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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EVERGREEN HOLISTIC COLLECTIVE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

CITY OF LAKE FOREST,

Real Party in Interest.

G045179

(Super. Ct. No. 30-2009-00298887)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, David R. Chaffee, Judge. Petition granted.

D|R Welch and David R. Welch for Petitioner.

No appearance by Respondent.

Best Best & Krieger, Scott C. Smith, Jeffrey V. Dunn, Daniel S. Roberts
and Christopher D. Whyte for Real Party in Interest.

* * *

Evergreen Holistic Collective (Evergreen) challenges the trial court's order shuttering its medical marijuana distribution activities in April 2011 based on new legislation enacted in January 2011. (See Health & Saf. Code, § 11362.768; all further undesignated statutory references are to this code.) Specifically, section 11362.768, subdivision (b), provides: "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." The statute also provides, however, that it "shall apply only to" dispensaries that have "a storefront or mobile retail outlet which ordinarily requires a local business license." (*Id.*, subd. (e).) The City of Lake Forest (the City) concedes it does not ordinarily require a business license before any new business opens its doors, except for a few uses specified in its municipal code such as bingo and dance halls, massage parlors, and adult businesses, but not dispensaries or similar uses. Consequently, section 11362.768 by its terms does not apply. Nor has the City undertaken to regulate medical marijuana dispensaries as expressly provided for in section 11362.768, including more restrictive distancing requirements at a city's discretion. (§ 11362.768, subd. (f).) Absent any applicable distancing requirement, we must grant Evergreen's writ petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

The City filed its nuisance complaint against Evergreen and other dispensaries in December 2009 alleging a per se nuisance cause of action for violation of

zoning provisions that, according to the City, banned medical marijuana outlets by not expressly authorizing them as a permitted use. The City also alleged in a second cause of action that whether or not a dispensary function constituted a per se nuisance, Evergreen's use of its premises created an actual nuisance.

The City sought a preliminary injunction to shut down Evergreen and the other dispensaries. Opposing the City's motion, one of the dispensaries asserted its activities fell within a zoning category authorizing service businesses. Alternatively, the dispensaries argued they had not violated the City's municipal code because the City did not require a business license before a new enterprise opened its doors. They pointed to the City's website promoting the City as a business-friendly local government because "The City does not require businesses to obtain a business license in order to operate." The dispensaries also argued state medical marijuana law, including the Legislature's endorsement of cooperative or collective (§ 11362.775) distribution endeavors, prevented the City from banning dispensary activities as a public nuisance.

In May 2010, the trial court granted the City's request for a preliminary injunction, concluding a local government's ban on medical marijuana dispensaries sufficed to establish the dispensaries' property use constituted a per se nuisance. Evergreen and several other dispensaries appealed, and we recently determined that because state medical marijuana law preempts total local bans on medical marijuana dispensaries (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 (*Evergreen I*), the trial court erred in issuing its preliminary injunction on per se nuisance grounds. We therefore reversed the injunction and remanded the matter for further proceedings.

Meanwhile, during the pendency of the appeal in *Evergreen I*, the Legislature in January 2011 enacted section 11362.768, which provides that in zoning districts where a local government requires a business license, no medical marijuana dispensary with a storefront or mobile retail outlet may be located within 600 feet of a school. Based on this new enactment, the City in April 2011 sought a temporary restraining order (TRO), alleging Evergreen and other dispensaries were each located within 600 feet of a school. The City in its ex parte application made no suggestion it now or previously required a business license, nor did the City address the requirement in section 11362.768 that states: “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.*” (§ 11362.768, subd. (e), italics added.) The dispensaries noted this requirement in their written opposition.

Declining to hold a hearing, the trial court granted the City’s TRO request on April 22, 2011, and set an “Order to Show Cause re Preliminary Injunction” (OSC) for May 2, 2011, which was continued to May 13, 2011. Evergreen filed the instant writ to challenge the TRO and to contest any ensuing injunctive relief based on section 11362.768. On May 6, 2011, we issued a stay of any further trial court proceedings to enforce the April 22, 2011, order. The trial court held its preliminary injunction hearing on May 13 but, in light of our stay, took the matter under submission instead of issuing an order. We now turn to the merits of Evergreen’s writ petition.¹

¹ We noted in *Evergreen I* that the trial court there, which is the same trial court here, “found unpersuasive” at the *initial* preliminary injunction hearing the dispensaries’ argument they violated no municipal law “because the City did not require a business license The [trial] court explained that the City’s ‘zoning scheme

II

DISCUSSION

The City does not address whether section 11362.768 applies where, as here, it does not require a business license. We note that in a related pending writ petition argued together with this petition (*Lake Forest Wellness Center and Collective v. Superior Court* (Apr. 25, 2012, G045130) [nonpub. opn.]), the City contends section 11362.768, subdivision (e)'s ““storefront or mobile retail outlet which *ordinarily* requires a local business license”” language “cannot mean that a city must have a business license requirement for *illegal* marijuana facilities in order for the distancing statute to have effect.” (First italics in original, second italics added.) The City’s phrasing reveals its erroneous assumption. The City assumes medical marijuana dispensaries are necessarily illegal or that it may designate them so on a per se basis by its ban. But as we explained in *Evergreen I*, the Legislature and electorate have reached a contrary conclusion in state medical marijuana law, preempting total local bans on dispensaries. (*Evergreen I, supra*, 203 Cal.App.4th at pp. 1444-1452.) And a municipality may not rely on the illegality of marijuana under federal law to preempt state medical marijuana law. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 756-763.)

In any event, the City misreads section 11362.768 in another respect. The plain language of the statute makes clear that the Legislature’s 600-foot distancing radius

effectively regulates what is and is not allowed in the City of Lake Forest, thereby obviating the need for a business license requirement.” (*Evergreen I, supra*, 203 Cal.App.4th at p. 1428.) It may be that the trial court continued to believe the City’s implied ban on dispensaries obviated a business license requirement as a precondition for section 11362.768’s 600-foot distancing radius, despite express language to the contrary in that statute. In any event, we review the trial court’s ruling, not its stated or unstated rationale. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

is *not* triggered by a general ban on dispensaries that purports to render them illegal *per se*. To the contrary, section 11362.768 applies by its terms “only to” medical marijuana establishments “authorized by law.” (§ 11362.768, subd. (e).) A banned use is, by definition, not authorized by law, and therefore does not trigger the 600-foot requirement. The Legislature declined to make its 600-foot radius mandatory in the absence of a local business licensing requirement, presumably to allow for a measure of local control over dispensary regulation, including *more* restrictive requirements short of a total ban. (*Evergreen I, supra*, 203 Cal.App.4th at p. 1452; see § 11362.768, subd. (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 . . . dispensary”]; see also *id.*, subd. (g) [local governments may “regulate” dispensaries].)

In sum, the Legislature specified its 600-foot radius applies to otherwise legal dispensaries and is expressly conditioned on a local business license requirement. The City characterizes the licensing requirement as “illogical” but, as noted, the licensing predicate has a rational basis in affording local entities a measure of control over dispensaries and, in any event, it is not our purview to judge the wisdom, expediency, or policy of legislative acts. (*Evergreen I, supra*, 203 Cal.App.4th at p. 1433.)

III

DISPOSITION

The petition is granted. The trial court is directed to dissolve the TRO and its preliminary injunction OSC. Evergreen is entitled to its costs in this proceeding. Our interim stay is dissolved when the remittitur issues from this court.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.