging the trial court’s earlier ruling denying THC’s own summary judgment motion. Palm Springs’s summary judgment motion and the order granting the motion are not included in the record on appeal. The trial court register of actions states that Palm Springs’s summary judgment motion was granted for the same reasons stated in the ruling denying THC’s summary judgment motion and also based on *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864 (*Hill*). THC and Palm Springs’s motions for summary judgment

⁴ Unless otherwise noted, all statutory references are to the Health and Safety Code.

⁵ Palm Springs requests judicial notice of appellants’ opening brief, filed by attorney J. David Nick, in the case of *City of Riverside v. Inland Empire Patient’s Health & Wellness Center, Inc.* (2011) 200 Cal.App.4th 885, 891, review granted Jan. 18, 2012, S198638. Palm Springs’s unopposed request for judicial notice, filed on December 15, 2011, is granted. (Evid. Code, § 452, subd. (d)(1) and § 453.)

were, in effect, cross-motions for summary judgment. Under such circumstances, it is appropriate for this court to review the ruling on THC's motion for summary judgment on the merits. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 836.) Because THC is challenging the trial court's ruling denying THC's motion for summary judgment, the following summary of undisputed facts is based on facts from evidence supporting THC's motion and Palm Springs's opposition.⁶

Tom Conway Trust owns the real property where THC's MMD is located, and has owned the property since 1999. THC has leased the property from the Tom Conway Trust and operated its MMD since October 2008. The property includes residential units. At the facility, THC provides medical marijuana to patients. The property where THC's MMD is located is within Palm Springs's C-1 zoning district. MMD's are not listed as a permissible use in the C-1 zone.

On March 4, 2009, Palm Springs enacted Ordinance 1758 pertaining to regulation and zoning of MMD's in Palm Springs. Effective April 3, 2009, Ordinance 1758 created P.S.Z.C. section 93.22.00, which provided a process for legal operation of MMD's in the commercial manufacturing (CM), service/manufacturing (M1), and manufacturing (M2) zones in Palm Springs. Ordinance 1758 provided for a 90-day application period for a permit to operate an MMD in Palm Springs. The ordinance also provided that no more than two MMD's could be maintained in Palm Springs at any time. THC's MMD is not

⁶ Most of THC's citations to the record in the appellant's opening brief are incorrect, which has impeded this court's ability to locate cited evidence and facts.

located in a zone where MMD's are permitted under P.S.Z.C. section 93.22.00 and THC failed to obtain a permit for operating an MMD in Palm Springs.

On March 4, 2009, Palm Springs filed a complaint against THC, and a month later Palm Springs filed a first amended complaint (complaint), seeking (1) abatement of a public nuisance, consisting of THC's MMD, and (2) civil penalties. The complaint alleges that on January 13, 2009, a Palm Springs code compliance officer visited THC's MMD in response to a complaint regarding the display of signage at the MMD. During the investigation, a THC employee stated that THC dispensed marijuana. On February 26, 2009, Palm Springs Police Detective Gil Fernandez purchased marijuana from THC upon presentation of a medical marijuana recommendation and identification card. Between December 12, 2008, and February 26, 2009, Fernandez monitored and inspected the property where THC's MMD was located. During that time and thereafter, THC maintained the property in violation of the P.S.Z.C. so as to constitute a public nuisance. THC failed to obtain a permit to operate the MMD in Palm Springs under P.S.Z.C. section 93.22.00. Palm Springs sought a permanent injunction authorizing Palm Springs to abate THC's MMD. Palm Springs also requested THC to be assessed civil penalties up to \$500 per violation, per day, for use of the MMD property as a public nuisance.

On May 20, 2010, THC filed a motion for summary judgment, arguing that Palm Springs's complaint had no merit because P.S.Z.C. section 93.22.00 was preempted by state law and violated THC's state and federal constitutional rights to equal protection. Palm Springs opposed THC's summary judgment motion. The trial court heard THC's summary judgment motion on December 22, 2010, and took the motion under

submission. On February 10, 2011, the trial court denied THC's summary judgment motion. That same day, the Court of appeal (Second District, Division One) issued its decision in *Hill, supra*, 192 Cal.App.4th at page 864. Because the *Hill* decision addressed issues raised in the instant case, the trial court vacated its ruling on THC's summary judgment motion and invited the parties to file briefs addressing the effect of the *Hill* decision on THC's motion. Only Palm Springs filed a supplemental brief.

On March 8, 2011, the trial court entered a written decision denying THC's summary judgment. The trial court concluded Palm Springs's MMD ordinance was not preempted by state law (the MMP) and did not violate the equal protection clauses of the state and federal constitutions. THC filed a petition for writ of mandate, challenging the ruling. This court summarily denied THC's writ petition.

Meanwhile on February 23, 2011, Palm Springs filed a motion for summary judgment. THC did not file opposition and neither party appeared for the hearing on the motion on April 22, 2011. The trial court granted Palm Springs's summary judgment motion and entered judgment on May 3, 2011.

III

STANDARD OF REVIEW

THC's contentions, challenging the trial court's ruling denying THC's summary judgment motion, are based on undisputed facts and are limited solely to questions of law. Whether analyzed under the review standard applicable to summary judgment motions or under the standard applicable to issues of law, our review is de novo and independent. (*Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th

1001, 1005 [“Summary judgment is properly granted when the papers show there is no triable issue of material fact, and the moving party is entitled to judgment as a matter of law. [Citation.] Issues of law, including statutory construction and the application of that construction to a set of undisputed facts, are subject to this court’s independent review.”].) Here, we review de novo the legal issues of whether P.S.Z.C. section 93.22.00 is preempted by state law (the MMP) and whether P.S.Z.C. section 93.22.00 violates THC’s equal protection rights under the California Constitution (Cal. Const. art. I, § 7).

IV

CALIFORNIA MEDICAL MARIJUANA LAWS

In determining whether the P.S.Z.C. regulating MMD’s is preempted by state law, we first consider the scope and purpose of California’s medical marijuana laws, specifically the CUA and MMP.

In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the “Compassionate Use Act” (§ 11362.5). 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 marijuana. The CUA is narrow in scope. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929-930; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1170 (*Kruse*).) It does not create a statutory or constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by MMD’s. (*Ross* at p. 926, *Kruse*, at pp. 1170-1171; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773-774.)

In 2003, the Legislature enacted the MMP (§§ 11362.7 – 11362.83). The purposes of the MMP 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.’ [Citation.]” (*Hill, supra*, 192 Cal.App.4th at p. 864.) The MMP “includes guidelines for the implementation of the Compassionate Use Act of 1996. 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.)” (*Hill, supra*, 192 Cal.App.4th at p. 864.)

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 p. 1171.) 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.”⁷ In addition, section 11362.765 provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

MMP section 11362.83, as amended in 2011, clarifies that cities have authority to enact local ordinances regulating MMD’s: “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.” This section originally stated: “Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.” (Stats. 2011, c. 196 (A.B. 1300).)

⁷ With the exception of section 11570, which is not a penal statute, 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). Section 11570 is not a penal statute. It provides for abatement of a nuisance created by premises used for manufacture, storage, or distribution of controlled substances and authorizes recovery of damages (§ 11570).

APPLICABLE PALM SPRINGS MUNICIPAL CODE PROVISIONS

THC contends the MMP preempts Palm Springs's zoning code, P.S.Z.C. section 93.22.00, regulating MMD's. P.S.Z.C. section 93.22.00 contains detailed medical marijuana regulations, including the following provision: "No more than two Medical Cannabis Cooperatives and/or Collectives shall be maintained or operated in the City at any time. In the event more than two cooperatives or collectives are eligible for regulatory permits under this Section, the City Council shall review and evaluate all qualified applications and will approve issuance of regulatory permits to the most qualified as determined through the Allotment Process described below." (P.S.Z.C. § 93.22.00, subd. F.) This provision was amended to increase the number of permissible cooperatives and/or collectives from two to three. THC's attorney informed the court at the hearing on THC's motion for summary judgment that the permissible number of MMD's at that time was three, not two.

P.S.Z.C. section 93.22.00, subdivision M provides that "In the event a qualified cooperative or collective that receives an allotment under Subsection I of this Section ceases to operate for any reason, the City Manager shall reopen the allotment process and provide an opportunity for new applications to be submitted. The time periods and process provided in Subsection I shall be applied to the review and consideration of applications and the allotment of a regulatory permit."

The city attorney summary for ordinance 1758, which includes P.S.Z.C. section 93.22.00, states that "This Ordinance establishes that medical cannabis cooperatives and

collectives that comply with the Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use issued by the Attorney General of the State of California in August 2008 are permitted uses in the C-M (commercial manufacturing), M-1 (service and manufacturing), and M-2 (manufacturing) Zones subject to compliance with the procedural and operational requirements of the Ordinance. The Ordinance imposes certain restrictions on operations, requires a regulatory permit to operate a medical cannabis cooperative or collective, provides that no more than two cooperatives or collectives will be allowed in the City, and sets forth a process for the evaluation and approval of applications.”

P.S.Z.C. sections 92.12.00 and 92.12.01 enumerate specific uses of property permitted within Palm Springs’s C-1 zoning district, where THC’s MMD is located. MMD’s are not listed as one of the permitted uses in C-1 zones. P.S.Z.C. section 92.12.02 states that “[a]ll uses and structures not permitted in Section 92.12.01 are deemed to be specifically prohibited.” P.S.Z.C. section 91:00.09(B) states that it is unlawful and a public nuisance to erect, maintain or use any property contrary to the P.S.Z.C. provisions.

Under the P.S.Z.C., THC’s MMD constitutes a zoning violation because it is located in a C-1 zoning district, in which MMD’s are prohibited, and THC is operating its MMD without a required permit. As a zoning violation, THC’s MMD is a per se nuisance, amenable to abatement and subject to civil damages.

VI

STATE LAW PREEMPTION

THC, the party claiming state law preempts local law, has the burden of demonstrating preemption. (*Kruse, supra*, 177 Cal.App.4th at p. 1168.) THC has not met this burden.

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*); *Kruse, supra*, 177 Cal.App.4th at p. 1168.) 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.” But “[i]f 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*, 177 Cal.App.4th at p. 1168; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.)

Here, there is no clear indication the Legislature intended for state law to preempt local restrictions on the number and location of MMD’s permitted within the city. We therefore presume that Palm Spring’s MMD zoning regulations are not preempted by state law. (*Kruse, supra*, 177 Cal.App.4th at p. 1169.) “[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*, 177 Cal.App.4th at p. 1169, quoting *Big Creek Lumber, supra*, 38 Cal.4th at p. 1149.) This court thus must presume, absent a clear indication to the contrary, that Palm Springs’s MMD regulations are *not* preempted by state law.

A. Federal Preemption of State Law

THC argues that under *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734 (*Qualified*), “[t]he 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*, 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 MMD’s.

We agree that under *Qualified*, federal preemption of state medical marijuana law is not a valid basis for upholding Palm Springs’s zoning ordinance restricting the number and location of MMD’s. The key issue in determining whether Palm Springs’s zoning ordinance is legally enforceable is whether state medical marijuana statutes, such as the CUA and MMP, preempt Palm Springs’s zoning ordinance limiting the number and location of MMD’s. If the local ordinance is not preempted by state law, the ordinance is valid and enforceable.

B. State Law Preemption of Local Law

We reject the proposition that local governments, such as Palm Springs, are precluded by the CUA and MMP from enacting zoning ordinances restricting the number and location of MMD's. Since Palm Springs's zoning ordinance does not duplicate, contradict, or enter an area fully occupied by state law, the ordinance is not preempted by state law.

1. 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*, at p. 1327; *O’Connell*, at p. 1068.)

Palm Springs's zoning ordinance regulating MMD's does not “mimic” or duplicate state law and can be reconciled with the CUA and MMP. Palm Springs's zoning ordinance regulating MMD's differs in scope and substance from the CUA and MMP. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 902.) The CUA is narrow in scope. (*Kruse, supra*, 177 Cal.App.4th at p. 1170.) It provides medical marijuana users and care providers with limited criminal immunity for use, cultivation, and possession of medical marijuana. The CUA does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by MMD's. (*Id.* at pp. 1170-1171.) The MMP merely implements the CUA and also provides immunity for those involved in

lawful MMD's. The CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's. The state statutes do not preclude local governments from regulating MMD's through zoning ordinances. The establishment and operation of MMD's is thus subject to local zoning and business licensing laws. There is nothing stated to the contrary in the CUA or MMP. The CUA and MMP do not expressly mandate that MMD's shall be permitted within every city and county, nor do the CUA and MMP prohibit cities and counties from limiting the number and location of MMD's. (*Kruse, supra*, 177 Cal.App.4th at pp. 1172-1173, 1175.) Although the MMP provides limited immunity to those using and operating lawful MMD's, the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations restricting the number and location of MMD's.

THC argues Palm Springs's MMD ordinance is invalid because it is inconsistent with the MMP, which provides limited immunity for operating and using MMD's. For instance, section 11362.775 of the MMP provides immunity for a nuisance claim arising from a violation of section 11570, which encompasses operating an MMD. Section 11570 provides civil nuisance liability: "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 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.**” (Emphasis added.)

As THC notes, section 11570, unlike the other statutes listed in section 11362.775, does not provide criminal sanctions. Nevertheless, THC argues that under *Qualified, supra*, 187 Cal.App.4th at pages 753-754, section 11362.775 provides immunity from a nuisance claim for operating an MMD in violation of section 11570. The court in *Qualified* states: “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’”

THC claims that section 11362.775 demonstrates the Legislature’s intent to bar cities from declaring MMD’s a nuisance and banning them. THC argues that, by enacting section 11362.775, which refers to section 11570, the Legislature expressly prohibits cities from bringing civil nuisance claims for operating MMD’s. (*People v. Urziceanu, supra*, 132 Cal.App.4th at p. 785.) Civil Code section 3482 provides that “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”

THC asserts that, because section 11362.775 exempts an operator of an MMD from liability for nuisance, Palm Springs’s zoning ordinance, regulating MMD’s is

preempted by state law. We disagree. Here, Palm Springs is prosecuting THC for a zoning violation, and not “solely on the basis” THC was operating an MMD. Although section 11362.775 allows lawful MMD’s, a municipality can limit or prohibit MMD’s through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. Protection under section 11362.775 and 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.) THC’s reliance on section 11362.775 and Civil Code section 3482 is misplaced since, here, the Legislature did not expressly prohibit cities from enacting zoning regulations restricting the location and number of MMD’s or from bringing a nuisance action enforcing such ordinances. (*Kruse, supra*, 177 Cal.App.4th at pp. 1172-1173, 1175.) Palm Springs’s MMD zoning ordinance does not duplicate or contradict the CUA and MMP statutes.

2. *Expressly Occupying the Field of State Law*

Local legislation 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 MMP do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning MMD’s, to the exclusion of all local law. In *Kruse, supra*, 177 Cal.App.4th 1153, the court stated that the CUA did not expressly preempt the city’s zoning ordinance which temporarily prohibited MMD’s: “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

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 MMD's 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.'" (*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 MMP. 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 MMP do not expressly preempt Palm Springs’s zoning ordinance regulating MMD’s.

3. *Impliedly Occupying the Field of State Law*

Palm Springs’s zoning ordinance banning MMD’s is not impliedly preempted by state law since Palm Springs’s ordinance does not enter an area of law fully occupied by the CUA and MMP 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 Palm Springs MMD zoning ordinance 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 MMP “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.” (*Id.* 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.” (*Ibid.*)

THC cites *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 521, *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 293, *O’Connell, supra*, 41 Cal.4th at pages 1068-1069, and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103-104 for the proposition the MMP preempts Palm Springs’s MMD ordinance. These cases are factually inapposite. They

do not concern medical marijuana, the CUA, the MMP, or local ordinances regulating MMD's. While the cases address general preemption principles, they are not dispositive of the issues raised in the instant case regarding state law preemption of local regulation of MMD's.

THC also lists numerous state statutes relating to medical marijuana, which it argues demonstrate the MMP encompasses a comprehensive scheme intended to regulate just about every aspect of the administration of medical marijuana, including MMD's. We disagree. The CUA and MMP do not expressly or impliedly preclude cities from restricting the number and location of MMD's within their jurisdiction. Furthermore, the MMP provides immunity only for lawful MMD's, unlike THC's MMD, which has been operating in violation of Palm Springs's zoning ordinance and without a permit.

(b) State Law Tolerating Local Action

The CUA and MMP 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 MMP) expresses an intent to permit local regulation of MMD's, preemption by implication of legislative intent may not be found here. (*Kruse, supra*, 177 Cal.App.4th at p. 1176.) In *Kruse*, the court explained that the CUA and MMP 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).” (*Ibid.*)

After *Kruse, supra*, 177 Cal.App.4th 1153 and *Hill, supra*, 192 Cal.App.4th 861 were decided, the Legislature amended section 11362.83 to clarify that “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.” (§ 11362.83.) The court in *Hill, supra*, 192 Cal.App.4th 861 noted that, with regard to section 11362.83, “the Legislature showed it expected and intended that local governments adopt additional ordinances” regulating medical marijuana. (*Id.* at p. 868.) It is clear from section 11362.83, as amended, that the Legislature did not intend to fully occupy the area of law regulating MMD’s. Rather, the Legislature expressly stated in section 11362.83 that local government is authorized to adopt local ordinances regulating the location, operation, and establishment of MMD’s. We construe section 11362.83, as amended, to allow cities to restrict not only the location but also the number of permissible MMD’s within the city.

In addition, after *Kruse, supra*, 177 Cal.App.4th 1153 was decided, the Legislature also added section 11362.768. Section 11362.768, in part, states that: “(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.” As the *Hill* court noted, “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.” (*Hill, supra*, 192 Cal.App.4th at p. 868.) The *Hill* court added that a local government may zone where MMD’s are permissible (*id.* at p. 870) and apply nuisance laws to MMD’s 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 MMD’s and where the statutory scheme recognizes local regulation. (*Kruse, supra*, 177 Cal.App.4th at p. 1176.)

(c) Balancing Adverse Effects and Benefits of Local Law

THC has also not established the third indicium of implied legislative intent to “fully occupy” the area of regulating MMD’s. THC has not shown that any adverse effect on the public from Palm Springs’s MMD ordinance outweighs the possible benefit to the city. (*Kruse, supra*, 177 Cal.App.4th at p. 1169.) THC argues that allowing cities, such as Palm Springs, to restrict MMD’s would lead to nonuniform application of the law, with MMD’s concentrated in limited areas or not existing in entire regions of the state. We recognize that, as THC stresses, the Legislature intended in enacting the MMP

to promote uniform application of the CUA and enhance qualified patient access to medical marijuana through MMD's (§ 11362.7, Historical and Stat. Notes, 40, Pt. 2 West's Ann. Health & Saf. Code (2007) foll. § 11362.7, §§ 1 and 3 of Stats.2003, c. 875 (S.B.420)). Nevertheless, nothing in the CUA or MMP suggests that cities are required to accommodate the use of medical marijuana and MMD's, by precluding cities from limiting the location and number of MMD's within their jurisdiction. Nothing stated in the CUA and MMP precludes cities from enacting zoning ordinances as a means of regulating MMD's within their jurisdictions. Furthermore, those qualified patients who wish to use medical marijuana legally are not precluded from obtaining medical marijuana from the three legal MMD's that have been issued permits to legally operate MMD's in Palm Springs.

As concluded by the courts 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. [Citations.] "[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, supra*, 177 Cal.App.4th at p. 1176.) Palm Springs’s MMD ordinance in the instant case is even less restrictive than the ordinances in *Kruse* and *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 (*Naulls*), which impose temporary moratoriums banning MMD’s. Palm Springs’s MMD ordinance allows a limited number of MMD’s within its jurisdiction. Therefore any adverse effect of the ordinance does not outweigh the possible benefit to the city. (*Kruse, supra*, 177 Cal.App.4th at p. 1176.)

THC urges this court to disregard *Kruse, supra*, 177 Cal.App.4th 1153 and *Naulls, supra*, 166 Cal.App.4th 418, because these cases are not dispositive for various reasons noted in *Qualified, supra*, 187 Cal.App.4th 734. Although we agree *Kruse* and *Naulls* are factually inapposite because they involve temporary MMD moratoriums, the analysis in *Kruse*, in particular, is instructive on general principles of preemption.

THC argues in its appellate brief that Palm Springs’s “total ban on Appellant’s otherwise lawful conduct ‘contradicts state law’ ([*O’Connell, supra*, 41 Cal.4th at p. 1068]) because it is ‘inimical to and cannot be reconciled’ (*Id.*) with the Legislature’s paramount purpose of promoting ‘uniform’ application of the MMP and ‘enhance the access’ ‘through collective, cooperative cultivation projects’ to qualified patients and in essence contradicts state law by altogether banning what is permitted.” But Palm Springs’s ordinance is not a total ban. It allows a limited number of MMD’s within the city. Initially, Palm Springs authorized two MMD’s and later amended its ordinance to allow three. Palm Springs’s restriction on the location of MMD’s also does not constitute

a total ban of MMD's and is consistent with section 11362.83 of the MMP, which permits local government to regulate the location and establishment of MMD's.

The MMP's balanced legislation takes into consideration the desire of voters that state and federal government develop a safe and affordable plan for distribution of medical marijuana to needy qualified patients, while recognizing local governments' interests in exercising their police powers in regulating the distribution of medical marijuana in furtherance of maintaining a safe and law-abiding community. The MMP allows local government to regulate MMD's in accordance with the unique characteristics, needs, and public preferences of each community. Taking this into account, the MMP allows local government to regulate MMD's within its own jurisdiction, with MMD regulations inevitably differing among communities, but remaining consistent with the general provisions of the MMP.

We cannot say that Palm Springs's MMD ordinance, restricting the number and location of MMD's within its community, is inconsistent or conflicts with the provisions or purpose of the MMP. Palm Springs's MMD ordinance is by no means a total ban on MMD's. Because Palm Springs's MMD ordinance is not expressly or impliedly inconsistent with the CUA and MMP, it is not preempted by state law.

VII

EQUAL PROTECTION

THC contends P.S.Z.C. section 93.22.00 is not rationally related to any valid legislative purpose and therefore violates state constitution guarantees of equal protection (Cal. Const., art. I, § 7). THC argues P.S.Z.C. section 93.22.00 targets one segment of

society, qualified medical marijuana patients, whereas they should be treated the same as users of any other prescription medicine and MMD's should be permitted to operate in the same zoning districts as pharmacies.

We reject THC's equal protection challenge for the same reasons articulated in *Hill, supra*, 192 Cal.App.4th 861. First, an MMD is not "similarly situated" to a pharmacy. (*Id.* at p. 871.) As the court in *Hill* explained: "The concept of equal protection of the laws contemplates that entities 'similarly situated with respect to the legitimate purpose of the law receive like treatment.'[] [Citation.] Although under the Compassionate Use Act of 1996 and the Medical Marijuana Program, marijuana may, like a legal drug, be dispensed for medical purposes, MMD's and pharmacies are not 'similarly situated' for public health and safety purposes and therefore need not be treated equally.[]" (*Hill, supra*, 192 Cal.App.4th at p. 871.) This is because medical marijuana remains illegal under federal law. (*Id.* at p. 871, fn. 10.)

Second, local government has broad authority under its police power to enact ordinances relating to control its own land use, so long as there is no conflict with state law. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) Such an ordinance need only "bear some rational relationship to a conceivable legitimate state purpose." (*Rissenband v. Cory* (1984) 159 Cal.App.3d 410, 417.) It is presumed a land use ordinance is justified under the police power and promotes the public health, safety morals, and general welfare. (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460 (*Lockard*)). "It is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances,

when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power. [Citations.] In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances. [Citation.]” (*Ibid.*)

Although this court must consider whether the scheme of classification and districting is arbitrary or unreasonable, “the decision of the zoning authorities as to matters of opinion and policy will not be set aside or disregarded by the courts unless the regulations have no reasonable relation to the public welfare or unless the physical facts show that there has been an unreasonable, oppressive, or unwarranted interference with property rights in the exercise of the police power. [Citations.] The wisdom of the prohibitions and restrictions is a matter for legislative determination, and even though a court may not agree with that determination, it will not substitute its judgment for that of the zoning authorities if there is any reasonable justification for their action. [Citations.]” (*Lockard, supra*, 33 Cal.2d at p. 461.)

In the instant case, there is sufficient justification for Palm Springs to restrict the location and number of MMD’s operating within the city, since medical marijuana generally is an illegal drug and THC has not refuted the presumption that Palm Springs’s ordinance regulating MMD’s is a justifiable exercise of police power under such circumstances. As noted in *Hill, supra*, 192 Cal.App.4th at pages 871-872, “the County’s concern with dispensaries attracting an illegal resale market for marijuana would be justified in light of the use of marijuana for nonmedical purposes.” The *Hill* court concluded that, because this risk and other enumerated risks, “are not associated with the

location of pharmacies, the County had a rational basis for zoning MMD's differently than pharmacies.” (*Hill, supra*, 192 Cal.App.4th at p. 872.)

Likewise, here it is unrefuted that Palm Springs had a rational basis for adopting P.S.Z.C. section 93.22.00, which restricts the location of MMD's and limits the number of MMD's to three within Palm Springs. “In passing upon the validity of legislation it has been said that ‘the rule is well settled that the legislative determination that the facts exist which make the law necessary, must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice.’ [Citations.]” (*Lockard, supra*, 33 Cal.2d at p. 461, quoting *In re Miller* (1912) 162 Cal. 687, 696.) THC has not refuted the presumption that Palm Springs's ordinance is justified under the police power and promotes the public health, safety, morals, and general welfare (*Lockard, supra*, 33 Cal.2d at p. 460), nor has THC established that Palm Springs's ordinance is “is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted.” (*Lockard, supra*, 33 Cal.2d at p. 461.) THC's equal protection challenge lacks merit because there is a presumed rational basis for Palm Springs's ordinance limiting MMD's and THC has not refuted this presumption. Also, MMD's and pharmacies are not similarly situated.

VIII

DISPOSITION

The judgment is affirmed. Palm Springs is awarded its costs on appeal.

CODRINGTON
J.

We concur:

HOLLENHORST
Acting P.J.

RICHLI
J.