CITY OF MARYSVILLE

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: June 24, 2013

<table>
<tr><td>AGENDA ITEM:
Planning Commission Recommendation Relating to an Ordinance Prohibiting the Establishment of Medical Cannabis Collective gardens and Medical Cannabis Dispensaries and Repealing the Moratorium Established by Ordinance 2889</td><td colspan="2">AGENDA SECTION:
New Business</td></tr>
<tr><td>PREPARED BY:
Gloria Hirashima, Chief Administrative Officer</td><td colspan="2">DIRECTOR APPROVAL:</td></tr>
<tr><td rowspan="2">ATTACHMENTS:
1. Draft Ordinance.
2. Staff memorandum dated 5/9/13
3. Planning Commission minutes dated 5/14/13
4. Court decisions relating to Medical Cannabis
5. Information on city of Kent ordinance
6. Ordinance 2867
7. Ordinance 2882
8. Ordinance 2889
9. Planning Commission minutes dated 6/11/13 will be provided in packet update, when available.</td><td colspan="2"></td></tr>
<tr><td>MAYOR</td><td>CAO</td></tr>
<tr><td>BUDGET CODE:</td><td colspan="2">AMOUNT:
$</td></tr>
</table>

DESCRIPTION:

The Planning Commission is recommending approval of an ordinance amending Marysville Municipal Code (MMC) Sections 22A.020.040; 22A.020.140; 22C.020.060; and 22C.020.070 (68). The ordinance will prohibit the establishment of medical cannabis collective gardens and dispensaries and repeal the existing moratorium on said facilities which expires on July 5, 2013.

The Planning Commission (PC) held a public hearing on the proposed regulations on June 11, 2013. The PC considered the information, took testimony and recommended approval of the proposed ordinance.

RECOMMENDED ACTION: **Recommend approval of the Planning Commission recommendation, and adoption of an ordinance prohibiting the establishment of medical cannabis collective gardens and dispensaries, and repealing Ordinance 2889.**
COUNCIL ACTION:

CITY OF MARYSVILLE
Marysville, Washington

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF MARYSVILLE, WASHINGTON AMENDING MARYSVILLE MUNICIPAL CODE (MMC) SECTIONS 22A.020.040; 22A.020.140; 22C.020.060; AND 22C.020.070(68) PROHIBITING THE ESTABLISHMENT OF MEDICAL CANNABIS COLLECTIVE GARDENS AND MEDICAL CANNABIS DISPENSARIES; REPEALING THE MORATORIUM ON MEDICAL MARIJUANA DISPENSARIES AND COLLECTIVE GARDENS; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, Initiative Measure No. 692, approved by the voters of Washington State on November 30, 1998 and now codified as chapter 69.51A RCW, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana (cannabis); and

WHEREAS, in 2011, the Washington State Legislature passed a bill (E2SSB 5073) to legalize the licensing of medical marijuana or cannabis dispensaries, production facilities, and processing facilities; and

WHEREAS, on April 29, 2011, Governor Gregoire vetoed portions of E2SSB 5073 that would have provided the legal basis for legalizing and licensing medical marijuana or cannabis dispensaries, processing facilities and production facilities; and

WHEREAS, E2SSB 5073, as approved, further authorized cities to adopt and enforce zoning requirements regarding production and processing of medical cannabis; and

WHEREAS, Cannabis remains a controlled substance under the Controlled Substances Act, 21 U.S.C. Ch. 13 and the U.S. Department of Justice and United States Attorneys in the State of Washington have continued to maintain that cannabis (marijuana) is illegal to posess, distribute, dispense or manufacture under federal law; and

WHEREAS, MMC 22A.010.040(3) provides that all land uses and development authorized by Title 22 MMC shall comply with all other regulations and or requirements of Title 22 as well as any other applicable local, State or Federal law; and

WHEREAS, the City Council adopted Ordinance 2867, a six month moratorium and interim regulation prohibiting the establishment of medical cannabis dispensaries collective gardens and the licensing and permitting thereof on July 19, 2011. The City Council adopted Ordinance 2882, extending the moratorium established in Ordinance 2867 for an additional six (6) months from the date of expiration of Ordinance 2867. The City Council adopted Ordinance 2899, extending the moratorium an additional 12 months from the date of expiration of Ordinance 2882, providing adequate time for staff and Planning Commission to study and make a recommendation on the matter. Ordinance 2899 is set to expire on July 5, 2013.

WHEREAS, the City Council finds and determines that such amendments authorized herein are not intended to regulate the individual use of cannabis for medical purposes by qualifying patients and designated providers as authorized pursuant to Chapter 69.51 RCW; and

WHEREAS, the City Council seeks to identify what changes in Title 22 MMC are necessary and or appropriate to clearly ban or prohibit collective gardens as that term is described in Engrossed Second Substitute Senate Bill 5073 approved by Governor Christine Gregoire on April 29, 2011; and

WHEREAS, as part of the process for the adoption of zoning regulations, the land use impacts of collective gardens must be identified; and

WHEREAS, many jurisdictions around the country that have approved medical marijuana uses have experienced numerous land use impacts, such as:

- Conversion of residential uses into marijuana cultivation and processing facilities, removing valuable housing stock in a community;
- Degrading neighborhood aesthetics due to shuttered up homes, offensive odors, increased night-time traffic, parking issues, loitering from potential purchasers looking to buy from a collective member;
- Environmental damages from chemicals being discharged into surrounding and off-site soil and storm and sanitary sewer systems;
- Serious risk of fire hazard due to overload service connections used to operate grow lights and fans;
- Improper ventilation leading to high levels of moisture and mold;
- Illegal structural modifications; and
- Criminal issues such as home invasions, burglaries of medical marijuana facilities, theft and property damage; and

WHEREAS, the Planning Commission discussed the above-referenced amendment during public meetings held on May 14, 2013; and

WHEREAS, after providing notice to the public as required by law, on June 11, 2013, the Marysville Planning Commission held a Public Hearing on proposed amendments to the City's development regulations; and

WHEREAS, on June 11, 2013, the Marysville Planning Commission made a Recommendation to the City Council recommending the adoption of the proposed amendments to the City's development regulations; and

WHEREAS, at a public meeting on June 24, 2013, the Marysville City Council reviewed and considered the Marysville Planning Commission's Recommendation and proposed amendments to the City's development regulations; and

WHEREAS, the City of Marysville has submitted the proposed development regulation revisions to the Washington State Department of Commerce on April 15, 2013, seeking expedited review under RCW 36.70A.160(3)(b) in compliance with the procedural requirement under RCW 36.70A.106; and

WHEREAS, the amendments to the development regulations are exempt from State Environmental Policy Act review under WAC 197-11-800(19);

WHEREAS, the City Council has considered both the direct and incidental land use, law enforcement and public safety impacts of collective gardens, cannabis dispensaries, and is aware of the issues and impacts encountered in other cities that allow cannabis collective gardens and/or dispensaries; and

WHEREAS, the Marysville City Council has determined that Medical Cannabis Collective Gardens "marijuana", is in conflict with current Federal law which recognizes marijuana as a controlled substance; and

WHEREAS, the Marysville City Council has determined and the intent and purpose of this Ordinance is that Medical Cannibus Collective Gardens and Medical Cannabis Dispensaries shall not be permitted in the City of Marysville.

THE CITY COUNCIL OF THE CITY OF MARYSVILLE, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. MMC 22A.020.040 is hereby amended by amending Section "C" definitions to add the following definition:

> "Cannabis" means all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. For the purposes of this definition, "cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted there from, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. The term "cannabis" includes cannabis products and useable cannabis.

Section 2. MMC 22A.020.140 is hereby amended by amending Section "M" definitions to add the following definitions:

> "Medical marijuana (Cannabis) dispensary" or "dispensary" means any facility or location where medical marijuana is grown, made available to and/or distributed by or to two or more of the following: a primary caregiver, a qualified patient, or a person with an identification card.
>
> "Medical marijuana (Cannabis) collective gardens" or "collective garden" means a garden where qualifying patients engage in the production, processing, and delivery of cannabis for medical use as set forth in chapter 69.51A RCW and subject to the limitations therein and in this ordinance."
>
> "Miscellaneous Health" Establishments primarily engaged in providing health and allied services, including but not limited to physical and occupational therapists; blood banks; blood donor stations; medical photography and art; osteoporosis centers; kidney dialysis centers; sperm banks; etc.

Section 3. MMC Section 22C.020.060 table entitled 'Permitted uses' Commercial, Industrial, Recreation and Public Institution Zones is hereby amended to add a Miscellaneous Health land use category as follows:

Specific Land Use	NB	CB	GC	DC	MU	BP	LI	GI	REC	P/I
Health Services:										
Medical/dental clinic	P	P	P	P	P					P
Hospital		P	P	P	C					C
Miscellaneous Health	P(68)	P (68)	P(68)	P(68)	P(68)					P(68)

Section 4. MMC Section 22C.020.070 entitled "Permitted uses – Development conditions" is hereby amended to add a new footnote 68 which shall read as follows:
(68) Excepting "marijuana (cannabis) dispensaries" and "marijuana (cannabis) collective gardens" as those terms are defined or described in this code and/or under state law, such facilities and/or uses are prohibited in all zoning districts of the City of Marysville.

Section 5. Severability. If any section, subsection, sentence, clause, phrase or work of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality thereof shall not affect the validity or constitutionality of any other section, subsection, sentence, clause, phrase or word of this ordinance.

PASSED by the City Council and APPROVED by the Mayor this _____ day of

_____, 2013.

CITY OF MARYSVILLE

By: _____
JON NEHRING, MAYOR

Attest:

By: _____
SANDY LANGDON, CITY CLERK

Approved as to form:

By: _____
GRANT K. WEED, CITY ATTORNEY

Date of Publication: _____

Effective Date: _____

COMMUNITY DEVELOPMENT DEPARTMENT
80 Columbia Avenue • Marysville, WA 98270
(360) 363-8100 • (360) 651-5099 FAX

MEMORANDUM

DATE: **May 9, 2013**

TO: **Planning Commission**

FROM: **Cheryl Dungan, Senior Planner**

RE: **Medical Cannabis Draft Regulations**

INTRODUCTION

Initiative Measure No. 692, approved by the voters of Washington State in November, 1998 and now codified as chapter 69.51A RCW, created an affirmative defense for 'qualifying patients' to the charge of possession of marijuana (cannabis). The proposed amendments do not intend to regulate the individual use of cannabis for medical reasons by qualifying patients and designated providers as authorized pursuant to Chapter 69.51 RCW.

In April 2011, the state legislature passed E2SSB 5073, which allows "medical cannabis collective gardens in Washington State. Furthermore, the bill allows local jurisdictions to zone, license, and regulate medical cannabis grown in collective gardens.

On July 19, 2011, the City Council passed Ordinance 2867, establishing a six month moratorium and interim regulations prohibiting the establishment of medical cannabis dispensaries collective gardens and the licensing and permitting thereof. Ordinance 2882, which was effective on 12/25/2011 extended the six month moratorium to July 5, 2012, the Council then adopted Ordinance 2899 extending the moratorium an additional 12 months providing adequate time for staff to study and make a recommendation on the matter. Ordinance 2899 is set to expire on July 5, 2013.

State law is currently in conflict with Federal law regarding the issue. Cannabis remains a controlled substance under the Controlled Substances Act, 21 U.S.C. Ch 13 and the U.S. Department of Justice and United States Attorneys in the State of Washington have continued to maintain that cannabis (marijuana) is illegal to possess, distribute, dispense or manufacture under Federal law.

MMC 22A.010.040(3) provides that all land uses and development authorized by Title 22 MMC shall comply with all other regulations and or requirements of Title 22 as well as any other applicable local, State, or Federal law.

To date, the City's code does not address the issue. To protect the City from person(s) who may seek to take advantage of any ambiguity or uncertainty in the City's code, regulations are recommended below that clearly prohibit collective gardens and medical cannabis dispensaries. Additionally, many jurisdictions around the country that have approved medical marijuana uses have experienced numerous land use impacts, such as:

- Conversion of residential uses into marijuana cultivation and processing facilities, removing valuable housing stock in a community;
- Degrading neighborhood aesthetics due to shuttered up homes, offensive odors, increased night-time traffic, parking issues, loitering from potential purchases looking to buy from a collective member;
- Environmental damages from chemicals being discharged into surrounding and off-site soil and storm and sanitary sewer systems;
- Serious risk of fire hazard due to overload service connections used to operate grow lights and fans;
- Improper ventilation leading to a high level of moisture and mold;
- Illegal structural modifications; and
- Criminal issues such as home invasions, burglaries of medical marijuana facilities, theft and property damage.

PROPOSED CODE AMENDMENTS

MMC 22A.020.040 is hereby amended by amending Section "C" definitions to add the following definition:

"Cannabis" means all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. For the purposes of this definition, "cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted there from, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. The term "cannabis" includes cannabis products and useable cannabis.

MMC 22A.020.140 is hereby amended by amending Section "M" definitions to add the following definitions:

"Medical marijuana (Cannabis) dispensary" or "dispensary" means any facility or location where medical marijuana is grown, made available to and/or distributed by or to two or more of the following: a primary caregiver, a qualified patient, or a person with an identification card.

"Medical marijuana (Cannabis) collective gardens" or "collective garden" means a garden where qualifying patients engage in the production, processing, and delivery of cannabis for medical use as set forth in chapter 69.51A RCW and subject to the limitations therein and in this ordinance."

"Miscellaneous Health" Establishments primarily engaged in providing health and allied services, including but not limited to physical and occupational therapists; blood banks; blood donor stations; medical photography and art; osteoporosis centers; kidney dialysis centers; sperm banks; etc.

MMC Section 22C.020.060 table entitled 'Permitted uses' Commercial, Industrial, Recreation and Public Institution Zones is hereby amended to add a Miscellaneous Health land use category as follows:

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Hospital		P	P	P	C					C
Miscellaneous Health	P(68)	P (68)	P(68)	P(68)	P(68)					P(68)

MMC Section 22C.020.070 entitled "Permitted uses – Development conditions" is hereby amended to add a new footnote 68 which shall read as follows:
(68) Excepting "marijuana (cannabis) dispensaries" and "marijuana (cannabis) collective gardens" as those terms are defined or described in this code and/or under state law, such facilities and/or uses are prohibited in all zoning districts of the City of Marysville.

Attached for Planning Commission consideration are two recent court decisions upholding a City's right to use traditional land use regulations and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana.

Staff recommends the Planning Commission set a public hearing date to consider the proposed code amendments for June 10th, 2013.

Exhibit 3

DRAFT

PLANNING COMMISSION MINUTES

May 14, 2013 **7:00 p.m.** **City Hall**

CALL TO ORDER

Chair Leifer called the May 14, 2013 meeting to order at 7:02 p.m. noting no one present in the audience.

Marysville

Chairman:	Steve Leifer
Commissioners:	Roger Hoen, Jerry Andes, Kelly Richards, Kay Smith, Steven Lebo, Marvetta Toler
Staff:	Senior Planner Cheryl Dungan
Absent:	None

APPROVAL OF MINUTES: April 23, 2013

Motion made by Commissioner Kay Smith, seconded by Commissioner Richards, to approve the minutes as presented. **Motion** passed (6-0) with Commissioner Toler abstaining.

AUDIENCE PARTICIPATION

NEW BUSINESS

Wireless Communication Facility Prohibition in the Downtown Master Plan

Senior Planner Cheryl Dungan explained that in 2009 the City adopted the Downtown Master Plan in order to establish guidelines to help development and redevelopment to promote the City's goal of revitalizing the downtown. Currently, cell towers up to 140 feet tall are allowed in the Downtown Planning Area. It is staff's recommendation to the Planning Commission that wireless communication facilities be prohibited in the downtown planning area for aesthetic purposes. Senior Planner Dungan explained that the City recently contracted with a consultant for the downtown waterfront plan who had

stressed the importance of the nice vista. Allowing cell towers in that area could interfere with those valuable views.

Commissioner Andes asked if there are any towers in that area currently. Senior Planner Dungan replied that there are not, but there has been some interest recently.

Commissioner Hoen asked if anyone has ever tried to force the cell phone providers to share towers. Senior Planner Dungan explained that the City's code requires that they look at co-locating towers first.

Chair Leifer wondered if this could be revisited in the future if it becomes necessary to have cell towers in that area. Senior Planner Dungan replied that the code could be revisited in the future if necessary.

Motion made by Commissioner Toler, seconded by Commissioner Smith, to approve the staff's recommendation to forward the proposed code amendments prohibiting Wireless Communication Facilities in the Downtown Area Master Plan. **Motion** passed unanimously (7-0).

Draft Medical Cannabis Collective Regulations – Workshop

Senior Planner Dungan stated that this only pertains to medical marijuana regulations. She discussed the current regulations and explained that the City wants to create a new designation for accessory medical uses which would prohibit the medical cannabis dispensaries and collective gardens and limit medical marijuana to one patient, one provider.

Chair Leifer expressed some concern about the fact that the proposed regulations are not in compliance with federal law. Senior Planner Dungan explained that this has gone through the City Attorney's office, and there have been a couple of test cases in the courts. So far the courts are upholding the cities' ability to have police power and to choose whether or not to allow medical marijuana collective gardens and dispensaries in their cities. Chair Leifer wondered about implications of going contrary to the federal laws. Senior Planner Dungan concurred that that was a consideration. She noted that the police are in full support of the proposed regulations.

Commissioner Hoen commented that the state will probably be developing new rules for marijuana sale and use. He noted that those new rules could potentially be in conflict with these regulations and wondered if it might make sense to wait. Senior Planner Dungan explained that the City has already extended this for two years and is about at the point where it could be opening itself up to some liability for putting off adopting regulations. She discussed some differences between medical marijuana and retail and noted that there are significant differences between those regulations. She acknowledged that the City will be discussing the retail aspect after the state finalizes its regulations. Commissioner Toler commented that Colorado has had a lot of issues with robberies and dangerous situations surrounding their dispensaries. Senior Planner Dungan concurred that cities that have adopted these regulations have seen an

increase in crime and other issues related to marijuana. Staff is recommending a public hearing be set for June 11 so it can get to the Council before the end of June and before the expiration of the latest moratorium on July 5.

Chair Leifer requested legal advice on this as it would be contrary to federal law. Senior Planner Dungan explained that Grant Weed's office has reviewed this and supports it. She reiterated that the courts are giving cities the right to choose. She further explained that staff, the City Attorney, and the Police Department are all in full support of this and would like to see it move forward.

Commissioner Hoen asked about staff's expectations for public attendance at the hearing. Senior Planner Dungan was not sure, but she noted that the police would probably attend. She said she wasn't expecting a huge crowd. She thought that perhaps they would move on to other cities that are more lenient in this regard.

Commissioner Hoen commented that from what he has heard it sounds like legalized marijuana will be more expensive than illegal marijuana.

Motion made by Commissioner Richards, seconded by Commissioner Toler, to set a public hearing for June 11 to consider the proposed code amendments regarding marijuana. **Motion** passed unanimously (7-0).

COMMENTS FROM COMMISSIONERS

CITY COUNCIL AGENDA ITEMS AND MINUTES

ADJOURNMENT

Motion made by Commissioner Lebo, seconded by Commissioner Richards, to adjourn at 7:29 p.m. **Motion** passed unanimously.

NEXT MARYSVILLE MEETING:

June 11, 2013

_____

Laurie Hugdahl, Recording Secretary

Filed 5/6/13

IN THE SUPREME COURT OF CALIFORNIA

CITY OF RIVERSIDE, Plaintiff and Respondent, v. INLAND EMPIRE PATIENTS HEALTH AND WELLNESS CENTER, INC., et al., Defendants and Appellants.	S198638 Ct.App. 4/2 E052400 Riverside County Super. Ct. No. RIC10009872

The issue in this case is whether California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana. We conclude they do not.

Both federal and California laws generally prohibit the use, possession, cultivation, transportation, and furnishing of marijuana. However, California statutes, the Compassionate Use Act of 1996 (CUA; Health & Saf. Code, § 11362.5,[1] added by initiative, Prop. 15, as approved by voters, Gen. Elec. (Nov. 5, 1996)) and the more recent Medical Marijuana Program (MMP; § 11362.7 et seq., added by Stats. 2003, ch. 875, § 2, pp. 6422, 6424), have removed certain state law obstacles from the ability of qualified patients to obtain and use marijuana for legitimate medical purposes. Among other things, these statutes exempt the "collective[ ] or cooperative[ ] cultiva[tion]" of medical

1 All unlabeled statutory references are to the Health and Safety Code.

marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities. (§ 11362.775.)

The California Constitution recognizes the authority of cities and counties to make and enforce, within their borders, "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed.

In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a "[m]edical marijuana dispensary" — "[a] facility where marijuana is made available for medical purposes in accordance with" the CUA (Riverside Municipal Code (RMC), § 19.910.140)[2] — is a prohibited use of land within the city and may be abated as a public nuisance. (RMC, §§ 1.01.110E, 6.15.020Q, 19.150.020 & table 19.150.020 A.) The City's ordinance also bans, and declares a nuisance, any use that is prohibited by federal or state law. (RMC, §§ 1.01.110E, 6.15.020Q, 9.150.020.)

Invoking these provisions, the City brought a nuisance action against a facility operated by defendants. The trial court issued a preliminary injunction against the distribution of marijuana from the facility. The Court of Appeal affirmed the injunctive order. Challenging the injunction, defendants urge, as they did below, that the City's total ban on facilities that cultivate and distribute medical marijuana in compliance with the CUA and the MMP is invalid.

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[2] The RMC can be examined at <http://www.riversideca.gov/municode> (as of May 6, 2013).

Defendants insist the local ban is in conflict with, and thus preempted by, those state statutes.

As we will explain, we disagree. We have consistently maintained that the CUA and the MMP are but incremental steps toward freer access to medical marijuana, and the scope of these statutes is limited and circumscribed. They merely declare that the conduct they describe cannot lead to arrest or conviction, or be abated as a nuisance, as violations of enumerated provisions of the Health and Safety Code. Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument, and must affirm the judgment of the Court of Appeal.

LEGAL AND FACTUAL BACKGROUND

A. Medical marijuana laws.

The federal Controlled Substances Act (CSA; 21 U.S.C. § 801 et seq.) prohibits, except for certain research purposes, the possession, distribution, and manufacture of marijuana. (*Id.*, §§ 812(c) (Schedule I, par. (c)(10)), 841(a), 844(a).) The CSA finds that marijuana is a drug with "no currently accepted medical use in treatment in the United States" (*id.*, § 812(b)(1)(B)), and there is no medical necessity exception to prosecution and conviction under the federal act (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 490).

California statutes similarly specify that, except as authorized by law, the possession (§ 11357), cultivation, harvesting, or processing (§ 11358), possession for sale (§ 11359), and transportation, administration, or furnishing (§ 11360) of marijuana are state criminal violations. State law further punishes one who

maintains a place for the purpose of unlawfully selling, using, or furnishing, or who knowingly makes available a place for storing, manufacturing, or distributing, certain controlled substances. (§§ 11366, 11366.5.) The so-called "drug den" abatement law additionally provides that every place used to unlawfully sell, serve, store, keep, manufacture, or give away certain controlled substances is a nuisance that shall be enjoined, abated, and prevented, and for which damages may be recovered. (§ 11570.) In each instance, the controlled substances in question include marijuana. (See §§ 11007, 11054, subd. (d)(13).)

However, California's voters and legislators have adopted limited exceptions to the sanctions of this state's criminal and nuisance laws in cases where marijuana is possessed, cultivated, distributed, and transported for medical purposes. In 1996, the electorate enacted the CUA. This initiative statute provides that the state law proscriptions against possession and cultivation of marijuana (§§ 11357, 11358) shall not apply to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical purposes upon the written or oral recommendation or approval of a physician. (§ 11362.5, subd. (d).)

In 2004, the Legislature adopted the MMP. One purpose of this statute was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(3), pp. 6422, 6423.) Accordingly, the MMP provides, among other things, that "[q]ualified patients . . . and the designated primary caregivers of qualified patients . . ., 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 [s]ection 11357 [possession], 11358 [cultivation, harvesting, and processing], 11359 [possession for sale], 11360 [transportation, sale, furnishing, or administration],

11366 [maintenance of place for purpose of unlawful sale, use, or furnishing], 11366.5 [making place available for purpose of unlawful manufacture, storage, or distribution], or 11570 [place used for unlawful sale, serving, storage, manufacture, or furnishing as statutory nuisance]." (§ 11362.775.)

The CUA and the MMP have no effect on the federal enforceability of the CSA in California. The CSA's prohibitions on the possession, distribution, or manufacture of marijuana remain fully enforceable in this jurisdiction. (*Gonzalez v. Raich* (2005) 545 U.S. 1.)

B. Riverside's ordinances.

As noted above, the Riverside ordinances at issue declare as a "prohibited use" within any city zoning classification (1) a "[m]edical marijuana dispensary" — defined as "[a] facility where marijuana is made available in accordance with" the CUA — and (2) any use prohibited by state or federal law. (RMC, §§ 19.150.020 & table 19.150.020 A, 19.910.140.) The RMC further provides that any condition caused or permitted to exist in violation of the ordinance is a public nuisance which may be abated by the city. (*Id.*, §§ 1.01.110E, 6.15.020Q.)

C. The instant litigation.

Since 2009, defendant Inland Empire Patients Health and Wellness Center, Inc. (Inland Empire), has operated a medical marijuana distribution facility in Riverside. Defendants Meneleo Carlos and Filomena Carlos (the Carloses) are the owners and lessors of the Riverside property on which Inland Empire's facility is located. Their mortgage on the property is financed by defendant East West Bancorp, Inc. (Bancorp). Defendant Lanny Swerdlow is the lessee of the property, and defendant Angel City West, Inc. (Angel), provides the property with management services. Swerdlow is also a registered nurse and the manager of an immediately adjacent medical clinic doing business as THCF Health and Wellness Center (THCF). Though THCF has no direct legal link to Inland Empire, the two

facilities are closely associated, and THCF provides referrals to Inland Empire upon patient request. Defendant William Joseph Sump II is a board member of Inland Empire and the general manager of Inland Empire's Riverside facility.

In January 2009, the planning division of Riverside's Community Development Department notified Swerdlow by letter that the definition of "medical marijuana dispensary" in Riverside's zoning ordinances "is an all-encompassing definition, referring to all three types of medical marijuana facilities, a dispensary, a collective and a cooperative," and that, as a consequence, "all three facilities are banned in the City of Riverside." In May 2010, the City filed a complaint against the Carloses, Bancorp, Swerdlow, Angel, THCF, Sump, and various Doe defendants for injunctive relief to abate a public nuisance. Inland Empire was later substituted by name for one of the Doe defendants. The complaint alleged that defendants were operating a "medical marijuana distribution facility" in violation of the zoning provisions of the RMC.[3]

Thereafter, the City moved for a preliminary injunction against operation of Inland Empire's facility.[4] After a hearing, the trial court granted the preliminary

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[3] The complaint asserted that defendants' facility was being operated within the city's business and manufacturing park zone, and that a "medical marijuana distribution facility" was a prohibited use within that zone. But the RMC in fact makes a "[m]edical marijuana dispensary" — the broadly defined phrase used in the ordinance — a prohibited use in *every* zone within the city (see RMC provisions cited above), and Riverside has never denied that such a facility is banned everywhere within the city.

[4] In its briefs, Inland Empire describes itself as "a not for profit California Mutual Benefit Corporation established for the sole purpose of forming an association of qualified individuals who collectively cultivate medical marijuana and redistribute [it] to each other." No party disputes this description. Moreover, all parties further appear to assume that Inland Empire distributed medical marijuana from an established business address. But the record contains few details about Inland Empire's actual operations. The only real clues appear in

(Footnote continued on next page.)

injunction, prohibiting the defendants and all persons associated with them, during the pendency of the action, from using, or allowing use of, the subject property to conduct "any activities or operations related to the distribution of marijuana."

The trial court found the case was controlled by *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 (*Kruse*), which held that cities may abate, as nuisances, uses in violation of their zoning and licensing regulations, and that

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(Footnote continued from previous page.)

declarations supporting and in opposition to the motion for preliminary injunction. In support of the motion, Riverside Police Officer Darren Woolley declared as follows: He visited the THCF clinic at 647 North Main Street, suite 1B, in Riverside, where he received a medical marijuana authorization. Thereafter, THCF's receptionist provided him with a list of "collective storefronts" in Riverside County. Inland Empire headed the list, and its address was stated as 647 North Main Street, suite 2A, in Riverside. Woolley asked if he was already at that address. The receptionist directed him to a location "right across the lot" and said he could "purchase [his] medicine" there. Woolley walked to suite 2A, presented his authorization, passed through security, and was directed to a room "with a large counter displaying marijuana food and drink products." He was introduced to a "runner" who said she would keep track of his selections and take them to the checkout area where he would pay for and receive his purchases. He was then "led to the rear of the [facility] that was separated into small stalls. Each of these stalls was manned by a different seller of marijuana products." Woolley purchased $40 worth of marijuana from one seller and $25 worth of hashish from another. He also bought an $8 marijuana brownie. On another occasion, he attended the "Farmer's Market" at Inland Empire, when "individual growers sell their product." On this latter day, Woolley purchased marijuana from two separate vendors.

In opposition to the motion, defendant Swerdlow insisted that THCF and Inland Empire were not connected. However, Swerdlow's declaration did not dispute Inland Empire's basic method of operation, as observed by Woolley. Indeed, Swerdlow stated that Inland Empire chose its location, coincidentally adjacent to THCF, "because of its low cost, large size, central location with plenty of parking and [because] it was located in an Industrial Warehouse zone and was not near any schools, churches, etc. . . ."

neither the CUA nor the MMP preempts local zoning and licensing regulation of facilities that furnish, distribute, or make available medical marijuana — including, in *Kruse* itself, a moratorium on all such facilities within city boundaries. Moreover, though the court insisted it was not holding that federal prohibitions on the possession, distribution, or cultivation of marijuana preempted state medical marijuana laws, it nonetheless concluded that Riverside "[could] use its . . . zoning regulations to prohibit the activity [of dispensing medical marijuana] especially given the conflict between state and federal laws."

The Court of Appeal affirmed the order. The appellate court agreed with defendants that the City could not assert *federal* preemption of *state* law as authority for its total ban on medical marijuana dispensing facilities. However, the court rejected defendants' argument that Riverside's zoning prohibition of such facilities was preempted by state law, the CUA and the MMP. In the Court of Appeal's view, Riverside's provisions do not duplicate or contradict the state statutes concerning medical marijuana, nor do they invade a field expressly or impliedly occupied by those laws.

We granted review. We now conclude the Court of Appeal's judgment must be affirmed.

DISCUSSION[5]

A. Principles of preemption.

As indicated above, "[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.) "Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7. . . . 'We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.' " (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 (*Big Creek Lumber Co.*), fn. omitted.) Consistent with this principle, "when local government regulates in an area over which it traditionally has 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." (*Id.*, at p. 1149; see *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93.)

However, local legislation that conflicts with state law is void. (E.g., *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams Co.*).) " 'A conflict exists if the local legislation " 'duplicates,

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[5] An amicus curiae brief on behalf of defendants has been submitted by Americans For Safe Access. Amicus curiae briefs on behalf of the City have been submitted by (1) the League of California Cities and the California State Association of Counties (League of California Cities et al.), (2) the California State Sheriffs' Association, the California Police Chiefs Association, and the California Peace Officers' Association (California State Sheriffs' Association et al.), and (3) the City of Los Angeles.

contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.]" (*Ibid.*)

"Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation.]

"Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.]

"Finally, 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 [citation], or when it 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.]" (*Sherwin-Williams Co., supra,* 4 Cal.4th 893, 897-898; see *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 860-861 (*Great Western Shows*); *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 188.)

The "contradictory and inimical" form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. (*Big Creek Lumber, supra,* 38 Cal.4th 1139, 1161; *Great Western Shows, supra,* 27 Cal.4th 853, 866; *Sherwin-Williams Co., supra,* 4 Cal.4th 893, 902.) Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws.

In addition, "[w]e have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' " (*Big Creek Lumber Co., supra*, 38 Cal.4th 1139, 1149, quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707.) " 'The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.' " (*Big Creek Lumber Co., supra*, at p. 1149, quoting *Gluck v. City of Los Angeles* (1979) 93 Cal.App.3d 121, 133.)

B. The CUA and the MMP do not preempt Riverside's ban.

When they adopted the CUA in 1996, the voters declared their intent "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" upon a physician's recommendation (§ 11362.5, subd. (b)(1)(A)), "[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" (*id.*, subd. (b)(1)(B)), and "[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 the substance (*id.*, subd. (b)(1)(C)).

But the operative steps the electorate took toward these goals were modest. In its substantive provisions, the CUA simply declares that (1) no physician may be punished or denied any right or privilege under state law for recommending medical marijuana to a patient (§ 11362.5, subd. (c)), and (2) two specific state statutes prohibiting the possession and cultivation of marijuana, sections 11357 and 11358 respectively, "shall not apply" to a patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal

medical use upon a physician's recommendation or approval (§ 11362.5, subd. (d)).

When it later adopted the MMP, the Legislature declared this statute was intended, among other things, to "[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified [medical marijuana] patients and their designated primary caregivers" in order to protect them from unnecessary arrest and prosecution for marijuana offenses, to "[p]romote uniform and consistent application of the [CUA] among the counties within the state," and to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats. 2003, ch. 875, § 1, subd. (b), pp. 6422, 6423).

Again, however, the steps the MMP took in pursuit of these objectives were limited and specific. The MMP established a program for issuance of medical marijuana identification cards to those qualified patients and designated primary caregivers who wish to carry them, and required responsible county agencies to cooperate in this program. (§§ 11362.71, subds. (a)-(d), 11362.715, 11362.72, 11362.735, 11362.74, 11362.745, 11362.755.) It provided that the holder of an identification card shall not be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana, within the amounts specified by the statute, except upon reasonable cause to believe the card is false or invalid or the holder is in violation of statute. (§ 11362.71, subd. (e); see § 11362.77, subd. (a).)

The MMP further specified that certain persons, including (1) a qualified patient, or the holder of a valid identification card, who possesses or transports marijuana for personal medical use, or (2) a designated primary caregiver who transports, processes, administers, delivers, or gives away, in amounts no greater than those specified by statute, marijuana for medical purposes to or for a qualified patient or valid cardholder "shall not be subject, on that sole basis, to criminal

liability" under section 11357 (possession of marijuana), 11358 (cultivation of marijuana), 11359 (possession of marijuana for sale), 11360 (sale, transportation, importation, or furnishing of marijuana), 11366 (maintaining place for purpose of unlawfully selling, furnishing, or using controlled substance), 11366.5 (knowingly providing place for purpose of unlawfully manufacturing, storing, or distributing controlled substance), or 11570 (place used for unlawful selling, furnishing, storing, or manufacturing of controlled substance as nuisance). (§ 11362.765, subd. (a).)

Finally, as indicated above, the MMP declared that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of [such persons], 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." (§ 11362.775, italics added.) However, an amendment adopted in 2010 declares that no medical marijuana "cooperative, collective, dispensary, operator, establishment, or provider," other than a licensed residential or elder medical care facility, 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," shall be located within 600 feet of a school. (§ 11362.768, subds. (a)-(e), as added by Stats. 2010, ch. 603, § 1.)

Our decisions have stressed the narrow reach of these statutes. Thus, in *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920 (*Ross*), a telecommunications company discharged an employee from his supervisory position after an employer-mandated drug test disclosed the presence of tetrahydrocannabinol, a chemical found in marijuana. The employee sued, urging that his termination for this reason violated both the state's Fair Employment and

Housing Act (FEHA) and public policy. The employee's complaint alleged that he ingested medical marijuana, as a qualified patient under the CUA, to alleviate his chronic back pain, but was nonetheless able to perform his duties satisfactorily. Hence, the complaint asserted, the employer was obliged, under the FEHA, to accommodate his disability by accepting his use of medical marijuana. The trial court sustained the employer's demurrer without leave to amend and dismissed the action.

The Court of Appeal affirmed, and we upheld the Court of Appeal's judgment. We noted that neither the CUA's findings and declarations, nor its substantive provisions, mention employment rights, except in their protection of physicians who recommend medical marijuana to patients.

The employee urged that such rights were implied in the voters' declaration of their intent in the CUA "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." (§ 11362.5, subd. (b)(1)(A).) We rejected this notion. As we observed, "[p]laintiff would read [this declaration] as if it created a broad right to use marijuana without hindrance or inconvenience, enforceable against private parties such as employers." (*Ross*, *supra*, 42 Cal.4th 920, 928.) On the contrary, we stated, "the only 'right' to obtain and use marijuana created by the [CUA] is the right of 'a patient, or . . . a patient's primary caregiver, [to] possess[] or cultivate[] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. [Citation.]" (*Ross*, *supra*, at p. 929.)

In reaching this conclusion, we emphasized the CUA's "modest objectives" (*Ross*, *supra*, 42 Cal.4th 920, 930), pointing out that the initiative's proponents had "consistently described the proposed measure to the voters as motivated" only "by the desire to create a narrow exception to the criminal law" for medical

marijuana possession and use under the circumstances specified. (*Id.*, at p. 929.) We endorsed the observation that " 'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.' " (*Id.*, at p. 930, quoting *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152.)

In *People v. Mentch* (2008) 45 Cal.4th 274 (*Mentch*), a defendant charged with cultivation and possession for sale of marijuana sought to raise the defense, among others, that he was immune from conviction as a "primary caregiver" protected by the CUA. Two witnesses testified they had medical marijuana recommendations and obtained their marijuana from the defendant, paying him in cash for their supplies. The defendant testified that he himself had a medical marijuana recommendation; had studied how to grow marijuana; had thereafter opened a "caregiving and consultancy business" to give people safe access to medical marijuana; and supplied medical marijuana to five patients. The defendant also stated that he took " 'a couple' " of patients to medical appointments "on a 'sporadic' basis," and that he provided shelter to one patient during a brief part of the time he was selling her marijuana. (*Mentch*, at p. 280.)

Finding insufficient evidence on the point, the trial court declined to provide a "primary caregiver" instruction, and the defendant was convicted as charged. The Court of Appeal reversed the convictions. The appellate court concluded that evidence the defendant grew medical marijuana for qualified patients, counseled them on how to grow and use medical marijuana, and occasionally took them to medical appointments was sufficient to warrant a "primary caregiver" instruction. (*Mentch*, *supra*, 45 Cal.4th 274, 281-282.)

We reversed the Court of Appeal. We first examined the CUA's definition of a "primary caregiver" as "the individual designated by [a qualified medical

marijuana patient] who has *consistently* assumed responsibility for the *housing, health, or safety* of that person." (§ 11362.5, subd. (e), italics added.) This language, we reasoned, "impl[ied]" an ongoing "caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need." (*Mentch, supra*, 45 Cal.4th 274, 286.) Further, we observed, the ballot arguments for Proposition 215, which became the CUA, suggested that a patient would be primarily responsible for noncommercially supplying his or her own medical marijuana, but that a "primary caregiver" should be allowed to act for a seriously or terminally afflicted patient who was too ill or bedridden to do so. Accordingly, we held that a person cannot establish "primary caregiver" status simply by showing he or she was chosen and used by a qualified patient to assist the patient in obtaining and ingesting medical marijuana. Instead, we concluded, a "primary caregiver" must prove, at a minimum, that he or she consistently provided care in such areas as housing, health, and safety, independent of any help with medical marijuana, and undertook such general caregiving duties before assuming responsibility for assisting with medical marijuana.

Alternatively, the defendant urged that the MMP, specifically section 11362.765, provides a defense against charges of cultivation and possession for sale to those who assist patients and primary caregivers in administering, or learning how to cultivate or administer, medical marijuana. By failing to so advise his jury, the defendant insisted, the trial court breached its sua sponte duty to instruct on any affirmative defense supported by the evidence.

We responded that the defendant's reading of the MMP was too broad. We explained that while the MMP "does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the

immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws." (*Mentch, supra*, 45 Cal.4th 274, 290.)

Moreover, we noted, section 11362.765 declares only that the specified groups of people engaged in the specified conduct shall not "on that sole basis" be subject to criminal liability under the specified laws. Hence, we determined, section 11362.765, subdivision (b)(3), which grants immunity from certain state marijuana laws to one who "provides assistance to a qualified patient or . . . primary caregiver, in administering medical marijuana to the . . . patient or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the . . . patient," affords the specified criminal immunities *only* for providing the described forms of assistance. This subdivision, we said, "does not mean [the defendant] could not be charged with cultivation or possession for sale on *any* basis . . . . " (*Mentch, supra*, 45 Cal.4th 274, 292, original italics.) On the contrary, "to the extent he went beyond the immunized range of conduct, i.e., administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law." (*Ibid.*) Because it was undisputed that the defendant "did much more than administer, advise, and counsel," we said, the MMP afforded him no defense, and no instruction was required. (*Mentch*, at p. 292.)

Similarly, the MMP provision at issue here, section 11362.775, provides only that when particular described persons engage in particular described conduct, they enjoy, with respect to that conduct, a limited immunity *from specified state marijuana laws*. As previously noted, section 11362.775 simply declares that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification

cards, who associate . . . 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" for the possession, furnishing, sale, cultivation, transportation, or possession for sale of marijuana, or for providing or maintaining a place for the manufacture, processing, storage, or distribution of marijuana. (Italics added; see *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785 (*Urziceanu*).)

Recognizing the limited reach of the CUA and the MMP, Court of Appeal decisions have consistently held that these statutes, by exempting certain medical marijuana activities — including the collective cultivation and distribution of medical marijuana under specified circumstances — from the sanctions otherwise imposed by particular state antimarijuana laws, do not preempt local land use regulation of medical marijuana collectives, cooperatives, and dispensaries, even when such regulation amounts to a total ban on such facilities within a local jurisdiction's borders.

Thus, in *Kruse*, *supra*, 177 Cal.App.4th 1153, the defendant's application for a business license to operate a medical marijuana dispensary was denied by Claremont's city manager in September 2006. The grounds cited were that such a facility was not a permitted use under Claremont's land use and development code. The denial letter advised the defendant he could appeal to the city council, and could also seek an amendment to the code. He did not seek such an amendment, and he began operating his facility on the day his permit was denied. Meanwhile, he filed an administrative appeal. Therein he urged that a code amendment was unnecessary because state law (i.e., the CUA and the MMP) rendered " '[a] medical marijuana caregivers collective . . . a legal but not conforming business anywhere in the state where it is not regulated.' " (*Kruse*,

supra, at p. 1160.) He further alleged that, before beginning operations, he had given the city notice and opportunity to adopt such regulations if it chose.

In late September 2006, while the administrative appeal was pending, the city adopted a 45-day moratorium on the issuance of any permit, variance, license, or other entitlement for operation of a medical marijuana dispensary within its boundaries. The city manager promptly advised the defendant that adoption of the moratorium rendered his appeal moot. Thereafter, the city extended the moratorium several times, ultimately for a period ending on September 10, 2008.

Defendant continued to operate his facility. After he ignored two cease and desist orders, he was cited, tried, convicted, and fined for operating without a business license in violation of city ordinances. Thereafter, he continued to operate despite the issuance of yet another cease and desist order and a succession of administrative citations. Accordingly, in January 2007, the city sued for injunctive relief to abate a public nuisance. The trial court issued a temporary restraining order, a preliminary injunction, and ultimately, in May 2008, a permanent injunction. Among its other conclusions of law, the court determined that the CUA did not preempt the city's moratorium on medical marijuana dispensaries, "because 'there is nothing in the text or history of the [CUA] that suggests that the voters intended to mandate that municipalities allow [such facilities] to operate within their city limits.' " (*Kruse*, *supra*, 177 Cal.App.4th 1153, 1162.)

On appeal, the defendant urged, inter alia, that the CUA and the MMP preempted the city's moratorium on medical marijuana dispensaries and precluded the city from denying permission to operate such a facility. The Court of Appeal rejected this and the defendant's other claims and affirmed the judgment.

On the issue of preemption, the appellate court first found no *express* conflict between the state medical marijuana statutes and the city's action. By

their terms, the Court of Appeal observed, the CUA and the MMP do no more than exempt specific groups and specific conduct from liability under particular criminal statutes.

Second, the Court of Appeal concluded, there was no *implied* preemption under either state statute. The court reasoned as follows: Neither provision addresses, much less covers, the areas of zoning, land use planning, and business licensing. The city's moratorium ordinance was not "inimical" to the state statutes, in that it did not conflict with those laws by requiring what they forbid or prohibiting what they require. Nor does the CUA or the MMP impose a comprehensive regulatory scheme "demonstrating that the availability of medical marijuana is a matter of 'statewide concern,' thereby preempting local zoning and business licensing laws." (*Kruse*, *supra*, 177 Cal.App.4th 1153, 1175.) In particular, the CUA's statement of intent " '[t]o ensure that seriously ill Californians have the right of access to obtain and use marijuana for medical purposes' " (*Kruse*, at p. 1175) does not demonstrate a matter of preemptive statewide concern, for that declaration by the voters "[did] 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.*). Additionally, there is no partial state coverage of medical marijuana in terms indicating clearly that a paramount state concern will not tolerate further or additional local action. Indeed, the CUA expressly states that it does not preclude legislation prohibiting conduct that endangers others, and the MMP explicitly provides that it does not prevent a local jurisdiction from adopting and enforcing laws that are consistent with its provisions.

In sum, the Court of Appeal concluded, "[n]either the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The [c]ity'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 1153, 1176.)

Though it did not involve a complete moratorium or ban, the Court of Appeal in *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861 (*Hill*) similarly concluded that the CUA and the MMP do not preempt a local jurisdiction from applying its zoning and business licensing powers to regulate medical marijuana dispensaries. In particular, the *Hill* court observed, the "collective cultivation" provision of the MMP, section 11362.775, "does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*Hill*, *supra*, at p. 869.)

The county ordinance at issue in *Hill* placed various restrictions on the establishment and operation of medical marijuana dispensaries: it provided that such a facility could operate in a C-1 zone, but it required the operator to obtain a conditional use permit and a business license, and it prohibited the location of a dispensary within 1,000 feet of a school, playground, park, public library, place of worship, childcare facility, or youth facility.[6] County ordinances declared generally that any use of property in violation of zoning laws was a public nuisance. (*Hill*, *supra*, 192 Cal.App.4th 861, 864-865.)

The county brought a nuisance action alleging that the defendants were violating the ordinance by operating a medical marijuana dispensary in an unincorporated area of the county without obtaining a business license, a conditional use permit, and a zoning variance to allow operation within 1,000 feet

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6 The Court of Appeal took judicial notice that in December 2010, while the *Hill* appeal was pending, the county's board of supervisors had enacted a complete ban on medical marijuana dispensaries. (*Hill*, *supra*, 192 Cal.App.4th 861, 866, fn. 4.) The court indicated that the validity of the 2010 ordinance was not at issue, and would not be addressed, in the pending appeal. (*Ibid.*)

of a public library. The defendants did not deny they were operating next to a public library without the required authorizations. Instead, they urged that the ordinance's requirements were unconstitutional and preempted by state law. The trial court disagreed. It issued a temporary restraining order and a preliminary injunction against operation of the defendants' facility without the necessary permits. (*Hill*, *supra*, 192 Cal.App.4th 861, 865.)

The defendants appealed, and the Court of Appeal affirmed. The appellate court rejected the defendants' claims that the county's regulations were inconsistent with the MMP, and thus preempted. The defendants acknowledged that section 11362.83 as then in effect (added by Stats. 2003, ch. 875, § 2, pp. 6424, 6434; former section 11362.83) expressly authorized "a city or other local governing body [to] adopt[ ] and enforc[e] laws consistent with" the MMP. However, the defendants insisted this provision only permitted local restrictions that were " 'the same as' " those imposed by the MMP. (*Hill*, *supra*, 192 Cal.App.4th 861, 867.) The Court of Appeal disagreed, indicating that former section 11362.83 showed the Legislature "expected and intended that local governments adopt additional ordinances." (*Hill*, *supra*, at p. 868.) The defendants also conceded that section 11362.768, then recently adopted to impose a minimum 600-foot distance between a medical marijuana facility and a school (*id.*, subd. (b), added by Stats. 2010, ch. 603, § 1), explicitly permits a local jurisdiction to "adopt[ ] ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider" (*id.*, subd. (f)). Nonetheless, the defendants insisted, the 600-foot limit established by subdivision (b), added by Stats. 2010, ch. 603, § 1) impliedly preempted a local jurisdiction from imposing greater distance restrictions. The Court of Appeal dismissed this argument, noting the plain words of subdivision (f).

Finally, the Court of Appeal found no merit in the defendants' contention that because section 11362.775 affords qualified collective cultivation projects a limited immunity from nuisance prosecution under the state's "drug den" abatement law, section 11570, the county was precluded from applying its own nuisance laws to enjoin operation of a medical marijuana dispensary in violation of its zoning ordinance. Noting that the immunity provided by section 11362.775 only applies where the state-law nuisance prosecution is premised "solely on the basis" of the collective activities described in that section, the Court of Appeal concluded that the MMP "does not prevent the [c]ounty from applying its nuisance laws to [medical marijuana dispensaries] that do not comply with its valid ordinances." (*Hill*, *supra*, 192 Cal.App.4th 861, 868.)

We now agree, for the reasons expressed below, 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. We set forth our conclusions in detail.

1. No express preemption.

As indicated above, the plain language of the CUA and the MMP is limited in scope. It grants specified persons and groups, when engaged in specified conduct, immunity from prosecution under specified state criminal and nuisance laws pertaining to marijuana. (*Mentch*, *supra*, 45 Cal.4th 274, 290; *Kruse*, *supra*, 177 Cal.App.4th 1153, 1175.) The CUA makes no mention of medical marijuana cooperatives, collectives, or dispensaries. It merely provides that state laws against the possession and cultivation of marijuana shall not apply to a qualified patient, or the patient's designated primary caregiver, who possesses or cultivates marijuana for the patient's personal medical use upon a physician's recommendation. (§ 11362.5, subd. (d).)

Though the CUA broadly states an aim to "ensure" a "right" of seriously ill persons to "obtain and use" medical marijuana as recommended by a physician (§ 11362.5, subd. (b)(1)(A)), the initiative statute's actual objectives, as presented to the voters, were "modest" (*Ross*, *supra*, 42 Cal.4th 920, 928), and its substantive provisions created no "broad right to use [medical] marijuana without hindrance or inconvenience" (*id.*, at p. 928; see *Kruse*, *supra*, 177 Cal.App.4th 1153, 1163-1164; *Urziceanu*, *supra*, 132 Cal.App.4th 747, 773 [CUA created no constitutional right to obtain medical marijuana]). There is no basis to conclude that the CUA expressly preempts local ordinances prohibiting, as a nuisance, the use of property to cooperatively or collectively cultivate and distribute medical marijuana.

The MMP, unlike the CUA, does address, among other things, the collective or cooperative cultivation and distribution of medical marijuana. But the MMP is framed in similarly narrow and modest terms. As pertinent here, it specifies only that qualified patients, identification card holders, and their designated primary caregivers are exempt from prosecution and conviction under enumerated state antimarijuana laws "solely" on the ground that such persons are engaged in the cooperative or collective cultivation, transportation, and distribution of medical marijuana among themselves. (§ 11362.775.)

The MMP's language no more creates a "broad right" of access to medical marijuana "without hindrance or inconvenience" (*Ross*, *supra*, 42 Cal.4th 920, 928) than do the words of the CUA. No provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of

medical marijuana.[7] Hence, there is no ground to conclude that Riverside's ordinance is expressly preempted by the MMP.[8]

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[7] The MMP imposes only two obligations on local governments. It specifies the duties of a county health department or other designated county agency with respect to the establishment and implementation of the voluntary medical marijuana identification card program. (§§ 11362.72, 11362.74.) And it prohibits a local law enforcement agency or officer from refusing to accept an identification card as protection against *arrest* for the possession, transportation, delivery, or cultivation of specified amounts of medical marijuana, except upon "reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78; see § 11362.71, subd. (e).)

[8] The City claims sections 11362.768, as added in 2010, and 11362.83, as amended in 2011, *expressly authorize* total local bans on medical marijuana facilities. Section 11362.768 specifies that a "medical marijuana cooperative, collective[, or] dispensary" with "a storefront or mobile retail outlet which ordinarily requires a local business license" may not be located within 600 feet of a school (*id.*, subds. (b), (e)), but further provides that "[n]othing in this *section* shall prohibit a city [or] county . . . from adopting ordinances or policies that further restrict the location *or establishment* of" such a facility (*id.*, subd. (f), italics added; see also *id.*, subd. (g)). Section 11362.83 now declares that nothing in the MMP shall prevent a city or other local governing body from "[a]dopting local ordinances that regulate the location, operation, *or establishment* of a medical marijuana cooperative or collective" (*id.*, subd. (a), italics added) or from "[t]he civil and criminal enforcement" of such ordinances (*id.*, subd. (b)). The City urges that by granting local jurisdictions express authority to regulate the very "establishment" of such facilities, the MMP plainly sanctions ordinances that preclude such "establishment" within local boundaries. Our review of the language and legislative history of these provisions does not persuade us the Legislature necessarily intended them to provide affirmative authority for total bans. But we need not resolve the point. Local authority to regulate land use for the public welfare is an inherent *preexisting* power, recognized by the California Constitution, and limited only to the extent exercised "in conflict with general laws." (Cal. Const., art. XI, § 7.) As we otherwise conclude herein, the CUA and the MMP, by their substantive terms, grant limited exemptions from certain *state* criminal and nuisance laws, but they do not expressly or impliedly *restrict* the

(Footnote continued on next page.)

2. No implied preemption.

The considerations discussed above also largely preclude any determination that the CUA or the MMP *impliedly* preempts Riverside's effort to "de-zone" facilities that dispense medical marijuana. At the outset, there is no duplication between the state laws, on the one hand, and Riverside's ordinance, on the other, in that the two schemes are coextensive. The CUA and the MMP "decriminalize," for state purposes, specified activities pertaining to medical marijuana, and also provide that the *state's* antidrug nuisance statute cannot be used to abate or enjoin these activities. On the other hand, the Riverside ordinance finds, for local purposes, that the use of property for certain of those activities *does* constitutes a *local* nuisance.

Nor do we find an "inimical" contradiction or conflict between the state and local laws, in the sense that it is impossible simultaneously to comply with both. Neither the CUA nor the MMP *requires* the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use of property within the city's boundaries. Conversely, Riverside's ordinance requires no conduct that is forbidden by the state statutes. Persons who refrain from operating medical marijuana facilities in Riverside are in compliance with both the local and state enactments. (Compare, e.g., *Great Western Shows*, *supra*, 27 Cal.4th 853, 866 [ordinance banning sale of firearms or ammunition on county property was not "inimical" to state statutes contemplating lawful existence

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authority of local jurisdictions to decide whether local land may be used to operate medical marijuana facilities.

of gun shows; ordinance did not require what state law forbade or prohibit what state law demanded].)

Further, there appears no attempt by the Legislature to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated. On the contrary, as discussed in detail above, the CUA and the MMP take limited steps toward recognizing marijuana as a medicine by exempting particular medical marijuana activities from state laws that would otherwise prohibit them. In furtherance of their provisions, these statutes require local agencies to do certain things, and prohibit them from doing certain others. But the statutory terms describe no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action.

The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction. Amici curiae League of California Cities et al. point out that "California's 482 cities and 58 counties are diverse in size, population, and use." As these amici curiae observe, while several California cities and counties allow medical marijuana facilities, it may not be reasonable to expect every community to do so.

For example, these amici curiae point out, "[s]ome communities are predominantly residential and do not have sufficient commercial or industrial space to accommodate" facilities that distribute medical marijuana. Moreover, these facilities deal in a substance which, except for legitimate medical use by a qualified patient under a physician's authorization, is illegal under both federal and state law to possess, use, furnish, or cultivate, yet is widely desired, bought, sold, cultivated, and employed as a recreational drug. Thus, facilities that dispense

medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse,[9] and the extent of this danger may vary widely from community to community.

Thus, while some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens. (See, e.g., *Great Western Shows*, *supra*, 27 Cal.4th 853, 866-867 [noting, in support of holding that state gun show regulations did not occupy field, so as to preclude Los Angeles County's complete ban of gun shows on county property, that firearms issues likely require different treatment in urban, as opposed to rural, areas].) Under these circumstances, we

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[9] For example, when considering the 2011 amendment to section 11362.83, as proposed by Assembly Bill No. 1300 (2011-2012 Reg. Sess.), the Senate Committee on Public Safety noted the bill author's assertions about the "controversial picture of dispensaries," as revealed in "[a] scan of headlines." As reported by the committee, the bill author recounted that some dispensaries "have been caught selling marijuana to people not authorized to possess it, many intentionally operate in the shadows without any business licensure or under falsified documentation, and some have been the scene of violent robberies and murder." (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1300 (2011-2012 Reg. Sess.), as amended June 1, 2011, pp. E-F.) Courts of Appeal dealing with local regulation of medical marijuana dispensaries have cited similar concerns. (See, e.g., *Hill*, *supra*, 192 Cal.App.4th 861, 871 [because of evidence that the " 'cash only' " nature of most medical marijuana dispensary operations presents a disproportionate target for robberies and burglaries, and that such facilities affect neighborhood quality of life by attracting loitering and marijuana smoking on or near the premises, they are not similarly situated to pharmacies for public health purposes and need not be treated equally]; *Kruse*, *supra*, 177 Cal.App.4th 1153, 1161 [noting local findings of a correlation between medical marijuana dispensaries and increased crime].)

cannot lightly assume the voters or the Legislature intended to impose a "one size fits all" policy, whereby each and every one of California's diverse counties and cities must allow the use of local land for such purposes.[10]

O'Connell v. City of Stockton (2007) 41 Cal.4th 1061 (*O'Connell*), on which defendants rely, is readily distinguishable. There, a state law, the Uniform Controlled Substances Act (UCSA), established a comprehensive scheme for the treatment of such substances, specifying offenses and corresponding penalties in detail. Included among the sanctions provided by the UCSA was a defined program for forfeiture of particular categories of property, including vehicles, used to commit drug crimes. Under this system, vehicles were subject to forfeiture if they had been employed to facilitate the *manufacture*, *possession*, or *possession for sale* of *specified felony-level* amounts, as *explicitly* set forth, of *particular* controlled substances. Vehicle forfeiture under the UCSA required *proof beyond reasonable doubt* that the subject property had been so used. Provisions of the UCSA stated that law enforcement, not revenue, was the principal aim of forfeiture, that forfeiture had potentially harsh consequences for property owners, and that law enforcement officials should protect innocent owners' interests by providing adequate notice and due process in forfeiture proceedings.

The City of Stockton adopted an ordinance providing for *local* forfeiture of vehicles used simply to *acquire or attempt to acquire any amount of any controlled substance*, even if the offense at issue was a low-grade misdemeanor warranting only a $100 fine and no jail time, and was not eligible for forfeiture

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10 Nor, under these circumstances, can we find implied preemption on grounds that a local ban on medical marijuana facilities would so impede the ability of transient citizens to obtain access to medical marijuana as to outweigh the possible benefit to the locality imposing the ban.

under the UCSA. Stockton's ordinance permitted forfeiture upon proof by a *preponderance of evidence* that the vehicle had been used for the described purpose. Forfeited vehicles were to be sold at auction, with net proceeds payable to local law enforcement and prosecutorial agencies.

Under these circumstances, the *O'Connell* majority concluded, "[t]he comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation. The UCSA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City's forfeiture ordinance" calling for forfeiture of vehicles involved in the acquisition or attempted acquisition of drugs regulated under the UCSA. (*O'Connell*, *supra*, 41 Cal.4th 1061, 1071.) The majority explained that "the Legislature's comprehensive enactment of penalties for crimes involving controlled substances, but exclusion from that scheme of any provision for vehicle forfeiture for simple possessory drug offenses, manifests a clear intent to reserve that severe penalty for very serious drug crimes involving the manufacture, sale, or possession for sale of specified amounts of certain controlled substances." (*Id.*, at p. 1072.)

As indicated above, there is no similar evidence in this case of the Legislature's intent to preclude local regulation of facilities that dispense medical marijuana. The CUA and the MMP create no all-encompassing scheme for the control and regulation of marijuana for medicinal use. These statutes, both carefully worded, do no more than exempt certain conduct by certain persons from

certain state criminal and nuisance laws against the possession, cultivation, transportation, distribution, manufacture, and storage of marijuana.[11]

The gravamen of defendants' argument throughout is that the MMP "authorizes" the existence of facilities for the collective or cooperative cultivation and distribution of medical marijuana, and that a local ordinance prohibiting such facilities thus cannot be tolerated. But defendants' reliance on such decisions as *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277 (*Cohen*) and *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 16 (*City of Torrance*) for this proposition is misplaced.

Cohen, addressing a local ordinance that closely regulated escort services, stated that "[i]f the ordinance . . . attempted to prohibit conduct proscribed or permitted by state law, either explicitly or implicitly, it would be preempted." (*Cohen, supra*, 40 Cal.3d 277, 293.) However, *Cohen* made clear there is no preemption where state law expressly or implicitly allows local regulation. (*Id.*, at

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11 Defendants also cite *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, which struck down, as preempted by state law, a local ordinance banning the administration of electroconvulsive, or electric shock, therapy (ECT) within the city. The Court of Appeal found that, after expressly considering the benefits, risks, and invasive nature of ECT, a therapy recognized by the medical and psychiatric communities as useful in certain cases, the Legislature had indicated its intent that the right of every psychiatric patient to choose or refuse this therapy be " 'fully recognized and protected' " (*id.*, at p. 105), and had "enacted detailed legislation extensively regulating the administration of ECT, and requiring, among other things, stringent safeguards designated to insure that psychiatric patients have the right to refuse ECT." (*Id.*, at p. 99.) Under these circumstances, the Court of Appeal concluded that the state had occupied the field, thus precluding a locality from prohibiting the availability of ECT within its borders. By contrast, the MMP simply removes otherwise applicable state sanctions from certain medical marijuana activities, and exhibits no similar intent to occupy the field of medical marijuana regulation.

pp. 294-295.) As indicated, the MMP implicitly permits local regulation of medical marijuana facilities.

Similarly, in *City of Torrance*, *supra*, 30 Cal.3d 16, a state statute promoting the local community care of mental patients *specifically provided* that local zoning rules or use permit denials could not be used to exclude psychiatric care facilities from areas in which hospitals or nursing homes were otherwise allowed. By contrast, the MMP imposes no similar limits, express or implicit, on local zoning and permit rules.

More fundamentally, we have made clear that a state law does not "authorize" activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions. Thus, as discussed in *Nordyke v. King* (2002) 27 Cal.4th 875 (*Nordyke*), a state statute, Penal Code section 171b, made it a crime to possess firearms in any state or local public building, but exempted a person who, for the purpose of sale or trade, brought an otherwise lawfully possessed firearm into a gun show conducted in compliance with state law. Under an Alameda County ordinance, it was a misdemeanor to bring any firearm onto county property. The ordinance specified certain exceptions, but these did not include gun shows. Hence, a principal effect of the ordinance was to forbid the presence of firearms at gun shows on county property, thus making such shows impractical.

Gun show promoters challenged the ordinance, arguing, inter alia, that Penal Code section 171b prohibited the outlawing of guns at gun shows on public property, and thus preempted the ordinance's contrary provisions. We disagreed. As we explained, section 171b "merely exempts gun shows from the *state* criminal prohibition on possessing guns in public buildings, thereby permitting local government entities to authorize such shows. It does not *mandate* that local

government entities permit such a use . . . ." (*Nordyke*, *supra*, 27 Cal.4th 875, 884, first italics added.)

Similarly here, the MMP merely exempts the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby *mandate* that local governments authorize, allow, or accommodate the existence of such facilities.

Defendants emphasize that among the stated purposes of the MMP, as originally enacted, are to "[p]romote uniform and consistent application of the [CUA] among the counties of the state" and to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" (Stats. 2003, ch. 875, § 1, subd. (b), pp. 6422, 6423). Hence, they insist, the encouragement of medical marijuana dispensaries, under section 11362.775, is a matter of statewide concern, requiring the uniform allowance of such facilities throughout California, and leaving no room for their exclusion by individual local jurisdictions.

We disagree. As previously indicated, though the Legislature stated it intended the MMP to "promote" uniform application of the CUA and to "enhance" access to medical marijuana through collective cultivation, the MMP itself adopts but limited means of addressing these ideals. Aside from requiring local cooperation in the voluntary medical marijuana patient identification card program, the MMP's substantive provisions simply remove specified state-law sanctions from certain marijuana activities, including the cooperative or collective cultivation of medical marijuana by qualified patients and their designated caregivers. (*Mentch*, *supra*, 45 Cal.4th 274, 290.) The MMP has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana. We cannot employ

the Legislature's expansive declaration of aims to stretch the MMP's effect beyond a reasonable construction of its substantive provisions.

Defendants acknowledge that the MMP expressly recognizes local authority to "regulate" medical marijuana facilities (§§ 11362.768, subds. (f), (g), 11362.83), but they rely heavily on a passage from our decision in *Great Western Shows*, *supra*, 27 Cal.4th 853, for their claim that local governments, even if granted regulatory authority, may not wholly exclude activities that are sanctioned or encouraged by state law. On close examination, however, the premise set forth in *Great Western Shows* is not applicable here.

In *Great Western Shows*, we described several federal decisions under the federal Resource Conservation and Recovery Act (RCRA), including *Blue Circle Cement, Inc. v. Board of County Comm'rs* (10th Cir. 1994) 27 F.3d 1499 (*Blue Circle Cement*), as "stand[ing] broadly for the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows*, 27 Cal.4th 853, 868.)

But there are important distinctions between the RCRA and the California statutes at issue in this case. As explained in *Blue Circle Cement*, the RCRA "is the comprehensive federal hazardous waste management statute governing the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment." (*Blue Circle Cement*, *supra*, 27 F.3d 1499, 1505.) The federal statute aims "to assist states and localities in the development of improved solid waste management techniques to facilitate resource recovery and conservation." (*Ibid.*) It "enlists the states and municipalities to participate in a 'cooperative effort' with the federal government to develop waste management practices that facilitate the recovery of 'valuable

materials and energy from solid waste.' " (*Id.*, at p. 1506.) Under these circumstances, the court in *Blue Circle Cement*, like other federal courts, concluded that a complete local ban on the processing, recycling, and disposal of industrial waste, imposed without consideration of specific and legitimate local health and safety concerns, would frustrate the RCRA's overarching purpose to encourage state and local cooperation in furtherance of the efficient treatment, use, and disposal of such material. (*Blue Circle Cement,* 27 F.3d 1499, 1506-1509, & cases cited.)

The MMP, by contrast, creates no comprehensive scheme for the protection or promotion of facilities that dispense medical marijuana. The sole effect of the statute's substantive terms is to exempt specified medical marijuana activities from enumerated state criminal and nuisance statutes. Those provisions do not mandate that local jurisdictions permit such activities. (See *Nordyke*, *supra*, 27 Cal.4th 875, 883-884.) Local decisions to prohibit them do not frustrate the MMP's operation. Accordingly, we are not persuaded that the premise of *Blue Circle Cement*, *supra*, 27 F.3d 1499, as paraphrased in *Great Western Shows*, *supra*, 27 Cal.4th 853, is applicable here. [12]

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[12] Defendants also cite *Big Creek Lumber Co.*, *supra*, 38 Cal.4th 1139, in support of their assertion that local regulation of an activity sanctioned and encouraged by state law cannot include a total ban. But this decision, too, is distinguishable. In *Big Creek Lumber Co.*, the plaintiffs argued that a county ordinance specifying the zones where timber harvesting could occur was preempted by comprehensive state forestry statutes enacted to encourage the sound and prudent exploitation of timber resources. The principal statute at issue, the Forest Practices Act (FPA), forbade counties from " 'regulat[ing] the conduct of timber operations.' " (*Big Creek Lumber Co.*, *supra*, at p. 1147.) Among other things, we found no "inimical" state-local conflict, because it was not impossible for timber operators to comply simultaneously with both the state and county enactments. We also concluded, in essence, that by limiting the locations within the county where timber harvesting was permitted, the ordinance did not

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Finally, defendants urge that by exempting the collective or cooperative cultivation of medical marijuana by qualified patients and their designated caregivers from treatment as a nuisance under the *state's* drug abatement laws (§ 11362.775; see § 11570 et seq.), the MMP bars local jurisdictions from adopting and enforcing ordinances that treat these very same activities as nuisances subject to abatement. But for the reasons set forth at length above, we disagree. Nuisance law is not defined exclusively by what the *state* makes subject to, or exempt from, its own nuisance statutes. Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders (Cal. Const., art. XI, § 7) allows it to define nuisances for local purposes, and to seek abatement of such nuisances. (See *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 255-256.)

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impermissibly "regulate" the "conduct" of such operations. (*Id.*, at p. 1157.) Addressing the plaintiffs' "overriding concern" that unless preempted, counties could use locational zoning to entirely prohibit timber harvesting (*id.*, at p. 1160), we simply observed that "[t]he ordinance before us does not have that effect, nor does it appear that any county has attempted such a result." (*Id.*, at pp. 1160-1161.)

Here, as we have noted, the MMP is a limited measure, not a comprehensive scheme for the regulation and encouragement of medical marijuana facilities. As in *Big Creek Lumber Co.*, the local ordinance at issue here does not stand in "inimical" conflict with state statutes by making simultaneous compliance impossible. And unlike the FPA at issue in *Big Creek Lumber Co.*, the MMP includes provisions *recognizing* the regulatory authority of local jurisdictions. For these reasons, nothing we said in *Big Creek Lumber Co.* persuades us that Riverside's ordinance is preempted.

No such conflict exists here. In section 11362.775, the MMP merely removes *state law* criminal and nuisance sanctions from the conduct described therein. By this means, the MMP has signaled that the *state* declines to regard the described acts as nuisances or criminal violations, and that the *state's* enforcement mechanisms will thus not be available against these acts. Accordingly, localities in California are left free to accommodate such conduct, if they choose, free of state interference. As we have explained, however, the MMP's limited provisions neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct on local land to be a nuisance, and by providing means for its abatement.[13]

We thus conclude that neither the CUA nor the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by

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13 As defendants note, the court in *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734 suggested that, "at first glance," it seemed "incongruous" and "odd" to conclude the CUA and the MMP, which exempt specified medical marijuana activities from *state* criminal and nuisance laws, might leave local jurisdictions free to use nuisance abatement procedures to prohibit the same activities. (*Id.*, at p. 754.) However, this issue was not presented or decided in *Qualified Patients Assn.* There the court conceded the answer "remain[ed] to be determined" and was "by no means clear cut or easily resolved on first impressions." (*Ibid.*) After careful review, and for the reasons expressed at length herein, we are not persuaded by the tentative view expressed in *Qualified Patients Assn.*

nuisance actions. Accordingly, we reject defendants' challenge to Riverside's MMD ordinances.[14]

As we have noted, the CUA and the MMP are careful and limited forays into the subject of medical marijuana, aimed at striking a delicate balance in an area that remains controversial, and involves sensitivity in federal-state relations. We must take these laws as we find them, and their purposes and provisions are modest. They remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a "right" of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.

Of course, nothing prevents future efforts by the Legislature, or by the People, to adopt a different approach. In the meantime, however, we must conclude that Riverside's ordinances are not preempted by state law.

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14 Our analysis makes it unnecessary to address the City's argument that, were the CUA and the MMP construed to require local jurisdictions to accommodate medical marijuana facilities, it would be preempted by the federal CSA. Nor need we confront the related argument of amici curiae California State Sheriffs' Association et al. that a state law, Government Code section 37100, *forbids* a city to adopt ordinances authorizing the use of local land for operation of medical marijuana facilities because such ordinances would "conflict with the . . . laws of . . . the United States," i.e., the CSA.

The judgment of the Court of Appeal is affirmed.

BAXTER, J.

WE CONCUR:

CANTIL-SAKAUYE, C.J.
KENNARD, J.
WERDEGAR, J.
CHIN, J.
CORRIGAN, J.
LIU, J.

CONCURRING OPINION BY LIU, J.

I join the court's opinion and write separately to clarify the proper test for state preemption of local law.

As the court says, "[L]ocal legislation that conflicts with state law is void. [Citation.] ' "A conflict exists if the local legislation ' "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." ' " [Citations.]' " (Maj. opn., *ante*, at pp. 9–10.)

The court further states: "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. [Citations.] Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (Maj. opn., *ante*, at p. 10.)

The first sentence of the above statement should not be misunderstood to improperly limit the scope of the preemption inquiry. As the court's opinion makes clear elsewhere, state law may preempt local law when local law prohibits not only what a state statute "demands" but also what the statute permits or authorizes. (See maj. opn., *ante*, at pp. 31–32, 34–35, discussing *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 293 (*Cohen*); *Great Western Shows v. County of Los Angeles* (2002) 27 Cal.4th 853, 867–868 (*Great Western Shows*).

In a similar vein, the second sentence of the above statement — "no inimical conflict will be found where it is reasonably possible to comply with both

the state and local laws" (maj. opn., *ante*, at p. 10) — also should not be misunderstood. If state law authorizes or promotes, but does not require or demand, a certain activity, and if local law prohibits the activity, then an entity or individual can comply with both state and local law by not engaging in the activity. But that obviously does not resolve the preemption question. To take an example from federal law, the Federal Arbitration Act (FAA) promotes arbitration, and a state law prohibiting arbitration of employment disputes would be preempted. (See *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. __ [131 S.Ct. 1740, 1747].) Such preemption obtains even though an employer can comply with both the FAA, which does not *require* employers to enter into arbitration agreements, and the state law simply by choosing not to arbitrate employment disputes.

Accordingly, in federal preemption law, we find a more complete statement of conflict preemption: " 'We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements" [citation], *or* where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' " (*Sprietsma v. Mercury Maine* (2002) 537 U.S. 51, 64–65, italics added.) This more complete statement no doubt applies to California law. Local law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity. (See *Great Western Shows*, *supra*, 27 Cal.4th at pp. 867–868; *Cohen*, *supra*, 40 Cal.3d at p. 293.)

I do not understand today's opinion to hold otherwise. In this case, defendants argue that the Medical Marijuana Program (MMP) authorizes and intends to promote what the City of Riverside prohibits: the operation of medical marijuana dispensaries. If such legislative authorization were clear, then the

ordinance in question might well be preempted. But I agree with my colleagues that although the MMP provides medical marijuana cooperatives and collectives with a limited exemption from state criminal liability, "state law does not 'authorize' activities, to the exclusion of local plans, simply by exempting those activities from otherwise applicable state prohibitions." (Maj. opn., *ante*, at p. 32.) As the court's opinion makes clear, notwithstanding some language in the MMP regarding the promotion of medical marijuana cooperatives and collectives, "the MMP itself adopts but limited means of addressing these ideals. Aside from requiring local cooperation in the voluntary medical marijuana patient identification card program, the MMP's substantive provisions simply remove specified state-law sanctions from certain marijuana activities, including the cooperative or collective cultivation of medical marijuana by qualified patients and their designated caregivers. [Citation.] The MMP has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana." (Maj. opn., *ante*, at p. 33.)

Because state law does not clearly authorize or intend to promote the operation of medical marijuana dispensaries, I agree that the City of Riverside's prohibition on such dispensaries is not preempted.

LIU, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.

Unpublished Opinion
Original Appeal
Original Proceeding
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County: Riverside
Judge: John D. Molloy

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199 Cal.App.4th 1070
Court of Appeal, Second District, Division 3, California.

Ryan PACK et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
City of Long Beach, Real Party in Interest.
No. B228781.(Los Angeles County Super. Ct. Nos. NC055010/NC055053).Oct. 4, 2011.

Synopsis

Background: Medical marijuana collective members brought action against city for declaratory and injunctive relief challenging ordinance prohibiting "cultivation, possession, distribution, exchange or giving away" of medical marijuana except pursuant to a permit. The Superior Court, Los Angeles County, No. NC055010/NC055053, Patrick T. Madden, J., denied preliminary injunction. Members petitioned for writ of mandate.

Holdings: The Court of Appeal, Croskey, J., held that:
1 ordinance requiring medical marijuana to be analyzed by independent laboratories was preempted by Controlled Substances Act (CSA), and
2 ordinance requiring permits for medical marijuana collectives was preempted by CSA.

Petition granted.

West Headnotes (32)

1 **Controlled Substances**
⇦Medical Necessity

Federal prohibition against the possession and distribution of marijuana does not include an exception for medical marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202, 401(a)(1), 21 U.S.C.A. §§ 812, 841(a)(1); Controlled Substances Act, § 404, 21 U.S.C.A. § 844.

2 **Controlled Substances**
⇦Preemption
States
⇦Product Safety; Food and Drug Laws

Compassionate Use Act (CUA) is not preempted by the Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903; West's Ann.Cal.Health & Safety Code § 11362.5(d).

3 **Controlled Substances**
⇦Medical Necessity

A person who supplies marijuana to a qualified patient is not an immune "primary caregiver" under the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA) unless the person consistently provided caregiving, independent of assistance in taking marijuana at or before the time the person assumed responsibility for assisting the patient with medical marijuana. West's Ann.Cal.Health & Safety Code §§ 11362.5(e), 11362.7(d).

4 **Controlled Substances**
⇦Medical Necessity

While the Compassionate Use Act (CUA) provides a defense at trial for those medical marijuana patients and their caregivers charged with the illegal possession or cultivation of marijuana, it provides for no immunity from arrest. West's Ann.Cal.Health & Safety Code § 11362.5.

5 **Controlled Substances**
⇦Medical Necessity

Medical Marijuana Program Act (MMPA) provisions limiting patients' and caregivers' possession of dried marijuana and marijuana plants establishes a "safe harbor" from arrest and prosecution for the possession of no more than the statutory amounts. West's Ann.Cal.Health & Safety Code § 11362.77(a), (f).

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6 **Mandamus**
⇐Scope of Inquiry and Powers of Court

Court of Appeal would not address medical marijuana collective members' argument that city ordinance prohibiting "cultivation, possession, distribution, exchange or giving away" of medical marijuana except pursuant to a permit was preempted by state law, in members' petition for writ of mandate challenging trial court's denial of declaratory and injunctive relief against city's closure of their dispensary, where members did not make the preemption allegation in their complaint, the city represented that the ordinance did not apply to prohibit personal cultivation and possession, and there was no evidence that it had been so applied. West's Ann.Cal.Health & Safety Code §§ 11362.5, 11362.775.

7 **Controlled Substances**
⇐Medical Necessity

City ordinance prohibiting membership in more than one medical marijuana collective "fully permitted in accordance with this Chapter" did not prohibit members from joining a new collective after theirs was shut down due to noncompliance with the ordinance.

8 **Evidence**
⇐Nature and Scope in General

In reviewing denial of preliminary injunction challenging city ordinance requiring permits for medical marijuana collectives, Court of Appeal would take judicial notice of the fact that a search using an Internet search engine revealed that several medical marijuana dispensaries were apparently operating in the city, although their websites did not specifically indicate whether they were permitted.

9 **Municipal Corporations**
⇐Local Legislation

Charter city's ordinances relating to matters which are purely municipal affairs prevail over state laws on the same subject.

10 **Equity**
⇐He Who Comes Into Equity Must Come with Clean Hands

Medical marijuana collective members were not barred by the doctrine of unclean hands from arguing that the federal Controlled Substances Act (CSA) preempted city ordinance requiring permits for medical marijuana collectives, even if the members sought the ruling in order to continue to violate the federal CSA, since members' hands were not unclean under California law, and precluding challenges by parties who intended to violate the federal CSA would mean that no one would ever have standing to raise the preemption argument. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

11 **States**
⇐Preemption in General

Supremacy Clause establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

12 **States**
⇐State Police Power

There is a presumption against federal preemption in those areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2.

13 **States**
⇐State Police Power

Regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power, for purposes of the presumption against federal preemption in areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2.

14 **States**

⇐State Police Power

A local government's land use regulation is an area over which local governments traditionally have control, for purposes of the presumption against federal preemption in areas traditionally regulated by the states. U.S.C.A. Const. Art. 6, cl. 2.

15 **States**
⇐Preemption in General

There are four species of federal preemption of state law: express, conflict, obstacle, and field; express preemption arises when Congress defines explicitly the extent to which its enactments preempt state law, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible, obstacle preemption arises when under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and field preemption applies where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. U.S.C.A. Const. Art. 6, cl. 2.

16 **States**
⇐Congressional Intent

Where a statute contains an express pre-emption clause, the court's task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent. U.S.C.A. Const. Art. 6, cl. 2.

17 **Controlled Substances**
⇐Preemption
States
⇐Product Safety; Food and Drug Laws

Federal Controlled Substances Act (CSA) preempts conflicting laws under both conflict and obstacle preemption. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

18 **States**
⇐Conflicting or Conforming Laws or Regulations

Conflict or "impossibility" preemption is a demanding defense, requiring establishing that it is impossible to comply with the requirements of both laws. U.S.C.A. Const. Art. 6, cl. 2.

19 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance requiring permits for medical marijuana collectives was not subject to conflict preemption by the federal Controlled Substances Act (CSA), since a person could comply with both simply by not being involved in the cultivation or possession of medical marijuana at all. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

20 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance requiring that permitted medical marijuana collectives have samples of their marijuana analyzed by an independent laboratory to ensure that it was free from pesticides and contaminants was subject to conflict preemption by the federal Controlled Substances Act (CSA), since delivering the marijuana for testing would violate the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

21 **States**
⇐Conflicting or Conforming Laws or Regulations

If a federal act's operation would be frustrated and its provisions refused their natural effect by the operation of a state or local law, the latter

must yield pursuant to obstacle preemption. U.S.C.A. Const. Art. 6, cl. 2.

22 **Controlled Substances**
⇐Statutes and Other Regulations

Main objectives of the federal Controlled Substances Act (CSA) are combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, with a particular concern of preventing the diversion of drugs from legitimate to illicit channels. 21 U.S.C.A. § 801.

23 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance requiring permits for medical marijuana collectives was subject to obstacle preemption by the federal Controlled Substances Act (CSA), where the ordinance purported to authorize the collectives, city charged substantial application and renewal fees, city randomly chose qualified applicants to receive permits, and it was the possession of the permit itself, rather than any particular conduct, which exempted a collective from violation proceedings. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

See Annot., Preemption of State Regulation of Controlled Substances by Federal Controlled Substances Act (2010) 60 A.L.R.6th 175; Cal. Jur., 3d, Criminal Law: Crimes Against Administration of Justice and Public Order, § 39; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 63; 2 Witkin & Epstein, Cal. Criminal Law (2011 supp.) Crimes Against Public Peace and Welfare, § 70B.

24 **Criminal Law**
⇐Nature of Crime in General

There is a distinction, in law, between not making an activity unlawful and making the activity lawful.

25 **States**
⇐Conflicting or Conforming Laws or Regulations

When an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption. U.S.C.A. Const. Art. 6, cl. 2.

26 **States**
⇐Conflicting or Conforming Laws or Regulations

A law which authorizes individuals to engage in conduct that a federal act forbids stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and is therefore preempted. U.S.C.A. Const. Art. 6, cl. 2.

27 **Controlled Substances**
⇐Preemption

Court of Appeal would place "some weight" on the position of the United States Attorney General, in determining whether city ordinance requiring permits for medical marijuana collectives was subject to obstacle preemption by the federal Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

28 **Controlled Substances**
⇐Preemption
States
⇐Product Safety; Food and Drug Laws

State and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts, as would support obstacle preemption by the federal Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

29 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance prohibiting medical marijuana collectives from providing medical marijuana to their members between the hours of 8:00 p.m. and 10:00 a.m. was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

30 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

31 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance prohibiting medical marijuana collectives from permitting the consumption of alcohol on the property or in its parking area was not preempted by the federal Controlled Substances Act (CSA), since it did not permit or authorize activity prohibited by the CSA. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

32 **Controlled Substances**
⇐Preemption
Municipal Corporations
⇐Political Status and Relations

City ordinance's restrictions against medical marijuana collectives located in an exclusive residential zone, or within a 1,500 foot radius of a high school or 1,000 foot radius of a kindergarten, elementary, middle, or junior high school, if imposed strictly as a limitation on the operation of medical marijuana collectives in the city, would not be federally preempted by the Controlled Substances Act (CSA). Comprehensive Drug Abuse Prevention and Control Act of 1970, § 708, 21 U.S.C.A. § 903.

West Codenotes

Recognized as Unconstitutional
West's Ann.Cal.Health & Safety Code § 11362.77(a), (f).

ORIGINAL PROCEEDINGS in mandate. Patrick T. Madden, Judge. Petition granted and remanded with directions.

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Opinion

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CROSKEY, J.

*1 Federal law prohibits the possession and distribution of marijuana (21 U.S.C. §§ 812, 841(a)(1), 844); there is no exception for medical marijuana. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722.) Although California criminalizes the possession and cultivation of marijuana generally (Health & Saf.Code, §§ 11357, 11358), it has decriminalized the possession and cultivation of medical marijuana, when done pursuant to a physician's recommendation. (Health & Saf.Code, § 11362.5, subd. (d).) Further, California law decriminalizes the collective or cooperative cultivation of medical marijuana. (Health & Saf.Code, § 11362.775.) Case law has concluded that California's statutes are not preempted by federal law, as they seek only to decriminalize certain conduct for the purposes of state law. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757, 115 Cal.Rptr.3d 89.)

In this case, we are concerned with a city ordinance which goes beyond simple decriminalization. The City of Long Beach (City) has enacted a comprehensive regulatory scheme by which medical marijuana collectives within the City are governed. The City charges application fees (Long Beach Mun.Code, ch. 5.87, § 5.87.030), holds a lottery, and issues a limited number of permits. Permitted collectives, which must then pay an annual fee, are highly regulated, and subject to numerous restrictions on their operation (Long Beach Mun.Code, ch. 5.87, § 5.87.040). The question presented by this case is whether the City's ordinance, which permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts, is preempted by federal law. In this case of first impression, we conclude that, to the extent it permits collectives, it is.

STATUTORY AND REGULATORY BACKGROUND

Before addressing the specific factual and procedural background of this case, we first discuss the contradictory federal and state statutory schemes which govern medical marijuana. This case concerns the interplay between the federal Controlled Substances Act (CSA), and the state Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA).

1. *The Federal CSA*

"Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." (*Gonzales v. Oregon* (2006) 546 U.S. 243, 250, 126 S.Ct. 904, 163 L.Ed.2d 748.) Enactment of the federal CSA was part of President Nixon's "war on drugs." (*Gonzales v. Raich* (2005) 545 U.S. 1, 10, 125 S.Ct. 2195, 162 L.Ed.2d 1.) "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." (*Id.* at pp. 12–13.)

The federal CSA includes marijuana on schedule I, the schedule of controlled substances which are subject to the most restrictions. (21 U.S.C. § 812.) Drugs on other schedules may be dispensed and prescribed for medical use; drugs on schedule I may not. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491.) The inclusion of marijuana on schedule I reflects a government determination that "marijuana has 'no currently accepted medical use' at all." (*Ibid.*) Therefore, the federal CSA makes it illegal to manufacture, distribute, or possess marijuana. (21 U.S.C. §§ 841, 844.) It is also illegal, under the federal CSA, to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. (21 U.S.C. § 856(a)(1).) The only exception to these prohibitions is the possession and use of marijuana in federally-approved research projects. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at pp. 489–490.)

*2 The federal CSA contains a provision setting forth the extent to which it preempts other laws. It provides: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." (21 U.S.C. § 903.) The precise scope of this provision is a matter of dispute in this case.

2. *The CUA*

While the federal government, by classifying marijuana as a schedule I drug, has concluded that marijuana has no currently accepted medical use, there is substantial debate on the issue. (See *Conant v. Walters* (9th Cir.2002) 309 F.3d 629, 640–643 (conc. opn. of Kozinski, J.).) In 1996, California voters concluded that marijuana does have valid medical uses, and sought to decriminalize the medical use of marijuana by approving, by initiative measure, the CUA.

The CUA added section 11362.5 to the Health and Safety Code. Its purposes include: (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 cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief"; (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"; 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." (Health & Saf.Code, § 11362.5, subds. (b)(1)(A), (b)(1)(B) & (b)(1)(C).)

2 To achieve these ends, the CUA provides, "Section 11357, relating to the possession of marijuana,2 and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver,3 who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf.Code, § 11362.5, subd. (d).) As noted above, this statute, which simply decriminalizes for the purposes of state law certain conduct related to medical marijuana, is not preempted by the CSA. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89.)

3. The MMPA

The MMPA was enacted by the Legislature in 2003. The purposes of the MMPA include: (1) to "[p]romote uniform and consistent application of the [CUA] among the counties within the state" and (2) to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats.2003, ch. 875 (S.B.420), § 1, subds. (b)(2) & (b)(3).) The MMPA contains several provisions intended to meet these purposes.

*3 3 First, the MMPA expands the immunities provided by the CUA. While the CUA decriminalizes the cultivation and possession of medical marijuana by patients and their primary caregivers,4 the MMPA extends that decriminalization to possession for sale, transportation, sale, maintaining a place for sale or use, and other offenses. Cultivation or distribution for profit, however, is still prohibited. (Health & Saf.Code, § 11362.765.)

4 Second, while the CUA provides a defense *at trial* for those medical marijuana patients and their caregivers charged with the illegal possession or cultivation of marijuana, it provides for no immunity from *arrest.* (*People v. Mower* (2001) 28 Cal.4th 457, 469, 122 Cal.Rptr.2d 326, 49 P.3d 1067.) The MMPA provides that immunity by means of a voluntary identification card system. Individuals with physician recommendations for marijuana, and their designated primary caregivers, may obtain identification cards identifying them as such .5 Under the MMPA, no person in possession of a valid identification card shall be subject to arrest for enumerated marijuana offenses. However, a person need not have an identification card to claim the protections from the criminal laws provided by the CUA. (Health & Saf.Code, § 11362.71.)

5 Third, the MMPA set limits on the amount of medical marijuana which may be possessed. Health & Safety Code section 11362.77 provides that, unless a doctor specifically recommends more6 (Health & Saf.Code, § 11362.77, subd. (b)), a qualified patient or primary caregiver "may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient."7 (Health & Saf.Code, § 11362.77, subd. (a).) This provision establishes a "safe harbor" from arrest and prosecution for the possession of no more than these set amounts.8 (Health & Saf.Code, § 11362.77, subd. (f).)

Fourth, the MMPA decriminalizes the collective or cooperative cultivation of marijuana, providing that qualified patients and their primary caregivers "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 [the same provisions identifying conduct otherwise decriminalized under the MMPA]." (Health & Saf.Code, § 11362.775.)

Two other provisions of the MMPA are relevant to our analysis. First, the MMPA provides for local regulation, stating, "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article."9 (Health & Saf.Code, § 11362.83.) This has been interpreted to permit cities and counties to impose greater restrictions on medical marijuana collectives than those imposed by the MMPA. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 867–868, 121 Cal.Rptr.3d 722.)

*4 Second, in 2010, the Legislature amended the MMPA to impose restrictions on the location of medical marijuana collectives. Health & Safety Code section

11362.768, subdivision (b), provides that 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." Subdivision (c) restricts the operation of subdivision (b) to only those providers that have a "storefront or mobile retail outlet which ordinarily requires a business license."10 In other words, private collectives are immune from this requirement. The section goes on to provide, "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." (Health & Saf.Code, section 11362.768, subd. (f).) Moreover, the subdivision provides that it shall not preempt local ordinances adopted prior to January 1, 2011 that regulate the locations or establishments of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers. (Health & Saf.Code, section 11362.768, subd. (g).)

In 2008, the Attorney General issued Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Guidelines). (<http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf> [as of Oct. 3, 2011].) The Guidelines addressed several issues pertaining to medical marijuana, including taxation,11 federal preemption,12 and arrest under federal law.13 The Guidelines also discussed collectives, cooperatives, and dispensaries, indicating that they should acquire medical marijuana only from their members, and distribute it only among their members. (Guidelines, *supra*, at p. 10.) The Guidelines added the following, regarding dispensaries: "Although medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives.14 [Citation.] It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines [above] are likely operating outside the protections of [the CUA] and the MMP[A], and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver—and then offering marijuana in exchange for cash 'donations'—are likely unlawful." (Guidelines, *supra*, at p. 11.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The City's Ordinance*

*5 In 2010, the City adopted an ordinance (Long Beach Ordinance No. 10-0007) intended to comprehensively regulate medical marijuana collectives within the City. The ordinance defines a collective as an association of four or more qualified patients and their primary caregivers who associate at a location within the City to collectively or cooperatively cultivate medical marijuana. (Long Beach Mun.Code, ch. 5.87, § 5.87.015, subd. J.)

The City's ordinance not only restricts the location of medical marijuana collectives (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subds. A, B, & C), but also regulates their operation by means of a permit system (Long Beach Mun.Code, ch. 5.87, § 5.87.020). The City requires all collectives which seek to operate in the City, including those that were in operation at the time the ordinance was adopted,15 to submit applications and a non-refundable application fee. (Long Beach Mun.Code, ch. 5.87, § 5.87.030.) The City has set this fee at $14,742. The qualified applicants then participate in a lottery for a limited number of permits.16 (Ex. 3, att.D, p. 2.) Only those medical marijuana collectives which have been issued Medical Marijuana Collective Permits may operate in the City. (Long Beach Mun.Code, ch. 5.87, § 5.87.020.)

In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with certain requirements. (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) These include the installation of sound insulation (*id.* at subd. G), odor absorbing ventilation (*id.* at subd. H), closed-circuit television monitoring17 (*id.* at subd. I), and centrally-monitored fire and burglar alarm systems (*id.* at subd. J). Collectives must also agree that representative samples of the medical marijuana they distribute will have been analyzed by an independent laboratory to ensure that it is free of pesticides and contaminants. (*Id.* at subd. T.)

Once a permit has been issued, an "Annual Regulatory Permit Fee" is also imposed, based on the size of the collective. That fee is $10,000 for a collective with between 4 and 500 members, and increases with the size of the collective.

6 7 The permitted collective system is the exclusive means of collective cultivation of medical marijuana in Long Beach.18 The ordinance provides that it is "unlawful for any person to cause, permit or engage in the cultivation, possession, distribution, exchange or giving away of marijuana for medical or non medical purposes except as provided in this Chapter, and pursuant to any

and all other applicable local and state law."[19] (Long Beach Mun.Code, ch. 5.87, § 5.87.090, subd. A.) The ordinance further provides that no person shall be a member of more than one collective "fully permitted in accordance with this Chapter."[20] (*Id.* at subd. N.) Violations of the ordinance are misdemeanors, as well as enjoinable nuisances per se. (Long Beach Mun.Code, ch. 5.87, § 5.87.100.)

*6 The City set a timeline for its initial permit lottery. Applications were to be accepted between June 1 and June 18, 2010; the City was to review the applications for compliance from June 21 through September 16, 2010; the lottery would be held on September 20, 2010; and site inspections, public notice and a hearing process would occur between September 21, 2010 and December 15, 2010. However, the City indicated that any collective that did not comply with the ordinance must cease operations by August 29, 2010.

2. *Plaintiffs' Complaint and Request for Preliminary Injunction*

Plaintiffs Ryan Pack and Anthony Gayle were members of medical marijuana collectives that were directed to cease operations by August 29, 2010, for non-compliance with the ordinance. On August 30, 2010, plaintiffs filed the instant action seeking declaratory relief that the ordinance is invalid as it is preempted by federal law. On September 14, 2010, plaintiffs filed a request for a preliminary injunction. By this time, the City had shut down the collectives of which plaintiffs were members. However, as the lottery had not yet been held, no collectives had been issued permits in accordance with the ordinance. The plaintiffs thus argued that they would be irreparably harmed by the continued enforcement of the ordinance, as there was *no collective* they could legally join in order to obtain their necessary medical marijuana. As to the probability of success, plaintiffs argued that the City's ordinance went beyond decriminalization and instead *permitted* conduct prohibited by the federal CSA, and thus was preempted.

3. *The City's Opposition to the Preliminary Injunction Request*

On September 24, 2010, the City opposed the request for preliminary injunction, arguing that the ordinance was not preempted because it did not affect those responsible for enforcing the federal CSA. The City also raised an unclean hands argument, briefly suggesting that plaintiffs could not complain of any harm because their collectives "opened up for business" in an "unpermitted illegal manner."

4. *The Trial Court's Denial of the Request for Preliminary Injunction*

After a hearing, the trial court denied the request for a preliminary injunction. Its order issued on November 2, 2010. The court ultimately declined to address the federal preemption argument, on the basis of unclean hands. The court rejected the unclean hands argument raised by the City; however, it concluded that plaintiffs could not be heard to argue that the City ordinance was preempted due to a conflict with federal law (the CSA), when plaintiffs sought this ruling so that they could continue to violate the very same federal law. The court stated, "It is hardly equitable for [p]laintiffs to ask the court to enforce a federal law that they themselves are indisputably violating."[21]

5. *The Plaintiffs' Petition for Writ of Mandate*

On November 15, 2010, plaintiffs filed the instant petition for writ of mandate, challenging the trial court's denial of a preliminary injunction. We issued an order to show cause, seeking briefing on the federal preemption issue. We invited amicus briefing from various entities on both sides of the issue, including other cities considering or enacting medical marijuana collective ordinances, the U.S. Attorneys for California districts, the ACLU, and organizations advocating the legalization of marijuana. We received amicus briefing from: (1) the City of Los Angeles; (2) the California State Association of Counties and League of California Cities; and (3) the ACLU, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, Drug Policy Alliance, and Americans for Safe Access. Although the U.S. Attorneys declined to file amicus briefs, we have taken judicial notice of letters and memoranda which illuminate the federal government's position regarding the enforcement of the CSA with respect to medical marijuana collectives.

6. *The Progress of the Lottery and Permitting System*

*7 8 As briefing proceeded in this case, the City's permit lottery was conducted. According to a representation in the City's respondent's brief, the City received 43 applications, and the lottery resulted in 32 applications moving forward in the permit process. By the time briefing was closed, plaintiffs acknowledged that the permit process had resulted in a permit being issued for at least one collective, Herbal Solutions.[22]

ISSUE PRESENTED

The sole issue presented by this writ proceeding23 is whether the City's ordinance is preempted by the federal CSA. We conclude that it is, in part, and therefore grant the plaintiffs' petition.

DISCUSSION

1. *Standard of Review*

"Two interrelated factors bear on the issuance of a preliminary injunction-[t]he likelihood of the plaintiff's success on the merits at trial and the balance of harm to the parties in issuing or denying injunctive relief." (*County of Los Angeles v. Hill, supra,* 192 Cal.App.4th at p. 866, 121 Cal.Rptr.3d 722.) It is clear, in this case, that if the City's ordinance is invalid as a matter of law, plaintiffs had a 100% probability of prevailing, and a preliminary injunction therefore should have been entered.

9 10 Whether an ordinance is valid is a question of law. (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 305, 121 Cal.Rptr.3d 172.) Whether a local ordinance is preempted by federal law is a question of law on undisputed facts.24 (*Ibid.*) We therefore review the issue de novo.25 (*Ibid.*)

2. *Law of Preemption*

11 "The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

12 13 14 "There is a presumption against federal preemption in those areas traditionally regulated by the states." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938, 63 Cal.Rptr.3d 50, 162 P.3d 569.) Regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89.) More importantly, a local government's land use regulation is an area over which local governments traditionally have control. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1169, 100 Cal.Rptr.3d 1.) Thus, we assume the presumption against federal preemption applies in this instance. Therefore, " '[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

15 "There are four species of federal preemption: express, conflict, obstacle, and field." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 935, 63 Cal.Rptr.3d 50, 162 P.3d 569.) "First, express preemption arises when Congress 'define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.' [Citations.] Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. [Citations.] Third, obstacle preemption arises when " 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " [Citations.] Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citation.]" (*Id.* at p. 936, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

*8 16 "Where a statute 'contains an express pre-emption clause, our "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." ' [Citation.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 941, fn. 6, 63 Cal.Rptr.3d 50, 162 P.3d 569.) In this case, we are concerned with the federal CSA, which contains an express preemption clause: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." (21 U.S.C. § 903.)

17 It is undisputed that this provision eliminates any possibility of the federal CSA preempting a state statute (or local ordinance) under the principles of field preemption or express preemption (*e.g., Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758, 115 Cal.Rptr.3d 89). It is also undisputed that, under this provision, the federal CSA would preempt any

state or local law which fails the test for conflict preemption. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 823, 81 Cal.Rptr.3d 461.) One California court has concluded that the federal CSA's preemption language bars the consideration of obstacle preemption. (*Id.* at pp. 823–825, 81 Cal.Rptr.3d 461.) Another court, without specifically addressing the conflicting authority, concluded that the federal CSA preempts conflicting laws under both conflict and obstacle preemption. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758, 115 Cal.Rptr.3d 89.)

We believe this question was resolved by the United States Supreme Court in *Wyeth v. Levine* (2009) 555 U.S. 555 [129 S.Ct. 1187], a case which was decided after the decision in *County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461. In *Wyeth,* the Supreme Court was concerned with the preemptive effect of the Food, Drug, and Cosmetic Act (FDCA). The FDCA provided that "a provision of state law would only be invalidated upon a " 'direct and positive conflict' with the FDCA." (*Wyeth v. Levine, supra,* 555 U.S. at p. —— [129 S.Ct at p. 1196].) Given this language, the Supreme Court considered both conflict and obstacle preemption. (*Id.* at p. —— [555 U.S. at p. ——, 129 S.Ct. at p. 1199].) As there is no distinction between a federal statute which will only preempt those state and local laws which create a "direct and positive conflict" (FDCA) and those which create "a positive conflict ... so that the two cannot consistently stand together" (CSA), we conclude that the same construction applies here, and the federal CSA can preempt state and local laws under both conflict and obstacle preemption.

*9 Indeed, the Supreme Court has cautioned against drawing a practical distinction between these two types of preemption. "This Court, when describing conflict pre-emption, has spoken of pre-empting state law that 'under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'—whether that 'obstacle' goes by the name of 'conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference,' or the like. [Citations.] The Court has not previously driven a legal wedge—only a terminological one—between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are 'nullified' by the Supremacy Clause, [citations], and it has assumed that Congress would not want either kind of conflict. The Court has thus refused to read general 'saving' provisions to tolerate actual conflict *both* in cases involving impossibility, [citation], *and* in 'frustration-of-purpose' cases, [citations]. We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable system-wide costs (*e.g.,* conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of 'conflict' (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or ... both." (*Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861, 873–874, 120 S.Ct. 1913, 146 L.Ed.2d 914.)

Thus, we turn our analysis to the issue of whether the federal CSA preempts the City's ordinance, under either conflict or obstacle preemption.

a. *Conflict Preemption*

18 19 Conflict or "impossibility" preemption "is a demanding defense ." (*Wyeth v. Levine, supra,* 555 U.S. at p. —— [129 S.Ct. at p. 1199].) It requires establishing that it is impossible to comply with the requirements of both laws. (*Ibid.*) At first blush, no impossibility preemption is established by this case. While the federal CSA prohibits manufacture, distribution, and possession of marijuana, the City ordinance does not *require* any such acts. (See *Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 759, 115 Cal.Rptr.3d 89 [stating that a "claim of positive conflict might gain more traction if the [City] *required* ... individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law"].) Since a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict preemption. (Cf. *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 944, 63 Cal.Rptr.3d 50, 162 P.3d 569 [no conflict preemption because it is not a physical impossibility to simultaneously comply with both a federal law allowing conduct and a state law prohibiting it].)

*10 20 We are, however, troubled by one provision of the City's ordinance, the provision requiring that permitted collectives have samples of their medical marijuana analyzed by an independent laboratory to ensure that it is free from pesticides and contaminants. (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. T .) We question how an otherwise permitted collective can comply with this provision without violating the federal CSA's prohibition on distributing marijuana.26 In other words, this provision appears to *require* that certain individuals

violate the federal CSA. In an amicus brief in support of the City, the California State Association of Counties and League of California Cities argue that the only individuals being required to distribute marijuana under this provision are already violating the federal CSA by operating a medical marijuana collective. In other words, these amici argue that this section of the ordinance "does not compel any person who does not desire to possess or distribute marijuana to do so." We find this argument unavailing. That a person desires to possess or distribute marijuana to some degree (by operating a collective) does not necessarily imply that the person is also desirous of committing additional violations of the federal CSA (by delivering the marijuana for testing). The City cannot compel permitted collectives to distribute marijuana for testing any more than it can compel a burglar to commit additional acts of burglary. In this limited respect, conflict preemption applies.[27]

b. Obstacle Preemption

21 Obstacle preemption arises when the challenged law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89.) "As a majority of the current United States Supreme Court has agreed at one time or another, 'pre-emption analysis is not "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," [citation], but an inquiry into whether the ordinary meanings of state and federal law conflict.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at pp. 939–940, 63 Cal.Rptr.3d 50, 162 P.3d 569.) If the federal act's operation would be frustrated and its provisions refused their natural effect by the operation of the state or local law, the latter must yield. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89.)

22 The United States Supreme Court has already set forth the purposes of the federal CSA. As discussed above, the main objectives of the federal CSA are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances," (*Gonzales v. Oregon, supra,* 546 U.S. at p. 250), with a particular concern of preventing "the diversion of drugs from legitimate to illicit channels." (*Gonzales v. Raich, supra,* 545 U.S. at pp. 12–13.)

*11 23 For this reason, we disagree with our colleagues who, in two other appellate opinions, have implied that medical marijuana laws might not pose an obstacle to the accomplishment of the purposes of the federal CSA because the purpose of the federal CSA is to combat recreational drug use, not regulate a state's medical practices. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 760, 115 Cal.Rptr.3d 89; *County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th at p. 826, 81 Cal.Rptr.3d 461.) While this statement of the purpose of the federal CSA is technically accurate,[28] it is inapplicable in the context of medical marijuana. This is because, as far as Congress is concerned, there is no such thing as medical marijuana. Congress has concluded that marijuana has no accepted medical use at all; it would not be on Schedule I otherwise. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491.) Thus, to Congress, *all* use of marijuana is recreational drug use, the combating of which is admittedly the core purpose of the federal CSA.[29] This case presents the question of whether an ordinance which establishes *a permit scheme* for medical marijuana collectives stands as an obstacle to the accomplishment of this purpose. We conclude that it does.

24 25 There is a distinction, in law, between not making an activity unlawful and making the activity lawful. An activity may be prohibited, neither prohibited nor authorized, or authorized. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 952, 63 Cal.Rptr.3d 50, 162 P.3d 569.) When an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption. The state law does not present an obstacle to Congress's purposes simply by not criminalizing conduct that Congress has criminalized. For this reason, the CUA is not preempted under obstacle preemption.[30] (*City of Garden Grove v. Superior Court, supra,* 157 Cal.App.4th at pp. 384–385, 68 Cal.Rptr.3d 656.) The CUA simply decriminalizes (under state law) the possession and cultivation of medical marijuana (*People v. Mower, supra,* 28 Cal.4th at p. 472, 122 Cal.Rptr.2d 326, 49 P.3d 1067); it does not attempt to authorize the possession and cultivation of the drug (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926, 70 Cal.Rptr.3d 382, 174 P.3d 200).

26 The City's ordinance, however, goes beyond decriminalization into authorization. Upon payment of a fee, and successful participation in a lottery, it provides *permits* to operate medical marijuana collectives. It then imposes an annual fee for their continued operation in the City. In other words, the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives. A law which "authorizes [individuals] to engage in conduct that the federal Act forbids ... 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " and is therefore preempted. (*Michigan*

Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board (1984) 467 U.S. 461, 478, 104 S.Ct. 2518, 81 L.Ed.2d 399.)

*12 The same conclusion was reached by the Oregon Supreme Court in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* (Or.2010) 348 Or. 159, 230 P.3d 518. Oregon had enacted a medical marijuana statute which both affirmatively authorized the use of medical marijuana and exempted its use from state criminal liability. (*Id.* at p. 525.) The court concluded that the law was preempted by the federal CSA, under obstacle preemption, to the extent that it authorized the use of medical marijuana rather than merely decriminalizing its use under state law. (*Id.* at p. 529–531.) We agree with that analysis.

27 Additionally, we have taken judicial notice of letters which set forth the position of the U.S. Attorney General on the purposes of the CSA and the issue of obstacle preemption. While we do not simply defer to its position, we place "some weight" on it. (See *Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 883 [placing "some weight" on Department of Transportation's interpretation of its own regulations and whether obstacle preemption would apply].) On February 1, 2011, the U.S. Attorney for the Northern District of California sent a letter to the Oakland City Attorney relating to that city's consideration of a licensing scheme for medical marijuana cultivation and manufacturing. The letter explained, "Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities." (U.S. Attorney Melinda Haag, letter to Oakland City Attorney John A. Russo, February 1, 2011.) It further stated, "The Department is concerned about the Oakland Ordinance's creation of a licensing scheme that permits large-scale industrial marijuana cultivation and manufacturing as it authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances." (*Ibid.*)

28 On June 29, 2011, the Deputy Attorney General issued a memorandum to all United States Attorneys confirming the position taken in this letter and confirming that prosecution of significant traffickers of illegal drugs, including marijuana, "remains a core priority." (Deputy Attorney General James M. Cole, memorandum for all U.S. Attorneys, June 29, 2011.) The memorandum noted that several jurisdictions "have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers," and noted that these activities are not shielded from federal enforcement action and prosecution. (*Ibid.*) In short, the federal government has adopted the position that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts.31 We agree.

*13 The California State Association of Counties and League of California Cities suggest that, although the City's ordinance is phrased in the language of what it will "permit," it is, in truth, merely an identification of those collectives against which it will not bring violation proceedings, and is therefore akin to the CUA as a limited decriminalization. The ordinance cannot be read in that manner. First and foremost, it is the *possession of the permit itself,* not any particular conduct, which exempts a collective from violation proceedings. That is to say, the ordinance does not indicate that collectives complying with a list of requirements are allowed (or, perhaps, "not disallowed") to operate in the City, which then simply issues permits to identify the collectives in compliance. In this regard, the City's permit scheme is distinguishable from the voluntary identification card scheme set forth in the MMPA. A voluntary identification card identifies the holder as someone California has elected to exempt from California's sanctions for marijuana possession. (*County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th at pp. 825–826, 81 Cal.Rptr.3d 461.) One not possessing an identification card, but nonetheless meeting the requirements of the CUA, is also immune from those criminal sanctions. The City's permit system, however, provides that collectives with permits may collectively cultivate marijuana within the City *and those without permits may not.* The City's permit is nothing less than an *authorization* to collectively cultivate.

Second, the City charges substantial application and renewal fees, and has chosen to hold a lottery among all qualified collective applicants (who pay the application fee) in order to determine those lucky few who will be granted permits. The City has created a system by which: (1) of all collectives which follow its rules, only those which pay a substantial fee may be considered for a permit; and (2) of all those which follow its rules and pay the substantial fee, only a randomly selected few will be granted the right to operate. The conclusion is inescapable: the City's permits are more than simply an easy way to identify those collectives against whom the City has chosen not to enforce its prohibition against collectives; the permits instead authorize the operation of collectives by those which hold them. As such, the permit provisions, including the substantial application fees and renewal fees, and the lottery system, are federally preempted.

c. *Severability*

Having concluded that the permit provisions of the City's ordinance are federally preempted, we turn to the issue of severability. The City's ordinance provides, "If any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provision or application of this Chapter that can be given effect without the invalid provision or application; and to this end, the provisions or applications of this Chapter are severable." (Long Beach Mun.Code, ch. 5.87, § 5.87.130.)

*14 29 30 31 This case is before us on a writ petition from the denial of a preliminary injunction. As we have concluded the permit provisions of the City's ordinance are preempted under federal law, the operation of those provisions should have been enjoined. The parties did not brief the issue of which, if any, of the other provisions of the ordinance must also be enjoined, and which can be severed and given independent effect.32 Under the circumstances, we believe it is appropriate for the trial court to consider this issue in the first instance. However, we make the following observations: Several provisions of the City's ordinance simply identify prohibited conduct without regard to the issuance of permits. For example, the ordinance includes provisions (1) prohibiting a medical marijuana collective from providing medical marijuana to its members between the hours of 8:00 p.m. and 10:00 a.m. (Long Beach Mun.Code, ch. 5.87, § 5.87.090 at subd. H); (2) prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian (*id.* at subd. I); and (3) prohibiting the collective from permitting the consumption of alcohol on the property or in its parking area (*id.* at subd. K). These provisions impose further limitations on medical marijuana collectives beyond those imposed under the MMPA, and do not, in any way, permit or authorize activity prohibited by the federal CSA. As such, they cannot be federally preempted, and appear to be easily severable.

32 Other provisions of the ordinance could be interpreted to simply impose further limitations, although they are found in sections relating to the issuance of permits. For example, in order to obtain a medical marijuana collective permit, an applicant must establish that the property is not located in an exclusive residential zone (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. A), and not within a 1,500 foot radius of a high school or 1,000 foot radius of a kindergarten, elementary, middle, or junior high school (*id.* at subd. B). These restrictions, if imposed strictly as a limitation on the operation of medical marijuana collectives in the City, would not be federally preempted. However, the restrictions, as currently phrased, appear to be a part of the preempted permit process. We leave it to the trial court to determine, in the first instance, whether these and other restrictions can be interpreted to stand alone in the absence of the City's permit system, and therefore not conflict with the federal CSA.33 It is also for the trial court to consider whether any provisions of the City's ordinance that are not federally preempted impermissibly conflict with state law, to the extent plaintiffs have appropriately pleaded (or can so plead) the issue.

DISPOSITION

The petition for writ of mandate is granted. The matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. The petitioners shall recover their costs in this proceeding.

WE CONCUR: KLEIN, P.J., and ALDRICH, J.

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Footnotes

1 The CSA uses both the spellings, "marihuana" and "marijuana." We use the latter.

2 Health and Safety Code section 11357 prohibits the possession of marijuana, although possession of not more than 28.5 grams is declared to be an infraction, punishable by a fine of not more than $100. (Health & Saf.Code, § 11357, subd. (b).)

3 "Primary caregiver" is defined by the CUA to mean "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf.Code, § 11362.5, subd. (e).)

4 Although the MMPA added examples to the definition of "primary caregiver," it retained the restrictive definition set forth in the CUA. (Health & Saf.Code, § 11362.7, subd. (d).) Thus, a person who supplies marijuana to a qualified patient is not an immune primary caregiver under the CUA and MMPA unless the person consistently provided caregiving, *independent of assistance in taking marijuana* at or before the time the person assumed responsibility for assisting the patient with medical marijuana. In short,

a person is not a primary caregiver simply by being designated as such and providing the patient with medical marijuana. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1007, 98 Cal.Rptr.3d 347.)

5 The statutory language provides that the card "identifies a person authorized to engage in the medical use of marijuana." (Health & Saf.Code, § 11362.71, subd. (d)(3).) It would be more appropriate to state that the card "identifies a person whose use of marijuana is decriminalized." As we discussed above, the CUA simply *decriminalized* the medical use of marijuana; it did not *authorize* it.

6 A city or county may also enact a guideline allowing patients to exceed the statutory limitation. (Health & Saf.Code, § 11362.77, subd. (c).)

7 We note that this provision also speaks in the language of permission, rather than decriminalization. The MMPA does not state that the possession of eight ounces of dried marijuana by a qualified patient is immune from arrest and prosecution; rather, it states that a qualified patient "may possess" no more than eight ounces of dried marijuana. The plaintiffs in this case make no argument that the MMPA is preempted by the CSA for this reason.

8 This provision was held to constitute an improper amendment of the CUA to the extent that it burdens a criminal defense under the CUA to a criminal charge of possession or cultivation. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1012, 103 Cal.Rptr.3d 733, 222 P.3d 186.) The Supreme Court did not void the provision in its entirety, however, as it has other purposes, such as its creation of a safe harbor for qualified patients possessing no more than the set amounts. (*Id.* at pp. 1046–1049, 103 Cal.Rptr.3d 733, 222 P.3d 186.)

9 The Legislature has passed, and the Governor has approved, an amendment to this section. The statute amends this section to read as follows: "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." (Stats.2011, ch. 196, § 1.) While this new statute clarifies the state's position regarding local regulation of medical marijuana collectives, it has no effect on our federal preemption analysis.

10 The subdivision provides, in full, "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 business license." Again, the MMPA speaks of collectives "authorized by law to possess, cultivate, or distribute medical marijuana," when, in fact, the operative part of the MMPA simply provides that qualified patients and their caregivers shall not "be subject to state criminal sanctions" under enumerated statutes for their collective medical marijuana activities. (Health & Saf.Code, § 11362.775.)

11 The Guidelines confirm that the Board of Equalization taxes medical marijuana transactions, and requires businesses transacting in medical marijuana to hold a seller's permit. This does not "allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due." (Guidelines, *supra*, at p. 2.)

12 The Guidelines agree that California case authority has concluded that the CUA and MMPA are not preempted by the federal CSA. "Neither [the CUA], nor the MMP[A], conflict with the CSA because, in adopting these laws, California did not 'legalize' medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition." (Guidelines, *supra*, at p. 3.)

13 The Guidelines recommend that state and local law enforcement officers "not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws." (Guidelines, *supra*, at p. 4.)

14 The Guidelines were issued in 2008. When the Legislature amended the MMPA in 2010 to provide that collectives could not be located within 600 feet of a school, the restriction expressly applied to dispensaries as well as collectives and cooperatives. (Health & Saf.Code, § 11362.768, subd. (b).)

15 The ordinance expressly provides that it applies to collectives existing at the time of its enactment. No such collective could continue operation without a permit. (Long Beach Mun.Code, ch. 5.87, § 5.87.080.)

16 There is no provision in the ordinance for a lottery system. To the contrary, the ordinance provides that if the applicant demonstrates compliance with all of the requirements, a permit "shall [be] approve[d] and issue[d]." (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) No argument is made that the lottery system is improper on this basis.

17 "The camera and recording system must be of adequate quality, color rendition and resolution to allow the ready identification of an individual on or adjacent to the Property. The recordings shall be maintained at the Property for a period of not less than thirty

(30) days." (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. I.) According to an amicus curiae brief filed by the American Civil Liberties Union (ACLU) and other entities, the ordinance was amended in 2011 to add a requirement that full-time video monitoring of a collective be made accessible to the Long Beach Police Department in real time without a warrant, court order, or other authorization.

18 In plaintiffs' brief in reply to the amicus curiae briefing, plaintiffs suggest that the restrictions imposed by the permit system are so onerous, the only collectives that could conceivably obtain permits are large-scale dispensaries. We do not entirely disagree. One can assume that a small collective of four patients and/or caregivers growing a few dozen marijuana plants would lack the resources to: (1) pay a $14,742 application fee; (2) pay a $10,000 annual fee; (3) install necessary insulation, ventilation, closed-circuit television, fire, and alarm systems; and (4) regularly have its marijuana tested by an independent laboratory. Moreover, the location restrictions, which prohibit any collective in an exclusive residential zone or within 1000 feet of another collective (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subds. A & C) might also be prohibitive for small, private collectives. Nonetheless, plaintiffs' complaint did not challenge the ordinance on this basis. We do note, however, that these provisions of the ordinance make it somewhat more likely that the only collectives permitted in Long Beach will be large dispensaries that require patients to complete a form summarily designating the business owner as their primary caregiver and offer marijuana in exchange for cash "donations"—the precise type of dispensary believed by the Attorney General likely to be in violation of California law.

19 While not alleged in plaintiffs' complaint, it was suggested that this language prohibits the *personal* cultivation of medical marijuana, outside the context of a collective. Indeed, in plaintiffs' petition, they argue that the City's ordinance is preempted by *state* law because of this prohibition. At argument before the trial court, however, the City Attorney represented that the ordinance did not criminalize personal cultivation and possession, and addressed only collective cultivation. As the City has represented that the ordinance does not apply to prohibit personal cultivation and possession, and there is no evidence that it has been so applied, we do not address the argument.

20 Plaintiffs, who were members of collectives shut down due to noncompliance with the ordinance, suggest that, since they can each be a member of only a single collective, they are now foreclosed from obtaining medical marijuana from another collective. This is clearly untrue. Membership is limited to a single *permitted* collective. Since the collectives in which plaintiffs were members were not permitted, they may join another, permitted, collective without violating the terms of the ordinance.

21 The trial court apparently had before it two cases challenging the City's ordinance. Although it did not consolidate the cases or deem them related, it heard the preliminary injunction issue simultaneously in both cases, and denied the preliminary injunction in both cases in a single order. The other case had raised the issue of whether the ordinance impermissibly conflicted with the CUA and MMPA. The court concluded that it did not, although it noted that the "overall sense of the Ordinance is inconsistent with the purposes of the CUA and MMPA." (Emphasis omitted.)

22 We take judicial notice of the fact that a simple Google search reveals that several other medical marijuana dispensaries are apparently operating in Long Beach, although their websites do not specifically indicate whether they are permitted.

23 We sought briefing from the parties and amici on the issue of whether certain record-keeping requirements imposed by the ordinance violated collective members' Fifth Amendment rights. Given our resolution of the federal preemption issue, we need not reach the Fifth Amendment issue, although it may be considered by the trial court upon remand.

24 That City is a charter city makes no difference to our analysis. As a charter city, City's ordinances relating to matters which are *purely municipal affairs* prevail over state laws on the same subject. (*Home Gardens Sanitary Dist. v. City of Corona* (2002) 96 Cal.App.4th 87, 93, 116 Cal.Rptr.2d 638). The issue, however, is one of conflict with *federal law* on a matter on which the federal government has chosen to act in the national interest. Indeed, the United States Supreme Court has held that the federal CSA applies to marijuana cultivated and used *solely intrastate*, as a proper exercise of Congress's authority under the Commerce Clause. (*Gonzales v. Raich, supra*, 545 U.S. at pp. 29–30.) While City suggests that its ordinance relates to the purely municipal matters of zoning and land use, it is clear that the regulation of medical marijuana is a matter of state and, indeed, national interest, and the ordinance is thus not concerned *solely* with municipal affairs.

25 The trial court in this case did not reach the issue, concluding that plaintiffs were barred by the doctrine of unclean hands from arguing that the federal CSA preempted the City's ordinance because the plaintiffs sought the ruling in order to continue to violate the federal CSA. We disagree. Plaintiffs sought the assistance of the California courts in order to assert their rights to use medical marijuana under the California statutes. As the CUA and MMPA decriminalize medical marijuana use in California, plaintiffs' hands were not unclean under California law. Furthermore, if the only individuals who can challenge medical marijuana ordinances as preempted by federal law are those who have no intention of violating the provisions of federal law, no one would ever have standing to raise the preemption argument.

26 The federal CSA defines "distribution" to include "delivery," (21 U.S.C. § 802(11), which, in turn, includes the "transfer" of a controlled substance (21 U.S.C. § 802(8)).

27 There may also be an issue of whether the ordinance *requires* certain City officials to violate federal law by aiding and abetting (or facilitating (21 U.S.C. § 843(b)) a violation of the federal CSA. For example, the ordinance requires the City's Director of Financial Management to approve and issue a permit if certain facts are demonstrated. (Long Beach Mun.Code, ch. 5.87, § 5.87.040.) In this regard, we note that the Ninth Circuit has held that a physician does not aid and abet the use of marijuana in violation of the federal CSA simply by *recommending* that the patient use marijuana, but the conduct would escalate to aiding and abetting if the physician provided the patient with the means to acquire marijuana with the specific intent that the patient do so. (*Conant v. Walters, supra,* 309 F.3d at pp. 635–636.) We also note that the U.S. Attorneys for the Eastern and Western Districts of Washington took the position, in a letter to the Governor of Washington, that "state employees who conducted activities mandated by the Washington legislative proposals [which would establish a licensing scheme for marijuana growers and dispensaries] would not be immune from liability under the CSA." (U.S. Attorney Jenny A. Durkan and U.S. Attorney Michael C. Ormsby, letter to Governor Christine Gregoire, April 14, 2011.) Although a California court has concluded that law enforcement officials are not violating the federal CSA by returning confiscated medical marijuana pursuant to state law (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 368, 68 Cal.Rptr.3d 656), we are not as certain that the federal courts would take such a narrow view. (See, also, *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 742, 96 Cal.Rptr.3d 421 (dis. opn. of Morrison, J., [stating "[f]ostering the cultivation of marijuana in California, regardless of its intended purpose, violates federal law"].) We are not required to reach the issue.

28 In *Gonzales v. Oregon, supra,* 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748, the Supreme Court was concerned with an attempt by the Attorney General, purportedly acting under the federal CSA, to prohibit doctors from prescribing Schedule II drugs for use in physician-assisted suicide, as permitted by Oregon state law. The court concluded that the federal CSA was concerned with regulating medical practice insofar as it barred doctors from using their prescription-writing powers as a means to engage in illicit drug use, but otherwise had no intent to regulate the practice of medicine. (*Id.* at pp. 269–270.)

29 Indeed, in light of the Supreme Court's conclusions that: (1) "[A] medical necessity exception for marijuana is at odds with the terms of the [federal CSA]" (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491); and (2) the federal CSA reaches even purely intrastate cultivation and use of marijuana (*Gonzales v. Raich, supra,* 545 U.S. 9, 30), we see no legal basis for suggesting that the federal CSA's core purposes do not include the control of medical marijuana.

30 *Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757, 115 Cal.Rptr.3d 89, concluded that the MMPA also was not preempted by the CSA because it simply decriminalizes for the purposes of state law certain conduct related to medical marijuana. The court, however, was not presented with any argument that any specific sections of the MMPA go beyond decriminalization into authorization. As we noted above (see footnotes 5, 7, and 10, *ante*), the MMPA sometimes speaks in the language of authorization, when it appears to mean only decriminalization. Obviously, any preemption analysis should focus on the purposes and effects of the provisions of the MMPA, not merely the language used. (See *Willis v. Winters* (Or.App.2010) 235 Or.App. 615, 234 P.3d 141, 148 [Oregon's concealed weapon licensing statute is, in effect, merely an exemption from criminal liability], *aff'd* (Or.2011) 350 Or. 299, 253 P.3d 1058.)

31 We again note that the high costs of compliance with the City's ordinance may have the practical effect of allowing *only* large-scale dispensaries, rather than small collectives. (See footnote 18, *ante.*) Yet these large-scale dispensaries are precisely the type of dispensaries the licensing of which the U.S. Attorney General believes stands as an obstacle to the enforcement of the CSA.

32 In their reply brief, petitioners argue that, as the entire ordinance is designed to regulate and permit medical marijuana collectives, the federally preempted provisions cannot be severed from other provisions. The City did not brief the severability issue at all.

33 The ordinance also includes record-keeping provisions as a condition of obtaining a permit. (Long Beach Mun.Code, ch. 5.87, § 5.87.040, subd. S.) Other record-keeping provisions appear unconnected to the permit requirement. (Long Beach Mun.Code, ch. 5.87, § 5.87.060.) Although we requested briefing on the issue of whether the record-keeping provisions violated the Fifth Amendment privilege against self-incrimination, the trial court will first have to determine, as a preliminary matter, whether each of the comprehensive record-keeping provisions can stand in the absence of the permit provisions.

Exhibit 5

KENTREPORTER

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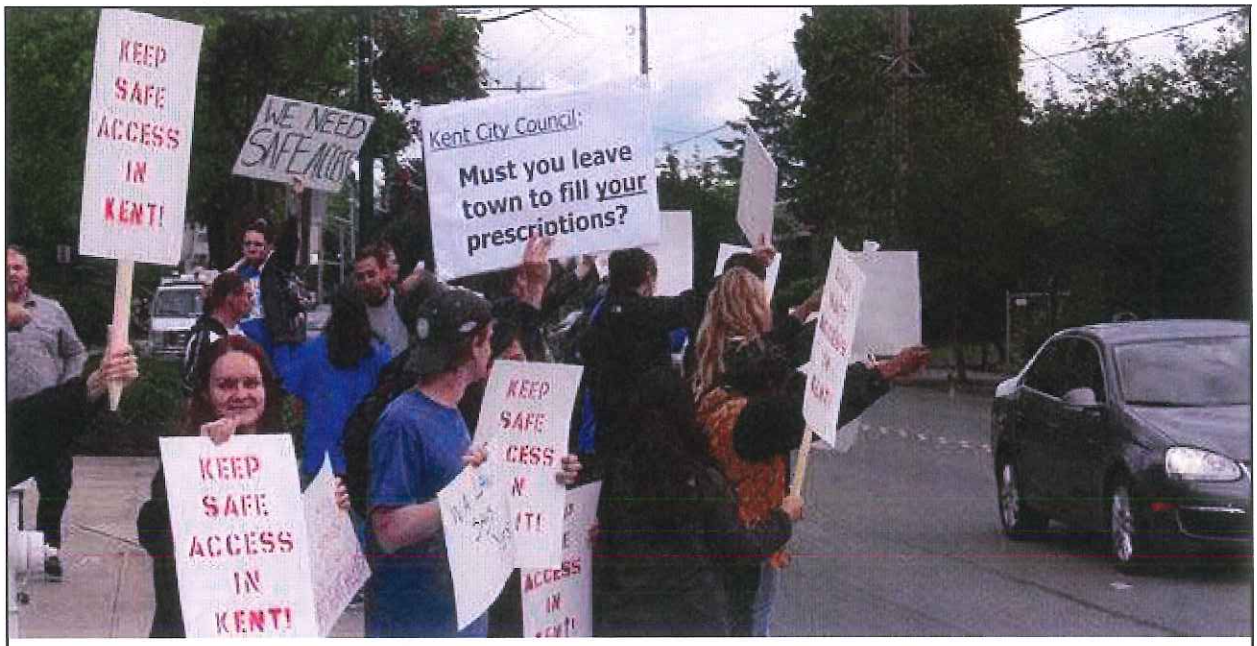
Judge upholds Kent's ban on medical marijuana collective gardens



KENT REPORTER, FILE PHOTO
Medical marijuana supporters gather in June before a Kent City Council meeting to protest the city's ban against medical marijuana collective gardens. A King County Superior Court judge upheld that ban on Oct. 5.

By STEVE HUNTER
Kent Reporter Courts, government reporter
OCTOBER 10, 2012 · 10:45 AM

A King County Superior Court judge upheld the city of Kent's ban on medical marijuana collective gardens.

Judge Jay White issued his ruling on a summary judgment motion by the city on Oct. 5 in court at the Norm Maleng Regional Justice Center in Kent.

"We won the entire case," said Deputy City Attorney Pat Fitzpatrick during a phone interview. "I was pleased. We expected that result. But we have to acknowledge it's a complicated matter."

Steve Sarich, a medical marijuana supporter who filed the lawsuit against the city in June in an effort to prohibit the city from enforcing its ban on collective gardens, said he also expected the ruling.

"We were disappointed but not surprised," said Sarich during a phone interview. "And it's not discouraging. We were prepared for whatever judgment came down."

Sarich, one of several plaintiffs on the initial lawsuit filed after the Kent City Council passed in June its ban on medical marijuana collective gardens, said they would appeal within a few days to either the state Court of Appeals or the state Supreme Court.

"In all the case laws we cited they were not won instantly," Sarich said. "They were all won in the Court of Appeals or Supreme Court. We could be in Supreme Court in as quickly as three weeks. We have no intention to let it drop. We're right with the case law."

Sarich argues that the state regulates medical marijuana collectives, and cities cannot enforce federal law over state medical marijuana laws.

The council banned collective gardens because it believes the businesses violate federal law that lists marijuana as an illegal drug under the federal Controlled Substances Act. State law allows medical marijuana use but council members decided the state law remains unclear about distribution of the drug and doesn't want any medical marijuana businesses operating in Kent.

Fitzpatrick said the ruling came down to a zoning issue.

"The judge ruled we have the authority to prohibit collective gardens," Fitzpatrick said. "It's not as much about medical marijuana but the city's right to zone. We have statutory authority to prohibit through zoning."

The judge also ruled that Deryck Tsang, owner of Herbal Choice Caregivers at 19011 West Valley Highway, must close because of the city's ban against collective gardens. Tsang operates the only known medical marijuana collective garden in Kent.

Tsang, who is also a plaintiff in the suit against the city, did not return a phone message for comment about the judge's ruling or his plans for the business. Sarich said he figured Tsang would close the business.

Fitzpatrick said the judge had many issues to look over.

"It's a very complicated case with the legal rules, state and federal law and the Gov. (Chris Gregoire) vetoes that left it a mess," Fitzpatrick said. "It's not an easy case for the judge to make sense of."

The Legislature passed a bill in 2011 to allow medical marijuana dispensaries and collective gardens. But Gregoire vetoed 36 of 58 sections, leaving a confusing legal landscape for cities to navigate.

A couple of medical marijuana businesses opened in Kent after passage of the bill. Evergreen Association of Collective Gardens closed in August on Central Avenue after a letter from the federal Drug Enforcement Administration threatened to shut down the store because it's too close to a school. Evergreen had remained open despite the city's ban against the business.

Contact Kent Reporter Courts, government reporter Steve Hunter at shunter@kentreporter.com or 253-872-6600, ext. 5052.

Find this article at:
http://www.kentreporter.com/news/173533721.html

☐ Check the box to include the list of links referenced in the article.

Exhibit 6

CITY OF MARYSVILLE
MARYSVILLE, WASHINGTON

ORDINANCE NO. 2867

AN INTERIM ORDINANCE OF THE CITY OF MARYSVILLE, WASHINGTON, ADOPTING A MORATORIUM ON THE ESTABLISHMENT OF MEDCIAL MARIJUANA DISPENSARIES, COLLECTIVE GARDENS AND THE LICENSING AND PERMITTING THEREOF; DEFINING "MEDICAL MARIJUANA DISPENSARY"; PROVIDING FOR A PUBLIC HEARING; ESTABLISHING AN EFFECTIVE DATE; AND PROVIDING THAT THE MORATORIUM, UNLESS EXTENDED, WILL SUNSET WITHIN SIX (6) MONTHS OF THE DATE OF ADOPTION.

WHEREAS, Initiative Measure No. 692, approved November 3, 1998, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana; and

WHEREAS, the initiative and current Chapter 69.51A RCW are clear that nothing in its provisions are to be "construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes"; and

WHEREAS, the Washington State Department of Health opines that it is "not legal to buy or sell" medical marijuana and further opines that "the law [Chapter 69.51.A RCW] does not allow dispensaries", leaving enforcement to local officials; and

WHEREAS, the City Council finds that the sale of marijuana, no matter how designated by dispensaries, is prohibited by federal and state law;

WHEREAS, ESSB 5073 – Chapter 181, Laws of 2011 ("the bill") was adopted with a partial veto of the Governor becomes effective July 22, 2011; and

WHEREAS, Section 404 of the bill effectively eliminates medical marijuana dispensaries as a legally viable model of operation under State law; and

WHEREAS, Section 403 of the bill provides that qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use subject to compliance with specific statutory conditions; and

WHEREAS, the City acknowledges the right of qualified health care professionals to prescribe the medical use of marijuana as well as the right of patients to designate a "designated provider" who can "provide" rather than sell marijuana to "only one patient at any one time"; and

WHEREAS, the City Council finds that the secondary impacts associated with marijuana dispensaries, and collective gardens include but are not limited to the invasion of the business, burglary and robbery associated with the cash and drugs maintained on the site;

WHEREAS, pursuant to Section 1102 of the bill and under their general zoning and police powers cities are authorized to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements and business taxes on the production, processing or dispensing of cannabis or cannabis products; and

WHEREAS, a public hearing will be held on July 11, 2011 before Marysville City Council;

NOW, THEREFORE, the City Council of the City of Marysville, Washington, do ordain as follows:

Section 1. Pursuant to the provisions of RCW 36.70A.390, a zoning moratorium is hereby enacted in the City of Marysville prohibiting licensing, permitting, establishment, maintenance or continuation of any use consisting of or including the sale, provision and/or dispensing of medical marijuana to more than one person, the establishment of a medical marijuana dispensary or creation of or participation in a "collective garden" as referenced and defined in Section 403 of ESSB 5073 – Chapter 181, Laws of 2011.

Section 2. "Medical marijuana dispensary" is hereby defined as any person, business, corporation, partnership, joint venture, organization, association and/or other entity which: 1) sells, provides and/or otherwise dispenses marijuana to more than one "qualifying patient" in any thirty (30) day period or to any person who does not meet the definition of "qualifying patient" under the terms of Chapter 69.51A RCW , and/or 2) maintains and/or possesses more than one sixty-day supply of marijuana for one qualifying patient at any time. The receipt of cash or other legal tender in exchange for, contemporaneously with or immediately following the delivery of marijuana to a qualifying patient shall be presumed to be a sale. Any person, business, corporation, partnership, joint venture, organization, association and/ or entity which sells, provides and/or otherwise dispenses marijuana to more than one qualifying patient in any sixty (60) day period should be presumed to be a "medical marijuana dispensary."

Section 3. Medical marijuana dispensaries and collective gardens are hereby designated as prohibited uses in the City of Marysville, in accordance with the provisions of RCW 35A.82.020, no business license, permit, zoning or development approval shall be issued to be a medical marijuana dispensary or collective garden.

Section 4. The City Council hereby directs that a work plan be developed by the Chief Administrative Officer to identify a process for review of medical marijuana dispensaries and collective gardens for potential regulation and inclusion in the Marysville Municipal Code. Said work plan will be presented to the City Council for review before the sunset of this ordinance.

Section 5. Ordinance to be Transmitted to Department. Pursuant to RCW 36.70A.106, a copy of this interim ordinance shall be transmitted to the Washington State Department of Commerce.

Section 6. Effective Date. This ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title, PROVIDED, HOWEVER, that unless extended by the act of the Marysville City Council, this ordinance shall automatically expire six (6) months following its adoption.

CITY OF MARYSVILLE

By: _____
Jon Nehring, Mayor

ATTEST/AUTHENTICATED:

By: _____
Sandy Langdon, City Clerk

APPROVED AS TO FORM:

By: _____
Grant K. Weed, City Attorney

Date of Publication: _____

Effective Date: 7/11/14

Medical Cannabis Collective Gardens Work Plan Timeline

Date	Step	Requirement
July 19, 2011	Moratorium effective date	Moratorium effective for six months following passage, until January 7, 2012
December 12, 2011	City Council public meeting to consider work plan, draft regulations and extension of moratorium for six (6) months.	Moratorium extended until July 5, 2012
January 13, 2012	Joint City Council/Planning Commission work session	
No later than April 2, 2012	Notice of intent to amend development regulations sent to Dept. of Commerce	Final adoption no sooner than 60 days after notice; March 20, 2012
No later than April 2, 2012	Notice of Application and SEPA determination	14-day comment/appeal period
April 16, 2012	End of comment/appeal hearing	
No later than May 22, 2012	Planning Commission public hearing on permanent regulations	10 day notice before hearing required
June 2, 2012	60 days after notice sent to Dept. of Commerce	
No later than June 25, 2012	City Council Public Meeting or Public Hearing (if needed) on permanent regulations	10 day notice before hearing required
No later than June 27, 2012	Ordinance published	Usually the Weds after the Monday City Council meeting
July 2, 2012	Effective date of ordinance	5 days after publication
Date Permanent Regulations Required to be Adopted		
July 5, 2012	6 months after moratorium extension adopted	

Exhibit 6

CITY OF MARYSVILLE
MARYSVILLE, WASHINGTON

ORDINANCE NO. 2867

AN INTERIM ORDINANCE OF THE CITY OF MARYSVILLE, WASHINGTON, ADOPTING A MORATORIUM ON THE ESTABLISHMENT OF MEDCIAL MARIJUANA DISPENSARIES, COLLECTIVE GARDENS AND THE LICENSING AND PERMITTING THEREOF; DEFINING "MEDICAL MARIJUANA DISPENSARY"; PROVIDING FOR A PUBLIC HEARING; ESTABLISHING AN EFFECTIVE DATE; AND PROVIDING THAT THE MORATORIUM, UNLESS EXTENDED, WILL SUNSET WITHIN SIX (6) MONTHS OF THE DATE OF ADOPTION.

WHEREAS, Initiative Measure No. 692, approved November 3, 1998, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana; and

WHEREAS, the initiative and current Chapter 69.51A RCW are clear that nothing in its provisions are to be "construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes"; and

WHEREAS, the Washington State Department of Health opines that it is "not legal to buy or sell" medical marijuana and further opines that "the law [Chapter 69.51.A RCW] does not allow dispensaries", leaving enforcement to local officials; and

WHEREAS, the City Council finds that the sale of marijuana, no matter how designated by dispensaries, is prohibited by federal and state law;

WHEREAS, ESSB 5073 – Chapter 181, Laws of 2011 ("the bill") was adopted with a partial veto of the Governor becomes effective July 22, 2011; and

WHEREAS, Section 404 of the bill effectively eliminates medical marijuana dispensaries as a legally viable model of operation under State law; and

WHEREAS, Section 403 of the bill provides that qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use subject to compliance with specific statutory conditions; and

WHEREAS, the City acknowledges the right of qualified health care professionals to prescribe the medical use of marijuana as well as the right of patients to designate a "designated provider" who can "provide" rather than sell marijuana to "only one patient at any one time"; and

WHEREAS, the City Council finds that the secondary impacts associated with marijuana dispensaries, and collective gardens include but are not limited to the invasion of the business, burglary and robbery associated with the cash and drugs maintained on the site;

WHEREAS, pursuant to Section 1102 of the bill and under their general zoning and police powers cities are authorized to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements and business taxes on the production, processing or dispensing of cannabis or cannabis products; and

WHEREAS, a public hearing will be held on July 11, 2011 before Marysville City Council;

NOW, THEREFORE, the City Council of the City of Marysville, Washington, do ordain as follows:

Section 1. Pursuant to the provisions of RCW 36.70A.390, a zoning moratorium is hereby enacted in the City of Marysville prohibiting licensing, permitting, establishment, maintenance or continuation of any use consisting of or including the sale, provision and/or dispensing of medical marijuana to more than one person, the establishment of a medical marijuana dispensary or creation of or participation in a "collective garden" as referenced and defined in Section 403 of ESSB 5073 – Chapter 181, Laws of 2011.

Section 2. "Medical marijuana dispensary" is hereby defined as any person, business, corporation, partnership, joint venture, organization, association and/or other entity which: 1) sells, provides and/or otherwise dispenses marijuana to more than one "qualifying patient" in any thirty (30) day period or to any person who does not meet the definition of "qualifying patient" under the terms of Chapter 69.51A RCW , and/or 2) maintains and/or possesses more than one sixty-day supply of marijuana for one qualifying patient at any time. The receipt of cash or other legal tender in exchange for, contemporaneously with or immediately following the delivery of marijuana to a qualifying patient shall be presumed to be a sale. Any person, business, corporation, partnership, joint venture, organization, association and/ or entity which sells, provides and/or otherwise dispenses marijuana to more than one qualifying patient in any sixty (60) day period should be presumed to be a "medical marijuana dispensary."

Section 3. Medical marijuana dispensaries and collective gardens are hereby designated as prohibited uses in the City of Marysville, in accordance with the provisions of RCW 35A.82.020, no business license, permit, zoning or development approval shall be issued to be a medical marijuana dispensary or collective garden.

Section 4. The City Council hereby directs that a work plan be developed by the Chief Administrative Officer to identify a process for review of medical marijuana dispensaries and collective gardens for potential regulation and inclusion in the Marysville Municipal Code. Said work plan will be presented to the City Council for review before the sunset of this ordinance.

Section 5. Ordinance to be Transmitted to Department. Pursuant to RCW 36.70A.106, a copy of this interim ordinance shall be transmitted to the Washington State Department of Commerce.

Section 6. Effective Date. This ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title, PROVIDED, HOWEVER, that unless extended by the act of the Marysville City Council, this ordinance shall automatically expire six (6) months following its adoption.

CITY OF MARYSVILLE

By: _____
Jon Nehring, Mayor

ATTEST/AUTHENTICATED:

By: _____
Sandy ~~Langdon~~, City Clerk - Deputy
APRIL O'BRIEN

APPROVED AS TO FORM:

By: _____
Grant K. Weed, City Attorney

Date of Publication: 7/14/11 - Herald 7/12/11 Globe (on line)

Effective Date: 7/19/11

Exhibit 7

CITY OF MARYSVILLE
MARYSVILLE, WASHINGTON

ORDINANCE NO. 2887

AN INTERIM ORDINANCE OF THE CITY OF MARYSVILLE, WASHINGTON, ADOPTING AN EXTENSION OF A MORATORIUM ON THE ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES, COLLECTIVE GARDENS AND THE LICENSING AND PERMITTING THEREOF; DEFINING "MEDICAL MARIJUANA DISPENSARY"; PROVIDING FOR A PUBLIC HEARING; REFERRING THE MATTER TO THE PLANNING COMMISSION FOR REVIEW; ESTABLISHING AN EFFECTIVE DATE; AMENDING ORDINANCE 2867 AND PROVIDING THAT THE EXTENDED MORATORIUM WILL EXPIRE SIX (6) MONTHS FROM THE DATE OF EXPIRATION OF ORDINANCE 2867.

WHEREAS, Initiative Measure No. 692, approved November 3, 1998, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana; and

WHEREAS, the initiative and current Chapter 69.51A RCW are clear that nothing in its provisions are to be "construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes"; and

WHEREAS, the Washington State Department of Health opines that it is "not legal to buy or sell" medical marijuana and further opines that "the law [Chapter 69.51.A RCW] does not allow dispensaries", leaving enforcement to local officials; and

WHEREAS, the City Council finds that the sale of marijuana, no matter how designated by dispensaries, is prohibited by federal and state law; and

WHEREAS, ESSB 5073 – Chapter 181, Laws of 2011 ("the bill") was adopted with a partial veto of the Governor becomes effective July 22, 2011; and

WHEREAS, Governor Gregoire vetoed 36 of the 58 provisions of ESSB 5073 and this has created considerable uncertainties and ambiguities regarding the meaning and enforcement of the bill; and

WHEREAS, Section 404 of the bill effectively eliminates medical marijuana dispensaries as a legally viable model of operation under State law; and

WHEREAS, Section 403 of the bill provides that qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use subject to compliance with specific statutory conditions; and

WHEREAS, the City acknowledges the right of qualified health care professionals to prescribe the medical use of marijuana as well as the right of patients to designate a "designated provider" who can "provide" rather than sell marijuana to "only one patient at any one time"; and

WHEREAS, the City Council finds that the secondary impacts associated with marijuana dispensaries and collective gardens include but are not limited to the invasion of the business, burglary and robbery associated with the cash and drugs maintained on the site; and

WHEREAS, pursuant to Section 1102 of the bill and under their general zoning and police powers cities are authorized to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements and business taxes on the production, processing or dispensing of cannabis or cannabis products; and

WHEREAS, the City currently has no zoning, licensing, and/or permitting requirements and/or regulations that address the medical marijuana collective gardens; and

WHEREAS, marijuana/cannabis remains a Schedule I drug under the federal Controlled Substances Act ("CSA") and is considered by the federal authorities to be a drug with no medical value, and its manufacture, distribution and/or possession are a violation of federal law; and

WHEREAS, there appears to be a conflict between state and federal law concerning the legal status of marijuana/cannabis and its manufacture, distribution, use and possession; and

WHEREAS, on or about November 30, 2011, Washington State Governor Christine Gregoire and Rhode Island State Governor Lincoln Chaffee petitioned the United States Drug Enforcement Administration (DEA) to reclassify marijuana/cannabis as a Schedule II drug that has therapeutic value and that should be treated as a prescription drug; and

WHEREAS, reclassification of marijuana/cannabis as a Schedule II drug by DEA would allow marijuana/cannabis to be prescribed by physicians with restrictions and dispensed by pharmacies, and would potentially eliminate the current legal and planning dilemma Marysville and other Washington cities and towns are currently struggling with concerning regulation, permitting and licensing issues surrounding medical marijuana/cannabis; and

WHEREAS, a number of initiatives and referendum have been filed with the Washington State Secretary of State that if adopted would change the legal framework concerning medical marijuana once again; and

WHEREAS, it is anticipated that the State Legislature may again revisit the issues surrounding medical marijuana again during the 2012 legislative session; and

WHEREAS, on July 11, 2011, the City Council passed Ordinance No. 2867 that imposed a six (6) month moratorium on the establishment of medical marijuana dispensaries, collective gardens and the licensing and permitting thereof; and

WHEREAS, Ordinance No. 2867 expires on January 7, 2012 (180 days from the adoption of Ordinance No. 2867; and

WHEREAS, given the many complications, uncertainties and impacts that exist and that are described above, additional time is necessary to engage in a meaningful planning process related to the development of regulations that address zoning, licensing and/or permitting of medical marijuana and the impacts thereof; and

WHEREAS, a public hearing was held on December 12, 2011, before Marysville City Council; and

WHEREAS, the City Council finds it is in the best interest of the City of Marysville and its citizens to extend the moratorium regarding the establishment of medical marijuana collective gardens and the licensing and permitting thereof for an additional six (6) month period from the expiration of the moratorium imposed by Ordinance No. 2867 to July 5, 2012;

NOW, THEREFORE, the City Council of the City of Marysville, Washington, do ordain as follows:

Section 1. The above "Whereas" clauses constitute findings of fact in support of the moratorium established by this Ordinance and said findings are fully incorporated into this Ordinance.

Section 2. Pursuant to the provisions of RCW 36.70A.390, the zoning moratorium established by Ordinance 2867 in the City of Marysville that prohibits licensing, permitting, establishment, maintenance or continuation of any use consisting of or including the sale, provision and/or dispensing of medical marijuana to more than one person, the establishment of a medical marijuana dispensary or creation of or participation in a "collective garden" as referenced and defined in Section 403 of ESSB 5073 - Chapter 181, Laws of 2011, is hereby extended for an additional six (6) month period from the date of expiration of Ordinance 2867 and the findings, terms and conditions of Ordinance 2867 and those set forth herein are incorporated herein by this reference, and Ordinance 2867 is hereby amended consistent herewith.

Section 3. "Medical marijuana dispensary" is hereby defined as any person, business, corporation, partnership, joint venture, organization, association and/or other entity which: 1) sells, provides and/or otherwise dispenses marijuana to more than one "qualifying patient" in any thirty (30) day period or to any person who does not meet the definition of "qualifying patient" under the terms of Chapter 69.51A RCW, and/or 2) maintains and/or possesses more than one sixty-day supply of marijuana for one qualifying patient at any time. The receipt of cash or other legal tender in exchange for, contemporaneously with or immediately following the delivery of marijuana to a qualifying patient shall be presumed to be a sale. Any person, business, corporation, partnership, joint venture, organization, association and/ or entity which sells, provides and/or otherwise dispenses marijuana to more than one qualifying patient in any sixty (60) day period should be presumed to be a "medical marijuana dispensary."

Section 4. Medical marijuana dispensaries and collective gardens are hereby designated as prohibited uses in the City of Marysville, in accordance with the provisions of RCW 35A.82.020, no business license, permit, zoning or development approval shall be issued to be a medical marijuana dispensary or collective garden.

Section 5. This Ordinance shall be referred to the Marysville Planning Commission for its review and recommendation for potential inclusion in the zoning and/or business and tax ordinances of the City of Marysville.

Section 6. Ordinance to be Transmitted to Department. Pursuant to RCW 36.70A.106, a copy of this interim Ordinance shall be transmitted to the Washington State Department of Commerce.

Section 7. Severability. If any section, clause, and/or phrase of this Ordinance is held invalid by a court of competent jurisdiction, such invalidity and/or unconstitutionality shall not affect the validity and/or constitutionality of any other section, clause and/or phrase of the Ordinance.

Section 8. Effective Date. This Ordinance shall take effect five (5) days after passage and publication of an approved summary thereof consisting of the title, PROVIDED, HOWEVER, that unless extended by the act of the Marysville City Council, this Ordinance shall automatically expire on July 5, 2012, which is six (6) months from the expiration date of Ordinance 2867 (January 7, 2012) following its adoption.

CITY OF MARYSVILLE

By: _____
Jon Nehring, Mayor

ATTEST/AUTHENTICATED:

By: _____
April O'Brien, Deputy City Clerk

APPROVED AS TO FORM:

By: _____
Grant K. Weed, City Attorney

Date of Publication: 12/21/11

Effective Date: 12/25/11

CITY OF MARYSVILLE
MARYSVILLE, WASHINGTON

ORDINANCE NO. 2899

AN INTERIM ORDINANCE OF THE CITY OF MARYSVILLE, WASHINGTON, ADOPTING AN EXTENSION OF A MORATORIUM ON THE ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES, COLLECTIVE GARDENS AND THE LICENSING AND PERMITTING THEREOF; DEFINING "MEDICAL MARIJUANA DISPENSARY"; REFERRING THE MATTER TO THE PLANNING COMMISSION FOR REVIEW; ESTABLISHING AN EFFECTIVE DATE; AMENDING ORDINANCES NO. 2867 AND 2882; AND PROVIDING THAT THE EXTENDED MORATORIUM WILL EXPIRE ON JULY 5, 2013 -- ONE (1) YEAR FROM THE DATE OF EXPIRATION OF ORDINANCE NO. 2882.

WHEREAS, Initiative Measure No. 692, approved November 3, 1998, created an affirmative defense for "qualifying patients" to the charge of possession of marijuana/cannabis; and

WHEREAS, the initiative and current Chapter 69.51A RCW are clear that nothing in its provisions are to be "construed to supersede Washington state law prohibiting the acquisition, possession, manufacture, sale or use of marijuana for non-medical purposes"; and

WHEREAS, the Washington State Department of Health opines that it is "not legal to buy or sell" medical marijuana and further opines that "the law [Chapter 69.51.A RCW] does not allow dispensaries", leaving enforcement to local officials; and

WHEREAS, the City Council finds that the sale of marijuana, no matter how designated by dispensaries, is prohibited by federal and state law; and

WHEREAS, ESSB 5073 – Chapter 181, Laws of 2011 ("the bill") was adopted with a partial veto of the Governor becomes effective July 22, 2011; and

WHEREAS, Governor Gregoire vetoed the provisions of ESSB 5073 that would have provided the legal basis for legalizing and licensing medical marijuana dispensaries, processing facilities and production facilities, thereby making these activities illegal; and

WHEREAS, Section 403 (codified at RCW 69.51A.085) of the bill provides that qualifying patients may create and participate in collective gardens for the purpose of producing, processing, transporting and delivering cannabis for medical use subject to compliance with specific statutory conditions; and

WHEREAS, the City acknowledges the right of qualified health care professionals to prescribe the medical use of marijuana; and

WHEREAS, the City Council finds that the secondary impacts associated with medical marijuana collective gardens include but are not limited to the invasion of the business, burglary and robbery associated with the cash and drugs maintained on the site; and

WHEREAS, pursuant to Section 1102 of the bill and under their general zoning and police powers, cities are authorized to adopt and enforce zoning requirements, business licensing requirements, health and safety requirements and business taxes on the production, processing or dispensing of cannabis or cannabis products; and

WHEREAS, the City currently has no zoning, licensing, and/or permitting requirements and/or regulations that address the medical marijuana collective gardens; and

WHEREAS, marijuana/cannabis remains a Schedule I drug under the federal Controlled Substances Act ("CSA") and is considered by the federal authorities to be a drug with no medical value, and its manufacture, distribution and/or possession are a violation of federal law; and

WHEREAS, there appears to be a conflict between state and federal law concerning the legal status of marijuana/cannabis and its manufacture, distribution, use and possession; and

WHEREAS, on or about November 30, 2011, Washington State Governor Christine Gregoire and Rhode Island State Governor Lincoln Chaffee petitioned the United States Drug Enforcement Administration (DEA) to reclassify marijuana/cannabis as a Schedule II drug that has therapeutic value and that should be treated as a prescription drug; and

WHEREAS, this conflict between federal and state law was highlighted by a January 17, 2012 letter to the Clark County Board of Commissioners, Joseph T. Rannazzisi, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice, stated that anyone "who knowingly carries out the marijuana activities contemplated by Washington state law, as well as anyone facilitates such activities, or conspires to commit such violations, is subject to criminal prosecution as provided in the [Controlled Substances Act]" (underlining added); and

WHEREAS, reclassification of marijuana/cannabis as a Schedule II drug by DEA would allow marijuana/cannabis to be prescribed by physicians with restrictions and dispensed by pharmacies, and would potentially eliminate the current legal and planning dilemma Marysville and other Washington cities and towns are currently struggling with concerning regulation, permitting and licensing issues surrounding medical marijuana/cannabis; and

WHEREAS, a number of initiatives and referendum have been filed with the Washington State Secretary of State that if adopted would change the legal framework concerning medical marijuana once again; and

WHEREAS, the voters will vote on at least one initiative (Initiative 502) that if passed would legalize the production, possession, delivery and distribution of marijuana/cannabis under State law; and

WHEREAS, on July 11, 2011, the City Council passed Ordinance No. 2867 that imposed a six (6) month moratorium on the establishment of medical marijuana dispensaries, collective gardens and the licensing and permitting thereof; and

WHEREAS, on December 12, 2011, the City Council passed Ordinance No. 2882 that extended the moratorium on the establishment of medical marijuana collective gardens and the licensing and permitting thereof by an additional six (6) months to July 5, 2012; and

WHEREAS, given the many complications, uncertainties and impacts that exist and that are described above, additional time is necessary to engage in a meaningful planning process related to the development of regulations that address zoning, licensing and/or permitting of medical marijuana/cannabis collective gardens and the impacts thereof; and

WHEREAS, a work plan ("Work Plan") has been developed to study the many complications, uncertainties and impacts described and to provide for a meaningful planning process to develop regulations that address zoning, licensing and/or permitting of medical marijuana/cannabis collective gardens and the impacts thereof; and

WHEREAS, a copy of the Work Plan is attached hereto as Exhibit A and incorporated herein by this reference; and

WHEREAS, a public hearing was held on June 11, 2012, before Marysville City Council regarding an additional one (1) year extension of the moratorium on the establishment of medical marijuana collective gardens and the licensing and permitting thereof; and

WHEREAS, the City Council finds it is in the best interest of the City of Marysville and its citizens to extend the moratorium regarding the establishment of medical marijuana collective gardens and the licensing and permitting thereof for an additional one (1) year period from the expiration of the moratorium imposed by Ordinance No. 2882 to July 5, 2013;

NOW, THEREFORE, the City Council of the City of Marysville, Washington, do ordain as follows:

Section 1. The above "Whereas" clauses constitute findings of fact in support of the moratorium established by this Ordinance and said findings are fully incorporated into this Ordinance.

Section 2. Pursuant to the provisions of RCW 36.70A.390, the zoning moratorium established by Ordinances No. 2867 and No. 2882 in the City of Marysville that prohibits licensing, permitting, establishment, maintenance or continuation of any use consisting of or including the sale, provision and/or dispensing of medical marijuana to more than one person, the establishment, creation of or participation in a "medical marijuana/cannabis collective garden" as referenced and defined in RCW 69.51A.085, is hereby extended for an additional one (1) year period from the date of expiration of Ordinance No. 2882 and the findings, terms and conditions of Ordinances No. 2867 and No. 2882 are incorporated herein by this reference, and Ordinances No. 2867 and No. 2882 are hereby amended consistent herewith.

Section 3. "Medical marijuana dispensary" is hereby defined as any person, business, corporation, partnership, joint venture, organization, association and/or other entity which: 1) sells, provides and/or otherwise dispenses marijuana to more than one "qualifying patient" in any sixty (60) day period or to any person who does not meet the definition of "qualifying patient" under the terms of Chapter 69.51A RCW, and/or 2) maintains and/or possesses more than one sixty-day supply of marijuana for one qualifying patient at any time. The receipt of cash or other legal tender in exchange for, contemporaneously with or immediately following the delivery of marijuana to a qualifying patient shall be presumed to be a sale. Any person, business, corporation, partnership, joint venture, organization, association and/ or entity which sells, provides and/or otherwise dispenses marijuana to more than one

qualifying patient in any sixty (60) day period should be presumed to be a "medical marijuana dispensary."

Section 4. Medical marijuana dispensaries and collective gardens are hereby designated as prohibited uses in the City of Marysville, in accordance with the provisions of RCW 35A.82.020, no business license, permit, zoning or development approval shall be issued to be a medical marijuana dispensary or medical marijuana/cannabis collective garden.

Section 5. This Ordinance shall be referred to the Marysville Planning Commission for its review and recommendation for potential inclusion in the zoning and/or business and tax ordinances of the City of Marysville.

Section 6. Ordinance to be Transmitted to Department. Pursuant to RCW 36.70A.106, a copy of this interim Ordinance shall be transmitted to the Washington State Department of Commerce.

Section 7. Severability. If any section, clause, and/or phrase of this Ordinance is held invalid by a court of competent jurisdiction, such invalidity and/or unconstitutionality shall not affect the validity and/or constitutionality of any other section, clause and/or phrase of the Ordinance.

Section 8. Effective Date. This Ordinance shall take effect July 5, 2012. Unless extended by action of the Marysville City Council, this Ordinance shall automatically expire on July 5, 2013, which is one (1) year from the expiration date of Ordinance No. 2882 (July 5, 2012).

PASSED by the City Council and APPROVED by the Mayor this 11th day of June, 2012.

CITY OF MARYSVILLE

By: _____
Jon Nehring, Mayor

ATTEST/AUTHENTICATED:

By: _____
April O'Brien, Deputy City Clerk

APPROVED AS TO FORM:

By: _____
Grant K. Weed, City Attorney

Date of Publication: June 13, 2012

Effective Date: July 5, 2012

DRAFT

PLANNING COMMISSION MINUTES

June 11, 2013 **7:00 p.m.** **City Hall**

CALL TO ORDER

Chair Leifer called the June 11, 2013 meeting to order at 7:01 p.m. noting the absence of Marvetta Toler and also that there was no one in the audience.

Chairman:	Steve Leifer
Commissioners:	Roger Hoen, Jerry Andes, Kelly Richards, Kay Smith, Steven Lebo
Staff:	CAO Gloria Hirashima, Police Chief Rick Smith, City Attorney Grant Weed, Chief Information Officer Doug Buell
Absent:	Marvetta Toler

APPROVAL OF MINUTES

May 14, 2013 Meeting Minutes

Motion made by Commissioner Smith, seconded by Commissioner Richards, to approve the May 14, 2013 Meeting Minutes. **Motion** passed unanimously (6-0).

AUDIENCE PARTICIPATION

PUBLIC HEARINGS

Draft Medical Cannabis Collective Regulations

The hearing was called to order at 7:01 p.m.

CAO Hirashima gave some background on the medical cannabis collective regulations. She explained that the City has been operating under a moratorium since 2011. While the Washington State has passed initiatives to legalize marijuana, federal laws still recognize it as illegal, and this has created a dilemma for cities. The City has been in a holding pattern since the original passage of the legislation while they have been

studying approaches regarding how to handle this. The City Attorney and Police Chief have also been involved in this review to find a path that is legally defensible and to gauge where the court is going. The ordinance before the Planning Commission provides for a somewhat permanent solution. It clearly provides for a use matrix and a use called *Miscellaneous Health* with a notation that says "excepting marijuana cannabis dispensaries and marijuana cannabis gardens . . ." The ordinance also provides for definitions for cannabis, medical marijuana cannabis dispensaries, medical marijuana cannabis collective gardens, and a description of miscellaneous health. CAO Hirashima added that the Marysville has also been working with surrounding jurisdictions with the recognition that they are operating within a larger urban area. The cities of Marysville, Arlington, and Lakes Stevens' police and planning departments have met to compare approaches. All of them are trying to take a regional approach of proposing similar laws. The City of Lake Stevens notified her today that their Council passed a very similar ordinance last night which also prohibits these uses.

Police Chief Rick Smith explained that aside from criminal consequences, he has seen the devastating consequences of marijuana on a personal level. He then discussed some of the criminal issues that are associated with the marijuana dispensaries and collective gardens. He acknowledged that this is a difficult issue because he believes there can be legitimate uses for marijuana on the medical side. The state of Washington is still working on the regulations through the Liquor Control Board, but it will be some time before those are put in place. In the meantime, federal law still says that marijuana is a controlled substance. Therefore, the possession, sale, manufacture, and distribution of it is still illegal per federal law even though it was recently passed on a state level.

Chief Smith reviewed how this issue has played out in Washington, Colorado, and California. Colorado is the only other state that has legalized marijuana outside of medical use. He stressed that the industry is laden with criminal activity. From March 2011 until the present time in the state of Washington there were 13 different types of crimes that are associated specifically with medical collective gardens, especially with burglary and armed robbery of the marijuana from the gardens and then reselling it. In the Denver area of Colorado, in 2009 they had 10 dispensary burglaries; in 2010 there were 64; in 2011 there were 100; in 2012 there were 102; and in 2013 there were 22 burglaries in dispensaries in just the first three months of the year.

In the state of Washington, the federal government is now cracking down on medical marijuana and dispensaries. In the Seattle area 11 dispensaries have received shutdown notices because they are not adhering to federal law. In San Francisco, they are shutting down 7 to 10 of the remaining 15 medical marijuana dispensary locations. Chief Smith reviewed crimes associated with dispensaries, grow operations, and/or coops for 2012 to 2013 in the state of Washington which included: arson, multiple homicides, explosives, home invasion robbery, and burglaries. Typically what Colorado has seen is that the THC concentration is much higher with the indoor grow operations. A lot of people are going into Colorado, stealing the marijuana, and taking it to other states because the value is much greater and they can get more money for it. He spoke in support of the ordinance and the way the City of Marysville is trying to approach this issue.

Commissioner Hoen said he was confused about the fact that this is illegal per federal law and the statement that federal law has to be followed or they will be shut down. Chief Smith noted that City Attorney Weed would be able to answer that question in more detail, but stated that the justice department has said that they are going to take a passive approach to the issue over the last several years, which has resulted in the current situation.

City Attorney Grant Weed reviewed the current status of the law at the federal level as well as in the state of Washington. He acknowledged that the law is not completely settled in this matter. It will take some time for this to work its way through the court system. The federal law that applies to it is the Federal Controlled Substances Act (CSA) which identifies five different schedules of drugs. Under the CSA marijuana is classified as a Schedule 1 Drug. This means that the federal government recognizes it as having no accepted medicinal use. It is a criminal offense to use, possess, transport, or manufacture that particular drug. It is also illegal to open, lease, or maintain any place for the purpose of manufacturing, distributing, or using a controlled substance.

Washington State Uniform Controlled Substance Act also makes it illegal to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. Marijuana is listed under the state law as a controlled substance, and that law is still on the books. Since the adoption of Uniform Controlled Substance Act, the Medical Marijuana Initiative was approved by the voters in the state of Washington in 1998. This related just to qualifying patients with terminal or debilitating medical conditions which in the judgment of their physician would benefit from the use of medical marijuana. This didn't make it lawful for everyone, but it gave those persons an affirmative defense against prosecution for a crime of possession and using it if they stayed within certain amounts. In 2011 the legislature adopted ESSSB 5073 which Governor Gregoire partially vetoed. The part that survived the veto allowed local government, including cities, to zone, license, and regulate the use of medical marijuana. Different cities have exercised their power to regulate in different ways. The operation of dispensaries is clearly illegal under the medical marijuana bill passed by the legislature in 2011. That bill's provisions relating to individual cultivation of medical marijuana cannabis in collective gardens was not vetoed, but the authority to regulate through zoning was preserved.

City Attorney Weed explained that there are some cities such as Woodinville and Pasco that have chosen to ban even collective gardens. Additionally, the City of Kent adopted an ordinance banning medical marijuana collective gardens through zoning and nuisance regulations. This is essentially similar to the ordinance that Marysville staff is proposing to the Planning Commission. He went on to explain that Kent's ordinance was challenged in court. In the King County Superior Court it was upheld as being valid and lawful. That decision was appealed, and the State Supreme Court agreed to consider the issue. The Supreme Court is currently deciding whether it is going to hear the appeal or whether it is going to remand it to the State Court of Appeals. The bright side is that out of this ordinance there will ultimately be some law that will decide in the state of Washington whether cities, through an ordinance, have the authority to ban collective

gardens. The same issue has come up in other states. The City of Riverside, California also adopted an ordinance banning collective gardens and dispensaries. The state of California's medical marijuana law is very similar to the one in Washington, and the California State Supreme Court upheld the City of Riverside's ban on collective gardens.

City Attorney Weed explained that I-502 approved by the voters legalizes the use of recreational marijuana with some stipulations. It is a different law than the medical marijuana issue (ESSSB 5073) and the two bills conflict in some respects. The directive in I-502 was to have the Liquor Control Board adopt regulations relating to marijuana by December of 2013. The Liquor Control Board has been in the process of rulemaking, holding public meetings all over the state and getting input from all the different interested parties regarding the recreational marijuana issue. He noted that somewhere down the road cities will have to address that issue separately from the medical marijuana issue. The draft ordinance before the planning commission tonight only applies to medical marijuana.

Referring to Commissioner Hoen's question about why we are dealing with this if it is already illegal under federal law, City Attorney Weed reviewed case law at the federal level that says no state can authorize violations of federal law. Except in specific cases federal law preempts state law and controls state law. There has been a case decided by the United States Supreme Court that says that the Federal Controlled Substances Act supersedes state regulations relating to marijuana even when it is used for medicinal purposes. Nevertheless, 19 states across the country have adopted medical marijuana statutes. In terms of enforcement, in 2009 there was a memo written by the US Department of justice called the Ogden Memo which tried to provide clarification and guidance to federal prosecutors on how they should enforce the CSA. That memo stated that prosecution of individuals with cancer or other serious illnesses will not be given high priority. Businesses that are operating to make a profit and that are operating in a way that puts special interests (like schools and daycares) at risk are a higher priority. In June of 2010 another memo by the Department of Justice sent to United States attorneys clarified that dispensaries and licensed growers could be prosecuted for violating the Federal drug and money laundering laws as well.

As it relates to the state of Washington, the County Commissioners in Clark County wrote asking the federal government whether their enforcement efforts would extend to activities implementing the state's law on medical marijuana. The US Attorney's Office responded by saying, "Anyone who knowingly carries out the marijuana activities contemplated by Washington State law as well as anyone who facilitates such activities or conspires to commit such violations, is subject to criminal prosecution as provided in the Controlled Substances Act. The same conclusion would apply with equal force to the proposed activities of the Board of County Commissioners and county employees." City Attorney Weed summarized that it appears that the City of Marysville has authority to ban collective gardens, but the law could change depending on what happens with the Kent case.

Commissioner Richards questioned if an ordinance was really necessary since it’s already illegal per federal standards. City Attorney Weed stated the need to take some

action regarding the Washington State bill. If the City doesn't address the issue there will be a belief that it's okay to set up a dispensary or collective garden in Marysville. The action being proposed is through zoning, making it clear that the City intends to ban collective gardens and dispensaries. Also, the local police don't have jurisdiction or authority to go out and cite people or shut them down under federal law, but they would have authority under the Marysville Municipal Code.

Commissioner Hoen asked about potential legal defense of planning commissioners on this decision if necessary. City Attorney Weed replied that both a state statute and a Marysville Municipal Code require the City to indemnify its elected and appointed officials for acts that they take within the scope of their responsibilities. This decision is within the scope of the Planning Commission's responsibility.

Commissioner Hoen asked about the problem with rolling the moratorium over. City Attorney Weed discussed the risk related to this. Staff is recommending that the City take some action other than continuing the moratorium. Commissioner Hoen asked about the likeliness of one state's Supreme Court recognizing the decision of another state's Supreme Court. City Attorney Weed noted that state level Supreme Court decisions are not binding on other states, but federal appellate court level decisions are binding on all states. However, the decision in the state of California gives an idea what the highest courts in other states are doing with this issue.

Commissioner Richards asked what would happen if the Washington State Supreme Court or the Court of Appeals comes back and says that Kent's ordinance is not lawful or valid. City Attorney Weed explained that staff would evaluate the court's decision and see what needs to be done to make the ordinance comply with what the court has said. He noted that the City can always bring the ordinance back and amend or repeal it.

Commissioner Lebo referred to page 3 of 4 of the draft ordinance under section 1 which seems to contradict itself regarding the parts of the plants covered under the definition. City Attorney Weed indicated that the verbiage defines it generally then attempts to clarify the definition just for the purposes of this document.

Chair Leifer spoke in support of the ordinance in order to provide the necessary tools of legitimacy to law enforcement personnel.

Grant Weed stated that the hearing had been properly noticed and advertised. He added that throughout the hearing there were no members of the public present to provide comment. Two members of the Marysville police department were present in the audience, but did not provide comment.

The public testimony portion of the public hearing was closed at 7:57 p.m.

Motion made by Commissioner Richards, seconded by Commissioner Lebo, to forward the ordinance as written to Council with a recommendation for approval. **Motion** passed unanimously (6-0).

The hearing was closed at 8:04 p.m. The Planning Commission recessed from 8:04 until 8:07 p.m.

Wireless Communication Facility Prohibition in the Downtown Master Plan

The public hearing was opened at 8:07 p.m.

CAO Hirashima stated that the hearing had been properly noticed and advertised. It was noted that there was no one present in the audience for the hearing. CAO Hirashima reviewed the proposed ordinance and stated that staff is recommending prohibition of wireless communication facilities in the Downtown Master Plan area.

Commissioner Andes asked if this just applied to the poles. CAO Hirashima replied that it did. Her understanding was that attached wireless facilities would still be allowed if they were integrated into the structure. Chair Leifer asked where this was stated in the proposed code. CAO Hirashima said her understanding of the intent of the code was to prohibit just the towers, but acknowledged it was not clear in the proposed code. She stated she was not opposed to wireless communication facilities if they could be disguised on the structure or integrated into the structure itself. After some discussion, CAO Hirashima suggested that this item be continued to the next meeting to allow staff time to research this more and potentially bring back language to differentiate between a tower and an attached wireless communication facility.

Motion made by Commissioner Andes, seconded by Commissioner Richards, to continue the hearing to June 25. **Motion** passed unanimously (6-0).

The hearing was closed at 8:15 p.m. until June 25.

COMMENTS FROM COMMISSIONERS

Commissioner Andes commented on the poor condition of the railroad crossing at 4th Street. CAO Hirashima said that those conditions have been reported to BNSF. She indicated she would check with Director Nielsen regarding the status of that.

ADJOURMENT

Motion made by Commissioner Richards, seconded by Commissioner Andes, to adjourn at 8:19 p.m. **Motion** passed unanimously.

NEXT MEETING

June 25, 2013

_____

Laurie Hugdahl, Recording Secretary