S198638

LIU, J.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF RIVERSIDE

Plaintiff and Respondent,

vs.

INLAND EMPIRE PATIENT'S HEALTH AND WELLNESS CENTER, INC, WILLIAM JOSEPH SUMP II, LANNY DAVID SWERDLOW, ANGEL CITY WEST, INC., MENELEO CARLOS, AND FILOMENA CARLOS.

Defendants and Petitioners.

NO.

Fourth District Ct. Appeal, Div 2, No. E052400

Riverside County Superior Court Case No. RIC10009872

PETITION FOR REVIEW

Honorable John D. Molloy, Judge of the Riverside County Superior Court

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Appellants respectfully petitions for review of the opinion by the California Court of Appeal, Fourth Appellate District, Division Two in *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.,* 200 Cal. App. 4th 885 (Cal. App. 4th Dist. 2011) (hereafter *Inland Empire*), which is attached hereto at **Exhibit A,** and as a slip opinion at **Exhibit B**, which was certified for publication and filed on November 9, 2011[1]. No request for rehearing was filed. Accordingly, this petition for review is timely. (*Cal. Rules of Court*, rule 28(e)(1).)

ISSUES PRESENTED

1.) Whether a municipality's authority to enact and enforce zoning ordinances and regulation is preempted by the 2004 *Medical Marijuana Program Act*[2] (hereafter "*MMPA*").

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[1] Alternatively, pursuant to *California Rules of Court*, Rule 8.1125, Appellants respectfully request that the above referenced opinion issued by the Court Appeal be ordered not published in the Official Reports.

[2] *Health and Safety Code* sections 11362.7 – 11362.83 (*2003 Cal SB 420; 2003 Cal Stats. ch. 875,* Effective Jan. 1, 2004) except section 11362.768 (*2010 Cal AB 2650; 2010 Cal Stats. ch. 603,* Effective, Jan. 1, 2011) (Section 11362.83 amended 2011, *2011 Cal Stats. ch. 196,* Effective Jan. 1 2012)

2.) Whether *Health & Safety Code § 11362.83*[3], which only permits the adoption and enforcement of local ordinances "consistent" with the *Medical Marijuana Program Act*, prohibit a municipality from enacting zoning ordinances which totally ban/prohibit conduct expressly authorized and encouraged by the Legislature (*Section 11362.775*) when it created the *MMPA* as part of a state wide medical marijuana distribution system.

3.) Whether the Court of Appeal's decision conflicts with this Court's decisions in *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 521 (*City of Torrance*), *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 293 (*Cohen*), *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068–1069, and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103–104 [223 Cal. Rptr. 609] and may the rules announced in those cases be distinguished on the grounds that "[t]hese cases are factually inapposite [for reasons they] do not concern medical marijuana, the

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[3] *Health and Safety Code* § 11362.83 (amended 2011, effective 2012) provides:

> 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.

MMP, or local ordinances regulating or banning MMDs."[4] *Inland Empire supra at* 902

4.) Must the Legislature expressly state which types of local ordinances are preempted or may a local law's conflict with the legislature's paramount and express purpose behind the state wide legislation be sufficient to find state law preemption. While the MMPA did not expressly mention zoning its express purpose is to "assure uniform application of the law" throughout the state and "enhance" access of medical cannabis through the collective projects such as appellants; does a total local ban conflict with these express legislative purposes and thus preempted by the MMPA?

I. INTRODUCTION

The right of the State to authorize and regulate, marijuana for medical purposes, versus local municipalities right to enact regulations in conformity with the state's marijuana laws is now in a complete state of chaos, where many local municipalities are claiming a right to ban acts authorized by the *MMPA* without any direction by the State. In other words, local municipalities are claiming a right to enact laws that are in conflict with the *MMPA.*

Currently, suits enforcing or challenging local ordinances banning acts pertaining to the cultivation and distribution of medical marijuana authorized by

the *MMPA* are being litigated within nearly every jurisdiction within the State of California. Appellants' Counsel in the instant case is presently representing parties on this issue in 9 different jurisdictions. Furthermore a plethora of reports are arising from counsel's peers engaged in similar actions, within a multiplicity of other jurisdictions within the state[5]. The abundance of these particular suits are reflected within a December 8, 2011, Google™ key word search for – [injunction "medical marijuana" California] - , which produces 2,100,000 results.

As a result of this flurry of litigation, the issue of whether a county or city may ban that which is authorized within the *MMPA* is the single most litigated issue within the California Courts, without any guidance by the California Supreme Court. The uncertainty arising from this lack of guidance, seriously impacts future prospects for consistent enforcement and regulation across the state.

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[5] Counsel has also been aware of Fourth District Court of Appeal case numbers G043867, G043817 which are a consolidation of 5 different appeals; also Case No: E052728 where supersedeas was issued by the Fourth District Court of Appeal, all of which involve issues regarding zoning ordinances regulating acts authorized by the *Medical Marijuana Program Act*. Amongst the jurisdictions counsel is litigating the issues addressed herein are: Roseville, Sacramento County, Palm Springs, Wildomar, Riverside, County of Los Angeles, Tehama County, Beaumont, Temecula, and San Jose (6th district court of appeal #HO36369). Counsel's current Appellate Court cases, regarding MMDs and zoning, are: 4th District, Div 2 Nos: E054150, E053736, E053310, E053215, E052788,; 2nd District, Div 1 No: B233419; 3rd District, Nos: C068800, C068163.

The lack of guidance is further demonstrated by the lack of uniformity on this issue. Presently, 16 counties and 167 cities have enacted outright bans, and 10 counties and 81 cities have adopted moratoria, which are in various stages of expiration,[6] given the two-year limit for moratoria. (*Gov. Code.* § 65858, subd. (a).) Many, local marijuana ordinances may cloak themselves as regulatory, but in effect are complete bans - as in the case of *County of Los Angeles v. Hill,* 192 Cal. App. 4th 861 (Cal. App. 2d Dist. 2011), County of Los Angeles, with a population over 9,848,011,[7] has not a issued a single permit under the contested ordinance since its enactment in June 2006.

Moreover, the Appellate Court opinion in *Inland Empire*, will cause chaos throughout the entire judicial system, by its abandonment of the foundational principals of *stare decisis*, by discarding binding precedence in *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516 (*City of Torrance*), *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277 (*Cohen*), *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90 on the grounds that "[t]hese cases are factually inapposite [for reasons they] do not concern

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[6] (See http://www.safeaccessnow.org/article.php?id=3165.)

[7] The 2009 Census reports that Los Angeles County, California population at 9,848,011 (http://quickfacts.census.gov/qfd/states/06/06037.html)

medical marijuana, the *CUA*, the *MMP*, or local ordinances regulating or banning MMDs."[8] *Inland Empire supra at* 902

II. FACTUAL AND PROCEDURAL HISTORY

A. Statement of Facts

As stated in *Inland Empire* supra at 891-893: Inland Empire Center is a nonprofit mutual benefit corporation established for the purpose of facilitating an MMD located in Riverside. Inland Empire Center's MMD is a nonprofit collaborative association of patient members, who collectively cultivate medical marijuana and redistribute it to each other. Inland Empire Center has operated its MMD in Riverside since 2009.

Appellant/Defendant Lanny Swerdlow (Swerdlow) is a registered nurse and manager of an adjacent, separate medical clinic, THCF Medical Clinic, unassociated with the MMD. Appellant/Defendant William Joseph Sump II is an Inland Empire Center board member and general manager of Inland Empire Center's Riverside MMD. Appellant/Defendants Meneleo Carlos and Filomena Carlos (the Carloses) own the property upon which the MMD is located and lease the property to Swerdlow. Defendant Angel City West, Inc. (Angel), provides management services for the property.

In January 2009, Riverside's Community Development Department

planning division sent Swerdlow a letter stating that Riverside's zoning code prohibits MMDs in Riverside. In May 2010, Riverside filed a complaint against Angel, Swerdlow, Sump, the Carloses, East West Bancorp, Inc., and THCF Health and Wellness Center, for injunctive relief to abate public nuisance. The complaint alleges Inland Empire Center's MMD constitutes a public nuisance, in violation of Riverside's zoning code, *Riverside Municipal Code* (*RMC*) section 6.15.020.Q. Riverside notified Swerdlow of the violation. Nevertheless, Swerdlow continues to operate the MMD.

Riverside's complaint includes two causes of action, both alleging public nuisance, and prays for injunctive relief enjoining Inland Empire Center from operating its MMD in Riverside. Riverside alleges in the complaint that Inland Empire Center is located in a commercial zone. Under Riverside's zoning code, MMDs are prohibited. (*RMC*) §§ 19.150.020, 19.910.140.) Riverside's zoning code further states that any use which is prohibited by state and/or federal law is strictly prohibited in Riverside. (*RMC*, § 19.150.020.) Any violation of Riverside's municipal code is deemed a public nuisance under *RMC* sections 1.01.110 and 6.15.020.Q. Inland Empire Center's MMD violates Riverside's zoning code and is therefore a public nuisance subject to abatement.

B. Procedural History

Riverside filed a motion for a preliminary injunction, seeking to close Inland Empire Center's MMD in Riverside.

Inland Empire Center maintained that it had been lawfully operating its MMD and it did not constitute a nuisance to the surrounding community.

On November 24, 2010, the trial court heard Riverside's motion for a preliminary injunction and granted the motion, concluding *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 (*Kruse*) controlled and therefore Riverside could use zoning regulations to prohibit MMDs, "especially given the conflict between state and federal law." The trial court added it was not finding that federal law preempted state law in this instance. The court acknowledged there was case law holding that there was no federal law preemption. The trial court entered a written order enjoining Inland Empire Center from operating its MMD on the Carloses' property.

Appellant/Defendants appealed.

The Fourth Appellate District, Division Two, Affirmed the Trial Court's Judgment, holding Riverside Municipal Code was not preempted by state law.

The Appellate Court decision concerning complete bans against MMDs in contention in this petition, reads:

4. Complete Ban

Inland Empire Center argues that, although local governments can regulate MMDs under subdivisions (f) and (g) of section 11362.768, this statute only concerns restricting MMDs located near schools. But it is clear from subdivisions (f) and (g), in conjunction with the MMP as a whole, that the Legislature intended to allow local governments to regulate MMDs beyond the limited provisions included in the CUA and MMP, as long as the local provisions are consistent with the CUA and MMP. Zoning ordinances banning MMDs are not inconsistent with the CUA and MMP, as discussed above.

Inland Empire Center also argues that subdivisions (f) and (g) of section 11362.768 do not authorize local governments to enact ordinances totally banning MMDs. Local government can only "restrict" or "regulate" the location or establishment of MMDs. (§ 11362.768, subds. (f), (g).) Inland Empire Center asserts that restricting and regulating MMDs is more limited than completely banning MMDs and therefore Riverside did not have authority under section 11362.768 to ban all MMDs. We disagree.

We construe the words in section 11362.768 in "their context and harmonize them according to their ordinary, common meaning. [Citation.] ... We consider the consequences which would flow from each interpretation and avoid constructions which defy common sense or which might lead to mischief or absurdity. [Citations.] By doing so, we give effect to the legislative intent even though it may be inconsistent with a strict, literal reading of the statute." (*Friedman v. City of Beverly Hills* (1996) 47 Cal.App.4th 436, 441–442 [54 Cal. Rptr. 2d 882].)

In determining whether section 11362.768 authorizes local government to ban MMDs, we look to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." The term "regulate" is defined in the dictionary as: "[T]o govern or direct according to rule ... [or] laws ... ." (Webster's 3d New Internat. Dict. (1993) p. 1913.) The term "regulation" is defined in Black's Law Dictionary as: "1. The act or process of controlling by rule or restriction ... . 3. A rule or order, having legal

> force, usu. issued by an administrative agency ... ." (Black's Law Dict. (8th ed. 2004) p. 1311.) "Restriction" is defined as: "1. A limitation or qualification. 2. A limitation (esp. in a deed) placed on the use or enjoyment of property." (Black's Law Dict., supra, p. 1341.)
>
> Applying these definitions, we conclude Riverside's prohibition of MMDs in Riverside through enacting a zoning ordinance banning MMDs is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMDs in the city. (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 473 [Fourth Dist., Div. Two].) A ban or prohibition is simply a type or means of restriction or regulation. Riverside's ban of MMDs is not preempted by the CUA or MMP.

City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc., 200 Cal. App. 4th 885, 905-906 (Cal. App. 4th Dist. 2011)

III. STATUTORY AND REGULATORY BACKGROUND ADDRESSED IN THE APPEAL.

A. *Compassionate Use Act* of 1996

In 1996, California voters adopted Proposition 215, the "Compassionate Use Act of 1996" (*Health & Safety Code*[9], § 11362.5). The act is intended to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana"; "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

[9] All further statutory citations are to the *Health and Safety Code*, unless otherwise stated.

sanction"; and "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (*§ 11362.5, subd. (b)(1)(A)–(C)*.) The act provides in relevant part that it shall not "be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others … ." (*§ 11362.5, subd. (b)(2).)*

B. ***Medical Marijuana Program Act***

In 2003, the Legislature added the "*Medical Marijuana Program Act,*" (hereinafter "MMPA") *article 2.5, chapter 6, division 10 to the Health and Safety Code*. The purposes of *article 2.5* include "[promoting] uniform and consistent application of the [Compassionate Use Act of 1996] among the counties within the state" and "[enhancing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b).) Among other things, the *MMPA* provides that qualified patients and their primary caregivers have limited immunity from prosecution for violation of various sections of the Health and Safety Code regulating marijuana including the "drug den" abatement law. (*§§ 11362.765, 11362.775*.) Most significant for this case, the *MMPA* provides: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." (*§ 11362.83*.)

The court of appeal in *People v. Urziceanu* (2004) 132 Cal.App.4th 747, *785*, articulated that it was the intent of the Legislature in enacting *§11362.775* of the *MMPA* to exempt qualified patients and primary caregivers from specific Health and Safety Code violations listed therein which previously prevented the lawful dispensation of medical cannabis for others "and **the laws declaring the use of property for these purposes a nuisance."** (*People v. Urziceanu* (2004) 132 Cal. App. 4th 747, 785 *emphasis added.*) *Urziceanu* pointed out that the enactment of the *MMP* signified a "dramatic change in the law" (See, *Urziceanu, supra, at p. 785*) in that the CUA did not permit distribution and now at the request of the voters (a provision in the CUA requested the Legislature to enact a distribution system) the Legislature had finally created a statewide distribution system. (*See People v. Urziceanu* (2004) 132 Cal.App.4th 747, 785.*)*

The *Urziceanu* court was keen in referring to the Legislature's express enumeration of *Health and Safety Code* § 11570 within § 11362.775 and realized the obvious, i.e. that the Legislature had not just removed criminal penalties identified in the other enumerated statutes contained within *§ 11362.775*, but additionally municipalities were prohibited from using "the laws declaring the use of property for these purposes a nuisance." *People v. Urziceanu* supra, at *785*.

IV. DISCUSSION

A. The Relationship Between The State's Medical Marijuana Laws and a Local Municipality's Power to Enact and Enforce Local Ordinances Regulating Marijuana Is Unsettled And Requires Clear Guidance.

Under *Rule* 8.500(b)(1), of *California Rules of Court*, this Court may grant review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law."

B. The Issue Whether State Law Preempts Marijuana ordinances Is Ripe For Review, Presents A Pure Question Of Law.

"Whether the *MMPA* bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined." *Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 754 (Cal. App. 4th Dist. 2010)

In the immediate case, the issue whether State law preempts local marijuana ordinances is ripe for review for the following reasons:

First, whether state law should be construed to preempt the City of Riverside's complete ban is a facial challenge that presents purely a legal issue that is ripe for review. It is well-settled that "[w]hether state law preempts a local ordinance is a question of law that is subject to de novo review." (*Roble Vista Associates v. Bacon* (2002) 97 Cal. App. 4th 335, 339.) In the instant case,

Appellants made *a facial challenge* to the City of Riverside Ordinance, presenting a pure question of law.

Second, the state preemption issue has been squarely raised and fully briefed before the trial court and Court of Appeal, as it was directly addressed in the Appellate Court Decision in *Inland Empire.*

Third, "a significant issue of widespread importance" has been raised in this petition for review and "it is in the public interest to decide the issue." This Court has granted review, even where the issue had not been raised in the Court of Appeal. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal. 4th 1, 6.) Indeed, this Court will "exercise [its] original jurisdiction," without the benefit of any lower court decisions, where it "is uniformly agreed that the issues are of great public importance and should be resolved promptly." (*Brosnahan v. Brown* (1982) 32 Cal. 3d 236, 241; *Lockyer v. City and County of San Francisco* (2004) 33 Cal. 4th 1055, 1066-1067 [this Court assumed original jurisdiction to decide the "important" issue of whether a local executive exceeded his authority in refusing to enforce a statute because he determined it was unconstitutional].) Here, 16 counties and 167 cities have enacted outright bans, and 10 counties and 81 cities have adopted moratoria, which are in various stages of expiration. With these moratoria in various stages of expiration (*Gov. Code*, § 65858, subd. (a)), all of these cities need immediate guidance over the legality of permanent bans;

furthermore the lack of guidance by this court has resulted in this issue being the most litigated issue in the courts at this time.

Fourth, recently enacted legislation (AB 2650 adding § 11362.768 to the *Health and Safety Code*), has subdivision (f) authorizing ordinances that "further restrict the location or establishment" of a medical marijuana dispensary; however, § 11362.768 did not repeal or change in any way the *MMPA* or *Health and Safety Code section* 11362.83 (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, (1998) 17 Cal. 4th 553; *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1.) Therefore, any regulation enacted under the provisions of § 11362.768 (f) must also be 'consistent' with the *MMPA* as provided under § 11362.83.

A clear example, of a local regulation that is both 'consistent' with the *MMPA* and further restricts the location of a MMD is a hypothetical regulation that prohibits a storefront medical marijuana dispensary that is 1000 feet or less from a school. This hypothetical regulation would be consistent with § 11362.79, prohibiting the outdoor use of medical marijuana within 1,000 feet of the grounds of a school; and it would be more restrictive than the 600 foot limit for storefront dispensaries prescribed under § 11362.768 subsection (b) which is authorized under subsection (f).

C. The *Inland Empire* Opinion may be cited for precedence that any Supreme Court decision is not binding if it involves a different subject matter.

The Appellate Court in *Inland Empire* held that *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 521 (*City of Torrance*), *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 293 (*Cohen*), *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068–1069, and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103–104 on the grounds that "[t]hese cases are factually inapposite [for reasons they] do not concern medical marijuana, the *CUA*, the *MMP*, or local ordinances regulating or banning MMDs." *Inland Empire supra at* 902

Under this logic any court may cite *Inland Empire* for the proposition that a reviewing court's rationale, consideration and application of principles of law leading to the court's ultimate disposition of the cause may be ignored if the underlying subject matter differs. In the instant case, this holding is in effect a 'marijuana exception' to the law, which can later be extended to an exception for whatever subject matter a litigant or a court desires, resulting in chaos. Under the Fourth District's Opinion in *Inland Empire*, *City of Torrance* would not be a binding precedence on any matter except for those matters involving facilities for mental patients; *Cohen* would not be a binding precedence on any matter except

for those matters involving escort services; and, *O'Connell* would not be a binding precedence on any matter except for those matters involving vehicle forfeitures.

The *Inland Empire* opinion is also in conflict with the well-established principal that local legislation in conflict with the general laws is void. Over the last twenty eight years there have been three cases from this court that directly address the issue of state preemption of laws over local zoning ordinances: *Transitional Living* supra, *Cohen* supra, and *O'Connell* supra. There have also been two lesser cases *Sherwin-Williams Co. v. City of Los Angeles* (*Sherwin-Williams*), 4 Cal. 4th 893 (Cal. 1993) and *American Financial Services Assn. v. City of Oakland*, 34 Cal. 4th 1239 (Cal. 2005) The *Inland Empire* opinion is on a direct collision course with these cases.

This court has expressed a rule that local zoning legislation cannot conflict with the Legislative purpose behind statewide statutes. In *City of Torrance v. Transitional Living Centers (1982) 30 Cal.3d 516*, this court invalidated a municipal zoning provision, which excluded residential treatment facilities for the mentally disturbed finding it conflicted with the Legislature's purpose in having residential facilities. The court indicated the importance of taking the Legislative purpose into account in determining if local legislative zoning actions are preempted and in doing so found that a statute similar to *Health and Safety Code section 11362.83* "did *not*

permit the **exclusion**..." *Id at 521* of otherwise state sanctioned and encouraged conduct.

Transitional Living supra is a case that is closely analogous to the immediate case. There the Court held:

> "It seems self-evident that in declaring an urgency the Legislature intended to promote and encourage the treatment of mental patients within a community by limiting the ability of municipalities to discriminate, through zoning restrictions, against facilities serving the mentally ill. Although the legislation authorized some local regulation of facilities serving more than six residents, this authority did *not* permit the **exclusion** or regulation of facilities serving the mentally ill from areas which otherwise allowed treatment of the physically ill or handicapped, even if only by conditional permit." (emphasis added)

City of Torrance v. Transitional Living Centers, supra., 30 Cal.3d at 521.

Here the City of Riverside sought to exclude the operation of any medical marijuana dispensary throughout the City of Riverside, identifying a medical marijuana dispensary as a "prohibited use" (*Riverside Municipal Code (RMC) § 19.150.020*), which is enforced through Riverside's nuisance abatement laws (*RMC §§ 1.01.110.E.* and *6.15.020.*)

The *Inland Empire* opinion, which lacks a definition of a MMD, conflicts with the principle articulated in *Transitional Living* supra*;* under *Inland Empire* at 905-906, a local *municipality has free reign to ban activities permitted under Health and Safety Code § 1136.775* [the operation of associations medical marijuana patients and caregivers within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, which

include possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. See *People v. Urziceanu, 132 Cal. App. 4th 747, 785* (Cal. App. 3d Dist. 2005)]

Cohen supra is the most extensive treatise issued by this Court concerning the power of local municipalities to regulate conduct authorized by the State. Application of the holding in *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, at 293, requires a legal ruling that an attempt by a municipality to ban what the state has expressly permitted (or more accurately here permitted and encouraged the conduct as part of a greater policy) is an ordinance "in conflict with general laws." (*Cal. Const., art. XI, § 7*) . In *Cohen* the preemption argument raised was that a local regulatory scheme over "escort services" was preempted by the singular Penal Code section prohibiting prostitution. The court held that there being no state law at all which applied to "escort services", a city, in those circumstances, may enact ordinances to prevent criminal acts such as prostitution. However, "If the ordinance were in substance a criminal statute which attempted to prohibit conduct proscribed or permitted by state law either explicitly or implicitly, it would be preempted." *Id at 293. Cohen* also held that "impos[ing] a sanction for engaging in" (*Cohen supra,* at 295) conduct otherwise authorized by

state law is sufficient to render the local ordinance void. Clearly, respondent's ordinance imposes a major sanction; abatement lawsuits seeking attorney's fees and enforced with injunctions prohibiting conduct explicitly authorized by state law and done so "solely on the basis of th[e] fact" (§ 11362.775) appellants are doing what the *MMP* permits. This is precisely what the reference to *§11570* as an excluded civil cause of action for this conduct was meant to prevent when the legislature cited it as a cause of action which is now excluded. See, *Health and Safety Code* § 11362.775*; also see, Cohen v. Board of Supervisors* supra 40 Cal. 3d at 290-291 *Citations omitted*

Under *Inland Empire* there is now an exception to the rule that "If the ordinance were in substance a criminal statute which attempted to prohibit conduct proscribed or permitted by state law either explicitly or implicitly, it would be preempted." *Cohen, supra at 293. Inland Empire* now conflicts with this rule established in *Cohen* as the appellate court's decision provides that unless the Legislature expressly forbids local legislation, a local municipality's power under *Cal. Const.*, art. XI, § 7 now includes the ability to enact local ordinances and regulations which contradict state law (i.e., sections *11362.775* and *11362.768* [the operation of medical marijuana collectives with store fronts]). *Inland Empire* thus conflicts with the rule in *Cohen*. Therefore, *Inland Empire* not only weakens the State's power of preemption of local laws under *Cal. Const.*, art. XI, § 7 (as it is

now required under that decision to expressly declare its intent), it will also lead to more confusion, not clarity, of the law and will generate significant additional litigation for Cities and Counties in other topics.

Inland Empire's conflict with the holdings of this court cannot be more exemplified than by its conflict with *O'Connell's* very definition of the types of local ordinances which are not consistent with the *Health and Safety Code* and thus preempted (the same preemption rule infused into the *MMPA* by the Legislature, See *Health and Safety Code* section 11362.83 requiring local ordinances be "consistent" with the *MMPA*).

O'Connell clearly established that:

> "A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law."

O'Connell supra at 1068

The City of Riverside's ordinance, banning MMDs, is "inimical to" and "cannot be reconciled with" the *MMPA*, which not only allows the existence of MMDs, but is a stated purpose of the *MMPA*. Directly conflicting with these prior holdings of this court is the fact that now, under *Inland Empire*, a municipality may prohibit/ban acts allowed under § 11362.775 under the expansive reading of § 11362.768's phrase "restrict" and "regulate"-the court of appeal here equating those terms to prohibition. *Inland Empire* holds that a "[a] ban or prohibition is simply a type or means of restriction or regulation. Riverside's ban of MMDs is

not preempted by the *CUA* or *MMP*." *Inland Empire* supra at 906. Simply put, "a ban or a prohibition" on MMDs cannot be reasonably construed as a means of restricting or regulating MMDs, when the purpose of the controlling statute, § 11362.775, is to provide a means for MMDs to exist. To extend the terms "regulate" and "restrict" in § 11362.768 to allow a ban, would defeat the Legislature's two principle purposes of the *MMPA*[10]; to 1) "Promote uniform and consistent application of the act among the counties within the state" and 2) "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" Stats 2003 ch 875 § 1 – the preamble of the *Medical Marijuana Program Act.*); and to defeat the express legislative declaration and finding in Assembly Bill No. 2650, which was to establish a

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[10] As of January 1, 2012 the legislature's amendment to *section 11362.83* (Assembly Bill 1300, Chapter 196) will still present the same issue and the resolution of that issue (i.e. does the phrase "regulate the location, operation, or establishment" include the ability to also prohibit the activity) will inevitably be controlled by the application of *Inland Empire* as that case interprets the identical phrases in *section 11362.768*. The new amendment to *section 11362.83* reads as follows:

> The *people of the State of California do enact as follows:*
> SECTION 1. Section 11362.83 of the Health and Safety Code is amended to read:
> 11362.83. 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.

uniform standard regulating medical marijuana establishments as a matter of statewide concern. Since *Inland Empire* permits local ordinances which contradict state law, *Inland Empire* contradicts *O'Connell*'s definition of preempted local ordinances as well as *O'Connell*'s definition of local ordinances which are not "consistent" with state law.

Under *Inland Empire,* a local ordinance that is "inimical to" or "can't be reconciled with" the express purpose of the *MMPA*, is deemed valid, again-unless the legislature expressly states otherwise; such a rule is contrary to *O'Connell.* The holding in *O'Connell v. Stockton (2007) 41 Cal.4th 1061 at p. 1069*, is compelling and requires a finding of preemption here. There the court held that a provision of the Stockton Municipal Code forfeiting vehicles used to solicit prostitution was preempted by the *Health and Safety Code*'s Uniformed Controlled Substance Act ("UCSA"). It was argued by the City of Stockton in *O'Connell* that since the UCSA did not expressly discuss forfeiture for prostitution, municipalities were free to legislate in that area. The *O'Connell* court rejected that method of determining if preemption existed and instead found that the UCSA was a comprehensive statutory scheme which governed forfeiture of vehicles as a penalty for specific violations of the UCSA and its pervasiveness preempted any local ordinance dealing with the same subject.

Respondent has argued (and the court of appeal here accepted their argument) that because the legislature in enacting the MMP did not express their will on the subject of preemption they are therefore able to ban the conduct under their authority to regulate "land use" and thus their ordinance is "consistent" with an *MMPA* which Respondent and the court of appeal is allegedly silent on that subject. This is the same argument the dissent in *O'Connell v. Stockton (2007) 41 Cal.4th 1061*, made; taking the position that if the Legislature says nothing in a specific area of law, a local municipality may regulate that specific area (i.e. they may forfeit cars for prostitution because the Health and Safety Code was silent on those acts). The majority held that the dissent's position, requiring a complete laundry list of specific areas of law over which state preemption applies, is not required; the local ordinance simply needs to be "inimical to or cannot be reconciled with state law" to be preempted. *Id at 1068*. Thus, one looks at the effect the local law has on statewide policy created by the state's legislation not whether the legislature specifically spoke up about a subcomponent of the subject. A local ordinance which bans that which the state has 1) made lawful, 2) encouraged 3) made part of a distribution system and 4) expressed a desire to have state wide uniformity, deserves the label of "inimical" to those concepts and is thus void as preempted under the holding in *O'Connell*. However, the *Inland Empire* turns the clock back and revives the

argument decided in *O'Connell* (i.e., the legislature need not expressly declare every area it wants preempted).

Also conflicting with *Inland Empire* is *N. Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, at 103-104.* There the trial court struck down as preempted, a local ordinance which banned the use of electroconvulsive 'shock' therapy (ECT) for psychiatric patients. Just as under the *MMPA* here, the *Welfare and Institutions Code* in that case contained a provision which gave patients the ability to choose ECT as a therapy. The purpose and history of that state statute, just like the *MMPA*, also supported patient choice. Because the Berkeley ordinance banned the use of ECT and state law permitted a patient to choose that treatment, the ordinance was struck down by the court of appeal. Just as maintained by appellants here (i.e., local ordinance can't conflict with the purpose of statewide law), the court found Berkeley's total ban conflicted with the legislative purpose of state law and was thus preempted. "By enacting an outright, unconditional ban on the administration of ECT within its own borders, Berkeley has created an apparent conflict with the state legislative statutory scheme and its guarantee to all mentally ill persons of a '"right to treatment services which promote the potential of the person to function independently."'...This conclusion is supported by the history of the provisions of the LPS Act dealing with ECT." (emphasis added) *Id. at 104.*

The court concluded that: "In light of this legislative history...we conclude that the total ban on ECT contained in Berkeley's Ordinance 5504 is in direct conflict with the Legislature's intention both that ECT be available...and that the free choice of every psychiatric patient to take or not take ECT be protected." (emphasis added) *Id at 105-106.* The only distinction which appellant can see between *N. Cal. Psychiatric Society v. City of Berkeley* and the instant case is one involves 'electro-shock therapy' and this case 'medical marijuana' which should not be a material distinction given the California Legislature's policy on the subject; *N. Cal. Psychiatric Society* thus dictates that a municipality can't ban a controversial medical treatment the state has expressly permitted its citizens to use yet the only distinction the court of appeal here assigned to this case is that it did not involve medical marijuana.[11]

In summary, *Inland Empire*'s collision course with *Transitional Living, Cohen, O'Connell,* and the court of appeal's decision in *N. Cal. Psychiatric Society*

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[11] The Attorney General has also issued an opinion regarding preemption of the *MMPA* over local legislation which merits serious consideration (it principally relies on *N. Cal. Psychiatric Society, supra.)*; it, articulates that "**a city program that defined 'attending physician' and 'primary caregiver' more narrowly than state law would be preempted to the extent that it prohibited what state law expressly permitted.**" (80 *Opinions California Attorney General* 113, 117-118, 2005 Cal. AG LEXIS 17 (2005).) A ban on permitted activities thus is preempted under the Attorney General's analysis of the subject.

sets the stage to allow local municipalities to enact ordinances in conflict with the general laws of the state of California, in violation of *Cal. Const.*, art. XI, § 7.

In order to resolve the legal uncertainty, revolving around the local enactment and enforcement of California's medical marijuana laws, the uncertainty revolving around the interpretation and impact of *Health and Safety Code* § 11362.83 must be resolved. As articulated in *Inland Empire, section* 11362.83, a part of the Medical Marijuana Program, specifically states: 'Nothing in this article shall "prevent a city or other local governing body from adopting and enforcing laws consistent with this article."' *Inland Empire* supra at 903 The only leeway provided by the State for local legislation, through § 11362.83, was the authorization to pass ordinances that are "consistent" with the *MMPA*. Thus the key to the scope of permissible local regulations lies upon the interpretation of the term "consistent."

Under no stretch of logic is the word "consistent" synonymous with being able to prohibit or ban what the Legislature found was of paramount importance; that being "the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana," *People v. Urziceanu* (2004) 132 Cal.App.4th 747, 785 including properly organized and operated collectives or cooperatives that dispenses medical marijuana through a storefront under

California law. *People v. Hochanadel* (2009) 176 Cal. App. 4th 997, 1011

Moreover, under no stretch of logic is the word "consistent" synonymous with being able to prohibit or ban those activities which the Legislature expressly[12] permitted, that being the existence of MMDs. As held in *Inland Empire*:

> [A]fter *Kruse* was decided, the Legislature added section 11362.768 in 2010. With regard to this new provision, the court in [*County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (Cal. App. 2d Dist. 2011)] noted that "the Legislature showed it expected and intended that local governments adopt additional ordinances" regulating medical marijuana. (Id. at p. 868.) Section 11362.768 states that: "(f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. [¶] (g) .... As the *Hill* court noted regarding this statute, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local government may regulate dispensaries." (192 Cal.App.4th at p. 868.) The Hill court added that a local government can zone where MMDs are permissible (id. at p. 870) and apply nuisance laws to MMDs that do not comply with valid ordinances (id. at pp. 868, 870).

Inland Empire supra, 200 Cal. App. 4th at 903

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[12] In addition to the provisions of the *MMPA*, the legislature stated in Assembly Bill No. 2650, enacting Health and Safety Code § 11362.768, that:

> [the]express a legislative finding and declaration that establishing a uniform standard regulating the proximity of these medical marijuana establishments to schools is a matter of statewide concern and not a municipal affair and that, therefore, all cities and counties, including charter cities and charter counties, shall be subject to the

2010 Cal Stats. ch. 603

Health & Safety Code § 11362.768 provides in relevant part:

> **(b)** No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school.
>
> **(e)** This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license.
>
> **(f)** Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

Despite the Court's attempt in *Inland Empire* to equate the term 'ban' with the term 'regulate,'[13] it is a logical impossibility to "restrict the location" of a thing

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[13] The Court in Inland Empire held:

> In determining whether section 11362.768 authorizes local government to ban MMDs, we look to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." The term "regulate" is defined in the dictionary as: "[T]o govern or direct according to rule ... [or] laws ... ." (Webster's 3d New Internat. Dict. (1993) p. 1913.) The term "regulation" is defined in Black's Law Dictionary as: "1. The act or process of controlling by rule or restriction ... . 3. A rule or order, having legal force, usu. issued by an administrative agency ... ." (Black's Law Dict. (8th ed. 2004) p. 1311.) "Restriction" is defined as: "1. A limitation or qualification. 2. A limitation (esp. in a deed) placed on the use or enjoyment of property." (Black's Law Dict., supra, p. 1341.) [continues on following page]

and to ban that thing simultaneously; and it is impossible to restrict the location of non-existent thing, that being the thing that is banned out of existence. A nullity cannot occupy a space or location.

Interpreting *Health and Safety Code* § 11362.83 as permitting a ban on conduct authorized by *Health and Safety Code* § 11362.775, and/or interpreting *Health and Safety Code* § 11362.768, [allowing local municipalities to further restrict the location or establishment of MMDs beyond the 600 foot minimum stated therein] *as* permitting a ban on the locations of MMDs would completely obliterate the Legislature's two principle purposes of the *MMPA*; to 1) "Promote uniform and consistent application of the act among the counties within the state" and 2) "Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects" Stats 2003 ch 875 § 1 – the preamble of the *Medical Marijuana Program Act.*); and the express legislative declaration and finding in Assembly Bill No. 2650 was to establish a uniform

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> Applying these definitions, we conclude Riverside's prohibition of MMDs in Riverside through enacting a zoning ordinance banning MMDs is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMDs in the city. (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 473 [210 Cal. Rptr. 545] [Fourth Dist., Div. Two].) A ban or prohibition is simply a type or means of restriction or regulation. Riverside's ban of MMDs is not preempted by the CUA or MMP.

Inland Empire supra 200 Cal. App. 4th at 903-906

The Court failed to examine the "common meaning" of the term "ban."

standard regulating medical marijuana establishments as a matter of statewide concern.

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law." *(emphasis added) O'Connell v. Stockton* (2007) 41 Cal.4th 1061, 1068. In the instant case, the Respondent's prohibition/ban on Appellants' otherwise lawful conduct "contradicts state law" because it is "inimical to and cannot be reconciled" with the Legislature's paramount purpose of promoting "uniform" application of the *MMPA* and to "enhance the access" to qualified patients; since Respondent's actions "contradict state law," Respondent's actions necessarily are also not "consistent" with the *MMPA* as required by *Health and Safety Code* § 11362.83.

As stated by *Citizens to Save California v. California FPPC* (2006) 145 Cal. App.4th 736 (*Citizens*):

> The "Regulation...is **at odds with the language of the [Act]**. It is also ***inconsistent with the legislative intent underlying the [Act]***.... The effect of [the] regulation is to inhibit...involvement in the...process. Involvement will lead to restrictions...***This conflicts with the voters' concern, as expressed in the ballot proposition***..."
>
> "Under the circumstances, [the] regulation...***does not effectuate the purpose of the [Act]*** because it ensnares contributions that do not implicate the evils the [Act] is intended to prevent, and it ***undermines Proposition 34's emphasis*** **on providing** individuals and interest groups with ***a fair and equitable opportunity to participate*** in the...processes. Moreover, as we earlier explained, [the] regulation...***directly conflicts*** **with portions of the [Act]**."

Citizens to Save California v. California FPPC supra, 145 Cal. App.4th at 751, 754. (*emphasis added*)

Citizens interpreted the language "consistent" in the identical manner urged by Appellant; i.e., every local ordinance must be "consistent with this article," meaning consistent the *MMPA*. *Citizens* interpreted the term "consistent" in the same manner urged by appellant; i.e., if Respondent's ordinance does not permit what the *MMPA* plainly allows, or it conflicts with its express purpose, then it is not "consistent with this article."

V. CONCLUSION

Accordingly, respondent respectfully requests that review be granted.

Respectfully submitted,

Date: December ____, 2011

J. David Nick
Attorney for Appellants
INLAND EMPIRE PATIENT'S HEALTH
AND WELLNESS CENTER, INC., et al.

Exhibit A

CITY OF RIVERSIDE, Plaintiff and Respondent, v. INLAND EMPIRE PATIENT'S HEALTH AND WELLNESS CENTER, INC., et al., Defendants and Appellants.

E052400

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

200 Cal. App. 4th 885; *2011 Cal. App. LEXIS 1406*

November 9, 2011, Filed

PRIOR HISTORY: [**1]
APPEAL from the Superior Court of Riverside County, No. RIC10009872, John D. Molloy, Judge.

DISPOSITION: Affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court found that a corporate defendant's medical marijuana dispensary (MMD) constituted a public nuisance per se, entered judgment in favor of a city, and issued a preliminary injunction enjoining defendant from operating its MMD in the city. (Superior Court of Riverside County, No. RIC10009872, John D. Molloy, Judge.)

The Court of Appeal affirmed the judgment. The court held that the city's prohibition of MMD's through enacting a zoning ordinance banning MMD's, was a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. A ban or prohibition is simply a type or means of restriction or regulation. The city's ban of MMD's was not preempted by the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, ß 11362.5*) or the "Medical Marijuana Program" (MMP) (*Health & Saf. Code, ßß 11362.7-11362.83*). The zoning ordinance did not duplicate, contradict, or occupy the field of state law legalizing medical marijuana and MMD's. The MMP provides immunity only as to lawful MMD's, and an MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful. Nothing stated in the CUA and MMP precludes cities from enacting zoning ordinances banning MMD's within their jurisdictions. Furthermore, those who wished to use medical marijuana were not precluded from obtaining it by means other than at an MMD in the city. Defendant's MMD constituted a violation of the city's valid and enforceable zoning ordinance banning MMD's in the city. In turn, the code violation constituted a nuisance per se subject to abatement. Because the city was likely to prevail on the merits at trial, the trial court did not abuse its discretion issuing a preliminary injunction enjoining defendant from operating its MMD in the city. (Opinion by Codrington, J., with Hollenhorst, Acting P. J., and Miller, J., concurring.) [*886]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Municipalities ß 56--Ordinances--State Preemption.--Under *Cal. Const., art. XI, ß 7*, 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. If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. Three types of conflict give rise to state law preemption: a local law (1) duplicates state law, (2) contradicts state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication.

(2) Municipalities ß 56--Zoning Regulations--Land Uses--Preemptive Intent.--Where there is no clear indi-

cation of preemptive intent from the Legislature, a court presumes that a municipality's zoning regulations, in an area over which local government traditionally has exercised control, are not preempted by state law. When local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute.

(3) Drugs and Narcotics ß 2--Compassionate Use Act--Medical Marijuana.--The Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, ß 11362.5*), is intended to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana (*ß 11362.5, subd. (b)(1)(A)*). The CUA is also intended to ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction (*ß 11362.5, subd. (b)(1)(B)*). In addition, the CUA is intended to encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana (*ß 11362.5, subd. (b)(1)(C)*). The CUA provides a limited defense from prosecution for cultivation and possession of marijuana. The CUA is narrow in scope. It does not create a statutory or constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by medical marijuana dispensaries.

(4) Drugs and Narcotics ß 2--Compassionate Use Act--Medical Marijuana Program--Drug Den Abatement.--The purposes of the "Medical Marijuana Program" (MMP) include promoting uniform and consistent application of the Compassionate Use Act of 1996 (CUA) (*Health & Saf.* [*887] *Code, ß 11362.5*) among the counties within the state and enhancing the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. The MMP includes guidelines for the implementation of the CUA. Among other things, it provides that qualified patients and their primary caregivers have limited immunity from prosecution for violation of various sections of the Health and Safety Code regulating marijuana including *Health & Saf. Code, ß 11570*, the "drug den" abatement law (*Health & Saf. Code, ßß 11362.765, 11362.775*). With regard to drug den abatement, the medical marijuana program provides a new affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana.

(5) Drugs and Narcotics ß 4--Offenses--Immunity--Medical Marijuana.--*Health & Saf. Code, ß 11362.765*, provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

(6) Zoning and Planning ß 9--Ordinances--Presumption of Validity.--Generally, a municipal zoning ordinance is presumed to be valid.

(7) Municipalities ß 46--Ordinances--Duplicative and Contradictory Rules.--A duplicative rule is one that mimics a state law or is coextensive with state law. A contradictory rule is one that is inimical to or cannot be reconciled with a state law.

(8) Zoning and Planning ß 9--Ordinances--Regulation of Medical Marijuana Dispensaries.--Riverside's zoning ordinance regulating medical marijuana dispensaries (MMD's) does not mimic or duplicate state law and can be reconciled with the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, ß 11362.5*) and the "Medical Marijuana Program" (MMP) (*Health & Saf. Code, ßß 11362.7-11362.83*). The zoning ordinance banning MMD's differs in scope and substance from the CUA and MMP.

(9) Drugs and Narcotics ß 4--Offenses--Compassionate Use Act and Medical Marijuana Program--Preemption--Zoning Ordinances.--The Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, ß 11362.5*) is narrow in scope, providing medical marijuana users and care providers with limited criminal immunity for use, cultivation, and possession of medical marijuana. The CUA does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. The "Medical Marijuana Program" [*888] (MMP) (*Health & Saf. Code, ßß 11362.7-11362.83*) merely implements the CUA and also provides immunity for those involved in lawful medical marijuana dispensaries (MMD's). The CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's. The state statutes do not preclude local governments from regulating MMD's through zoning ordinances. The establishment and operation of MMD's is thus subject to local zoning and business licensing laws. The CUA and MMP do not expressly mandate that MMD's shall be permitted within every city and county, nor do the CUA and MMP prohibit cities and counties from banning MMD's. The operative provisions of the CUA and MMP do not speak to local zoning laws. Although the MMP provides limited immunity to those using and operating lawful MMD's, the MMP does not restrict or usurp in any way the police power of local

governments to enact zoning and land use regulations prohibiting MMD's.

(10) Zoning and Planning ß 9--Ordinances--Regulation of Medical Marijuana Dispensaries.--Although *Health & Saf. Code, ß 11362.775*, allows lawful medical marijuana dispensaries (MMD's), a municipality can limit or prohibit MMD's through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. Protection under *Civ. Code, ß 3482*, is applied very narrowly, only where the alleged nuisance is exactly what was lawfully authorized. The Legislature has not expressly prohibited cities from enacting zoning regulations banning MMD's or from bringing a nuisance action enforcing such ordinances.

(11) Municipalities ß 56--Ordinances--State Preemption--Express.--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.

(12) Municipalities ß 56--Ordinances--State Preemption--Regulation of Medical Marijuana Dispensaries.--The Compassionate Use Act of 1996 (*Health & Saf. Code, ß 11362.5*) and the "Medical Marijuana Program" (*Health & Saf. Code, ßß 11362.7-11362.83*) do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning medical marijuana dispensaries, to the exclusion of all local law.

(13) Municipalities ß 56--Ordinances--State Preemption--Implied.--Local legislation enters an area that is fully occupied by general law when the Legislature has impliedly done so in light of one of the following indicia of intent (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has [*889] 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. The Court of Appeal rarely finds implied preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances. In determining whether the Legislature has preempted by implication to the exclusion of local regulation, the court must look to the whole purpose and scope of the legislative scheme. Preemption will not be implied where local legislation serves local purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes. There is a presumption against preemption.

(14) Zoning and Planning ß 9--Ordinances--Regulation of Medical Marijuana Dispensaries.--The Compassionate Use Act of 1996 (*Health & Saf. Code, ß 11362.5*) and the "Medical Marijuana Program" (MMP) (*Health & Saf. Code, ßß 11362.7-11362.83*) do not preclude a city from enacting zoning ordinances prohibiting medical marijuana dispensaries (MMD's) in the city. In addition, the MMP provides immunity only as to lawful MMD's. An MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful.

(15) Municipalities ß 56--Ordinances--State Preemption--Implication of Legislative Intent--Regulation of Medical Marijuana Dispensaries.--Preemption by implication of legislative intent may not be found where the Legislature has expressed its intent to permit local regulation of medical marijuana dispensaries and where the statutory scheme recognizes local regulations

(16) Statutes ß 29--Construction--Language--Legislative Intent.--A court construes the words in a statute in their context and harmonizes them according to their ordinary, common meaning. The court considers the consequences that would flow from each interpretation and avoids constructions that defy common sense or that might lead to mischief or absurdity. By doing so, the court gives effect to the legislative intent even though it may be inconsistent with a strict, literal reading of the statute. [*890]

(17) Zoning and Planning ß 9--Validity of Ordinances--Prohibition of Medical Marijuana Dispensaries--State Preemption.--The City of Riverside's prohibition of medical marijuana dispensaries (MMD's) in Riverside, through enacting a zoning ordinance banning MMD's, is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. A ban or prohibition is simply a type or means of restriction or regulation. Riverside's ban of MMD's is not preempted by the Compassionate Use Act of 1996 (*Health & Saf. Code, ß 11362.5*) or by the "Medical Marijuana Program" (*Health & Saf. Code, ßß 11362.7-11362.83*). Accordingly, because defendant's MMD constituted a municipal code violation and nuisance per se, the trial court did not abuse its discretion in granting Riverside injunctive relief based upon defendant's MMD constituting a nuisance per se subject to abatement.

[Cal. Forms of Pleading and Practice (2011) ch. 579, Zoning and Planning, ß 579.317; Erwin et al., Cal. Criminal Defense Practice (2011) ch. 145, ß 145.01.]

(18) Nuisances ß 6--Per Se--Elements.--A nuisance per se exists when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. To be considered a nuisance per se, the object, substance, activity, or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law. Where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made. Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.

COUNSEL: Law Office of J. David Nick and J. David Nick for Defendants and Appellants.

Gregory P. Priamos, City Attorney, Neil Okazaki, Deputy City Attorney; Best Best & Krieger, Jeffrey V. Dunn and Lee Ann Meyer for Plaintiff and Respondent.

JUDGES: Opinion by Codrington, J., with Hollenhorst, Acting P. J., and Miller, J., concurring.

OPINION BY: Codrington [*891]

OPINION

CODRINGTON, J.--

I

INTRODUCTION

Defendants and appellants Inland Empire Patient's Health and Wellness Center Inc., et al.[1] (Inland Empire Center), appeal from a judgment entered in favor of plaintiff and respondent, the City of Riverside (Riverside), after the trial court found that Inland Empire Center's medical marijuana dispensary (MMD)[2] constituted a public nuisance per se and issued a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside.

1 Defendants and appellants also include William Joseph Sump II, Lanny David Swerdlow, Angel City West, Inc., Meneleo Carlos, and Filomena Carlos.

2 When referring to MMD's, we use the term MMD broadly to include cooperatives, collectives, and dispensaries, despite any technical differences that [**2] may exist between them.

Inland Empire Center contends Riverside's ordinance banning MMD's throughout Riverside is preempted by state law; specifically, the Compassionate Use Act of 1996 (CUA) (*Health & Saf. Code, ß 11362.5*)[3] and the "Medical Marijuana Program" (MMP) (*ßß 11362.7-11362.83*). We conclude Riverside's ordinance banning MMD's is not preempted by state law. We therefore affirm the preliminary injunction and judgment.

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

II

FACTUAL AND PROCEDURAL BACKGROUND

Inland Empire Center is a nonprofit mutual benefit corporation established for the purpose of facilitating an MMD located in Riverside. Inland Empire Center's MMD is a nonprofit collaborative association of patient members, who collectively cultivate medical marijuana and redistribute it to each other. Inland Empire Center has operated its MMD in Riverside since 2009.

Defendant Lanny Swerdlow (Swerdlow) is a registered nurse and manager of an adjacent, separate medical clinic, THCF Medical Clinic, unassociated with the MMD. Defendant William Joseph Sump II is an Inland Empire Center board member and general manager of Inland Empire Center's Riverside [**3] MMD. Defendants Meneleo Carlos and Filomena Carlos (the Carloses) own the property upon which the MMD is located and lease the [*892] property to Swerdlow. Defendant Angel City West, Inc. (Angel), provides management services for the property.

In January 2009, Riverside's Community Development Department planning division sent Swerdlow a letter stating that Riverside's zoning code prohibits MMD's in Riverside. In May 2010, Riverside filed a complaint against Angel, Swerdlow, Sump,[4] the Carloses, East West Bancorp, Inc.,[5] and THCF Health and Wellness Center,[6] for injunctive relief to abate public nuisance. The complaint alleges Inland Empire Center's MMD constitutes a public nuisance, in violation of Riverside's zoning code, Riverside Municipal Code (RMC) section 6.15.020.Q. Riverside notified Swerdlow of the violation. Nevertheless, Swerdlow continues to operate the MMD.

4 Sump is added as Doe 1 in an amendment to the complaint.

5 East West Bancorp, Inc., is not a party to this appeal.

6 Riverside added Inland Empire Center by amendment to the complaint as Doe 2.

Riverside's complaint includes two causes of action, both alleging public nuisance, and prays for injunctive relief enjoining Inland Empire [**4] Center from operating its MMD in Riverside. Riverside alleges in the complaint that Inland Empire Center is located in a commercial zone. Under Riverside's zoning code, MMD's are prohibited. (RMC, ßß 19.150.020, 19.910.140.) Riverside's zoning code further states that any use which is prohibited by state and/or federal law is strictly prohibited in Riverside. (RMC, ß 19.150.020.) Any violation of Riverside's municipal code is deemed a public nuisance under RMC sections 1.01.110 and 6.15.020.Q. Inland Empire Center's MMD violates Riverside's zoning code and is therefore a public nuisance subject to abatement.

Riverside filed a motion for a preliminary injunction, seeking to close Inland Empire Center's MMD in Riverside. Riverside Police Detective Darren Woolley (Woolley) concluded in his supporting declaration that the medical clinic, "THCF Medical Clinic," where Swerdlow worked as a nurse, was connected to Inland Empire Center's MMD and referred patients to the MMD. Riverside requested the trial court to take judicial notice of various documents, including a report entitled, "California Police Chiefs Association's Task Force On Marijuana Dispensaries" and a report by the Riverside [**5] County District Attorney's Office, entitled, "Medical Marijuana: History and Current Complications." Inland Empire Center objected to judicial notice of these documents. The court did not rule on the judicial notice request.

In support of Inland Empire Center's opposition to Riverside's motion for a preliminary injunction, Swerdlow states in his declaration that he managed the medical clinic Woolley claimed was associated with the MMP. According [*893] to Swerdlow, the medical clinic is not connected with the MMD. Woolley erroneously referred to Inland Empire Center's MMD as the THCF Medical Clinic, which is at a different location nearby.

Inland Empire Center's general manager, Sump, also provided a declaration supporting Inland Empire Center's opposition, stating that Inland Empire Center had advised Riverside that it would be operating an MMD in Riverside. Sump further stated that Inland Empire Center had been lawfully operating its MMD and it did not constitute a nuisance to the surrounding community.

On November 24, 2010, the trial court heard Riverside's motion for a preliminary injunction and granted the motion, concluding *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153 [100 Cal. Rptr. 3d 1]* (*Kruse*) [**6] controlled and therefore Riverside could use zoning regulations to prohibit MMD's, "especially given the conflict between state and federal law." The trial court added it was not finding that federal law preempted state law in this instance. The court acknowledged there was case law holding that there was no federal law preemption. The trial court entered a written order enjoining Inland Empire Center from operating its MMD on the Carloses' property.

III

STANDARD OF REVIEW

In this appeal, Inland Empire Center challenges the trial court's order granting Riverside's request for a preliminary injunction. "We review an order granting a preliminary injunction, under an abuse of discretion standard, to determine whether the trial court abused its discretion in evaluating the two interrelated factors pertinent to issuance of a preliminary injunction--(1) the [**7] likelihood that the plaintiffs will prevail on the merits at trial, and (2) the interim harm that the plaintiffs are likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued. [Citation.] Abuse of discretion as to either factor warrants reversal. [Citation.]" (*Alliant Ins. Services, Inc. v. Gaddy (2008) 159 Cal.App.4th 1292, 1299 [72 Cal. Rptr. 3d 259].*) " '[W]e interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order. [Citations.]' [Citation.]" (*Id. at p. 1300.*)

Here, the validity of the injunction and the likelihood Inland Empire Center will prevail at trial turn on a question of law: whether Riverside's zoning code banning MMD's in Riverside is valid and enforceable. The underlying facts demonstrating a violation of the zoning code are undisputed. Inland Empire Center was operating an MMD on Riverside property, owned, leased, [*894] used and/or managed by the Inland Empire Center defendants. Inland Empire Center argues the zoning code prohibiting MMD's is invalid and unenforceable because it is preempted by state law (the CUA and [**8] MMP). " 'Whether state law preempts a local ordinance is a question of law that is subject to de novo review. [Citation.]' [Citation.] 'The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. [Citation.]' [Citation.]" (*Kruse, supra, 177 Cal.App.4th at p. 1168.*)

Since the material facts relevant to preemption are undisputed, this is a question of law which we review de novo. (*Kruse, supra, 177 Cal.App.4th at p. 1168.*) Inland Empire Center bears the burden of demonstrating preemption. We conclude Inland Empire Center has not met this burden and therefore the trial court did not abuse its discretion in granting a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside.

IV

PREEMPTION PRINCIPLES

(1) The general principles governing state statutory preemption of local land use regulation are well settled. (*Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1150 [45 Cal. Rptr. 3d 21, 136 P.3d 821]* (*Big Creek Lumber*); *Kruse, supra, 177 Cal.App.4th at p. 1168.*) Under *article XI, section 7 of the California Constitution*, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances [**9] and regulations not in conflict with general laws." " 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' " (*Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 897 [16 Cal. Rptr. 2d 215, 844 P.2d 534]* (*Sherwin-Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885 [218 Cal. Rptr. 303, 705 P.2d 876].*) Three types of conflict give rise to state law preemption: a local law (1) duplicates state law, (2) contradicts state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication. (*Kruse, at p. 1168*; *Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1242 [63 Cal. Rptr. 3d 398, 163 P.3d 89].*)

(2) Where, as here, there is no clear indication of preemptive intent from the Legislature, we presume that Riverside's zoning regulations, in an area over which local government traditionally has exercised control, are not preempted by state law. (*Kruse, supra, 177 Cal.App.4th at p. 1169.*) " '[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California [*895] courts will presume, absent a clear indication of preemptive intent from the Legislature, [**10] that such regulation is *not* preempted by state statute. [Citation.]' " (*Kruse, supra, 177 Cal.App.4th at p. 1169*, quoting *Big Creek Lumber, supra, 38 Cal.4th at p. 1149.*) This court thus must presume, absent a clear indication the Legislature intended to regulate the location of MMD's, that such regulation by local government is *not* preempted by state law.

V

CALIFORNIA MEDICAL MARIJUANA LAWS

In determining whether Riverside's zoning code banning MMD's is preempted by state law, we first consider the scope and purpose of California's medical marijuana laws, specifically the CUA and MMP.

(3) In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the "Compassionate Use Act of 1996." (*ß 11362.5.*) The CUA is intended to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana ... ." (*ß 11362.5, subd. (b)(1)(A).*) The CUA is also intended to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation [**11] of a physician are not subject to criminal prosecution or sanction." (*ß 11362.5, subd. (b)(1)(B).*) In addition, the CUA is intended to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (*ß 11362.5,, subd. (b)(1)(C).*) The CUA provides a limited defense from prosecution for cultivation and possession of marijuana. The CUA is narrow in scope. (*Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920, 929-930 [70 Cal. Rptr. 3d 382, 174 P.3d 200]*; *Kruse, supra, 177 Cal.App.4th at p. 1170.*) It does not create a statutory or constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by MMD's. (*Ross, at p. 926*; *Kruse, at pp. 1170-1171*; *People v. Urziceanu (2005) 132 Cal.App.4th 747, 773-774 [33 Cal. Rptr. 3d 859]* (*Urziceanu*).)

(4) In 2003, the Legislature added the MMP. (*ßß 11362.7-11362.83.*) The purposes of the MMP include " '[promoting] uniform and consistent application of the [CUA] among the counties within the state' and '[enhancing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.' [Citation.]" (*County of Los Angeles v. Hill (2011) 192 Cal.App.4th 861, 864 [121 Cal. Rptr. 3d 722]* [**12] (*Hill*).) The MMP "includes guidelines for the implementation of the [CUA]. Among other [*896] things, it provides that qualified patients and their primary caregivers have limited immunity from prosecution for violation of various sections of the Health and Safety Code regulating marijuana including [*section 11570*,] the 'drug den' abatement law. (*ßß 11362.765*, *11362.775.*)" (*Ibid.*, fn. omitted.)

(5) With regard to "drug den" abatement, the MMP "provides a new affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana. [Citation.]" (*Kruse, supra, 177 Cal.App.4th at pp. 1171-1172.*) For instance, *section 11362.775* of the MMP provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and per-

sons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under *Section 11357*, *11358*, *11359*, *11360*, *11366*, *11366.5*, or *11570*."[7] In addition, *section 11362.765* [**13] provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

7 These penal statutes criminalize possession of marijuana (*ß 11357*); cultivation of marijuana (*ß 11358*); possession of marijuana for sale (*ß 11359*); transportation of marijuana (*ß 11360*); maintaining a place for the sale, giving away, or use of marijuana (*ß 11366*); making available premises for the manufacture, storage, or distribution of controlled substances (*ß 11366.5*); and abatement of nuisance created by premises used for manufacture, storage, or distribution of controlled substances (*ß 11570*).

VI

APPLICABLE RIVERSIDE MUNICIPAL CODE PROVISIONS

Chapter 19.150 of the RMC enumerates permissible and impermissible land uses. RMC section 19.150.020 states that table A of section 19.150.020 "identifies those uses that are specifically prohibited. Uses not listed in Tables are prohibited unless ... the Zoning Administrator, pursuant to Chapter 19.060 (Interpretation of Code), determines that the use is similar and no more detrimental than a listed permitted or conditional use. Any use which is prohibited by state and/or federal law is also strictly prohibited." (RMC, ß 19.150.020.) Table [**14] A states that MMD's constitute a "Prohibited Use" throughout Riverside. (RMC, ß 19.150.020.) Riverside's zoning code further states that "persons vested with enforcement authority ... shall have the power to ... use whatever judicial and administrative remedies are available under the Riverside Municipal Code" to enforce the zoning code. (RMC, ß 19.070.020.) [*897]

RMC further provides that "any condition caused or permitted to exist in violation of any of the provisions of this Code, or the provisions of any code adopted by reference by this Code, shall be deemed a public nuisance and may be abated by the City ... ." (RMC, ß 1.01.110.E.) RMC section 6.15.020, enumerating acts constituting nuisances, states: "It is unlawful and is hereby declared a nuisance for any person owning, leasing, occupying or having charge or possession of any property ... in the City to maintain the property in such a manner that any of the following conditions are present: [∂] ... [∂] Q. Any other violation of this code pursuant to section 1.01.110E." This encompasses a violation of Riverside's zoning code, such as the provision banning MMD's. Under the RMC, Inland Empire Center's MMD is a zoning violation, [**15] constituting a public nuisance which is amenable to abatement and injunctive relief by civil action.

VII

PREEMPTION

(6) Generally a municipal zoning ordinance is presumed to be valid. (*Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal.App.4th 687, 713 [38 Cal. Rptr. 2d 413].*) Inland Empire Center argues that, while cities and counties may zone where MMD's may be located, Riverside cannot lawfully ban all MMD's from the city. This court must presume Riverside's zoning ordinance banning MMD's in Riverside is valid unless Inland Empire Center demonstrates the ordinance is unlawful based on state law preemption of Riverside's zoning ordinance.

A. *Federal Preemption of State Law*

Inland Empire Center argues that under *Qualified Patients Assn. v. City of Anaheim (2010) 187 Cal.App.4th 734 [115 Cal. Rptr. 3d 89]* (*Qualified*), local municipalities cannot enact a total ban of MMD's based solely on federal law preemption. The court in *Qualified* stated: "The city may not justify its ordinance solely under federal law [citations], nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance. The city's obstacle preemption argument therefore fails." (*Qualified, at p. 763*, fn. omitted.) In other [**16] words, the city cannot rely on the proposition that federal law, which criminalizes possession of marijuana, preempts state law allowing limited use of medical marijuana and MMD's.

We agree that under *Qualified* federal preemption of state medical marijuana law is not a valid basis for upholding Riverside's zoning ordinance banning MMD's. The key issue in determining whether Riverside's zoning ordinance is legally enforceable is whether state medical marijuana statutes, [*898] such as the CUA and MMP, preempt Riverside's zoning ordinance banning MMD's. If the local ordinance is not preempted by state law, the ordinance is valid and enforceable.

B. *State Law Preemption of Local Law*

We reject the proposition that local governments, such as Riverside, are preempted by the CUA and MMP from enacting zoning ordinances banning MMD's. Riverside's zoning ordinance does not duplicate, contradict, or

occupy the field of state law legalizing medical marijuana and MMD's.

1. *Duplicative and Contradictory Rules*

(7) A duplicative rule is one that mimics a state law or is "'coextensive' with state law." (*O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1067 [63 Cal. Rptr. 3d 67, 162 P.3d 583]*; see *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal.App.4th 1306, 1327 [96 Cal. Rptr. 3d 813] [Fourth Dist., Div. Two].*) [**17] A contradictory rule is one that is inimical to or cannot be reconciled with a state law. (*Habitat Trust for Wildlife, at p. 1327*; *O'Connell, at p. 1068.*)

(8) Riverside's zoning ordinance regulating MMD's does not "mimic" or duplicate state law and can be reconciled with the CUA and MMP. Riverside's zoning ordinance banning MMD's differs in scope and substance from the CUA and MMP. (*Sherwin-Williams, supra, 4 Cal.4th at p. 902.*) **(9)** The CUA is narrow in scope. (*Kruse, supra, 177 Cal.App.4th at p. 1170.*) It provides medical marijuana users and care providers with limited criminal immunity for use, cultivation, and possession of medical marijuana. The CUA does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. (*Kruse, at pp. 1170-1171.*)

The MMP merely implements the CUA and also provides immunity for those involved in lawful MMD's. The CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's. The state statutes do not preclude local governments from regulating MMD's through zoning ordinances. The establishment and operation of MMD's is thus subject to local zoning [**18] and business licensing laws. There is nothing stated to the contrary in the CUA or MMP. The CUA and MMP do not expressly mandate that MMD's shall be permitted within every city and county, nor do the CUA and MMP prohibit cities and counties from banning MMD's. The operative provisions of the CUA and MMP do not speak to local zoning laws. (*Kruse, supra, 177 Cal.App.4th at pp. 1172-1173, 1175.*) Although the MMP provides limited immunity to those using and operating [*899] lawful MMD's, the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting MMD's.

Inland Empire Center argues Riverside's ordinance banning MMD's is invalid because it is inconsistent with the MMP, which provides limited immunity for operating and using MMD's. For instance, *section 11362.775* of the MMP provides immunity for a nuisance claim arising from a violation of *section 11570*, which encompasses operating an MMD. *Section 11570* provides civil nuisance liability: "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance ... and every building or place wherein [**19] or upon which those acts take place, *is a nuisance which shall be enjoined, abated, and prevented*, and for which damages may be recovered, whether it is a public or private nuisance." (Italics added.) *Section 11362.775* of the MMP provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, *shall not solely on the basis of that fact be subject to state criminal sanctions* under *Section 11357, 11358, 11359, 11360, 11366, 11366.5*, or *11570*." (Italics added.)

As Inland Empire Center notes, *section 11570*, unlike the other statutes listed in *section 11362.775*, does not provide criminal sanctions. Nevertheless, Inland Empire Center argues that under *Qualified, supra, 187 Cal.App.4th at pages 753-754, section 11362.775* provides immunity from a nuisance claim for operating an MMD in violation of *section 11570*. The court in *Qualified* states: "*Sections 11362.765* and *11362.775* of the MMPA immunize operators of medical marijuana dispensaries ... from prosecution [**20] under state nuisance abatement law (*ß 11570*) 'solely on the basis' that they use any 'building or place ... for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance ... .' "

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

(10) Inland Empire Center asserts that, because *section 11362.775* exempts an operator of an MMD from liability for nuisance, Riverside's zoning [*900] ordinance, banning MMD's and declaring them a nuisance, is preempted by state law. We disagree. Here, Inland Empire Center is prosecuted for a zoning violation, and not "solely on the basis" Inland Empire Center used the premises for operating an MMD. Although [**21] *section 11362.775* allows lawful MMD's, a municipality can limit or prohibit MMD's through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. Protection under *Civil*

Code section 3482 is applied very narrowly, only "where the alleged nuisance is *exactly* what was lawfully authorized." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc. (2010) 190 Cal.App.4th 1502, 1532 [119 Cal. Rptr. 3d 529]*, italics added.) Inland Empire Center's reliance on *Civil Code section 3482* is misplaced since, here, the Legislature did not expressly prohibit cities from enacting zoning regulations banning MMD's or from bringing a nuisance action enforcing such ordinances. Therefore Riverside's zoning ordinance banning MMD's does not duplicate or contradict the CUA and MMP statutes.

2. *Expressly Occupying the Field of State Law*

(11) Local legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area. (*Kruse, supra, 177 Cal.App.4th at p. 1169.*) **(12)** Here, the CUA and MMP do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning MMD's, to the exclusion of all local [**22] law.

In *Kruse, supra, 177 Cal.App.4th 1153*, the court stated that the CUA did not expressly preempt the city's zoning ordinance which temporarily prohibited MMD's: "The CUA does not expressly preempt the City's actions in this case. The operative provisions of the CUA do not address zoning or business licensing decisions. The statute's operative provisions protect physicians from being 'punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes' (*ß 11362.5, subd. (c)*), and shield patients and their qualified caregivers from criminal liability for possession and cultivation of marijuana for the patient's personal medical purposes if approved by a physician (*ß 11362.5, subd. (d)*). The plain language of the statute does not prohibit the City from enforcing zoning and business licensing requirements applicable to defendants' proposed use." (*Kruse, supra, 177 Cal.App.4th at pp. 1172-1173.*)

The *Kruse* court further explained that the city's temporary moratorium on MMD's was permissible because: "The CUA does not authorize the operation of a medical marijuana dispensary [citations], nor does it prohibit local governments from regulating such [**23] dispensaries. Rather, the CUA expressly states that it does not supersede laws that protect individual and public safety: 'Nothing in this section shall be construed to supersede legislation prohibiting [*901] persons from engaging in conduct that endangers others ... .' (*ß 11362.5, subd. (b)(2).*) The CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries, enacted as an urgency measure 'for the immediate preservation of the public health, safety, and welfare.' " (*Kruse, supra, 177 Cal.App.4th at p. 1173.*)

The *Kruse* court also concluded the city's zoning ordinance was not expressly preempted by the MMP. The *Kruse* court noted, "The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances." (*Kruse, supra, 177 Cal.App.4th at p. 1175.*) Furthermore, "[m]edical marijuana dispensaries are not mentioned in the text or history of the MMP. The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries. Rather, like the CUA, the MMP expressly allows local regulation. ... Nothing in the [**24] text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries." (*Ibid.*) As in *Kruse*, the CUA and MMP do not expressly preempt Riverside's zoning ordinance regulating MMD's, including banning them.

3. *Impliedly Occupying the Field of State Law*

(13) Riverside's zoning ordinance banning MMD's is not impliedly preempted by state law since Riverside's ordinance does not enter an area of law fully occupied by the CUA and MMP by legislative implication. (*Kruse, supra, 177 Cal.App.4th at p. 1168.*) " ' "[L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature ... has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; [**25] or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." [Citation.]' [Citation.]" (*Id. at p. 1169.*)

This court rarely finds implied preemption: "We are reluctant to invoke the doctrine of implied preemption. 'Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances.' [Citation.] ' "In [*902] determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative

scheme." ' [Citation.] Indeed, preemption will not be implied where local legislation serves local purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes. [Citation.] There is a presumption against preemption ... ." (*Garcia v. Four Points Sheraton LAX (2010) 188 Cal.App.4th 364, 374 [115 Cal. Rptr. 3d 685]*.)

(a) *Complete Coverage*

The subject [**26] matter of the Riverside zoning ordinance banning MMD's has not been " ' " 'so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern.' " ' " (*Kruse, supra, 177 Cal.App.4th at p. 1169*.) As stated in *Kruse*, neither the CUA nor MMP "addresses, much less completely covers, the areas of land use, zoning and business licensing. Neither statute imposes comprehensive regulation demonstrating that the availability of medical marijuana is a matter of 'statewide concern,' thereby preempting local zoning and business licensing laws." (*177 Cal.App.4th at p. 1175*.) The *Kruse* court further noted that the CUA "does not create 'a broad right to use marijuana without hindrance or inconvenience' [citation], or to dispense marijuana without regard to local zoning and business licensing laws." (*177 Cal.App.4th at p. 1175*.)

Inland Empire Center cites *City of Torrance v. Transitional Living Centers for Los Angeles, Inc. (1982) 30 Cal.3d 516, 521 [179 Cal. Rptr. 907, 638 P.2d 1304]*, *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 293 [219 Cal. Rptr. 467, 707 P.2d 840]*, *O'Connell v. City of Stockton, supra, 41 Cal.4th at pages 1068-1069*, and *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal.App.3d 90, 103-104 [223 Cal. Rptr. 609]* for the proposition the [**27] MMP preempts Riverside's ordinance banning MMD's. These cases are factually inapposite. They do not concern medical marijuana, the CUA, the MMP, or local ordinances regulating or banning MMD's. While the cases address general preemption principles, they are not dispositive of the issues raised in the instant case.

(14) Inland Empire Center also lists numerous state statutes which Inland Empire Center claims demonstrate the MMP encompasses a comprehensive scheme intended to regulate just about every aspect of the administration of medical marijuana, including MMP's. Inland Empire Center argues that the CUA and MMP impliedly and expressly preempt local regulations prohibiting MMD's by fully occupying the area of law through statutes, such as *sections 11362.765* and *11362.775* of the MMP. We disagree. The CUA and MMP do not preclude Riverside from enacting zoning ordinances prohibiting MMD's [*903] in the city. In addition, the MMP provides immunity only as to lawful MMD's. An MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful.

(b) *State Law Tolerating Local Action*

The CUA and MMP do not provide " ' " 'general law couched in such terms as to indicate clearly that a paramount state [**28] concern will not tolerate further or additional local action.' " ' " (*Kruse, supra, 177 Cal.App.4th at p. 1169*; see *Sherwin-Williams, supra, 4 Cal.4th at p. 898*.) Because the state statutory scheme (the CUA and MMP) expresses an intent to permit local regulation of MMD's, preemption by implication of legislative intent may not be found here. (*Kruse, at p. 1176*.) In *Kruse*, the court explained that the CUA and MMP did not preclude local action regarding medical marijuana, "except in the areas of punishing physicians for recommending marijuana to their patients, and according qualified persons affirmative defenses to enumerated penal sanctions. (*ßß 11362.5, subds. (c), (d), 11362.765, 11362.775*.) The CUA expressly provides that it does not 'supersede legislation prohibiting persons from engaging in conduct that endangers others' (*ß 11362.5, subd. (b)(2)*), and the MMP expressly states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article' (*ß 11362.83*)." (*Kruse, at p. 1176*.)

In addition, after *Kruse* was decided, the Legislature added *section 11362.768* in 2010. With regard to this new provision, the court in *Hill, supra, 192 Cal.App.4th 861* [**29] noted that "the Legislature showed it expected and intended that local governments adopt additional ordinances" regulating medical marijuana. (*Id. at p. 868*.) *Section 11362.768* states that: "*(f)* Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. [*∂*] *(g)* Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." As the *Hill* court noted regarding this statute, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted *section 11362.768*, has made clear that local government may regulate dispensaries." (*192 Cal.App.4th at p. 868*.) The *Hill* court added that a local government can zone where MMD's are permissible (*id. at p. 870*) and apply nuisance laws to MMD's that do not comply with valid ordinances (*id. at pp. 868, 870*).

(15) Preemption [**30] by implication of legislative intent may not be found here where the Legislature has

expressed its intent to permit local regulation [*904] of MMD's and where the statutory scheme recognizes local regulations. (*Kruse, supra, 177 Cal.App.4th at p. 1176.*)

(c) *Balancing Adverse Effects and Benefits of Local Law*

Inland Empire Center has also not established the third indicium of implied legislative intent to "fully occupy" the area of regulating MMD's. Inland Empire Center has not shown that any adverse effect on the public from Riverside's ordinance banning MMD's outweighs the possible benefit to the city. (*Kruse, supra, 177 Cal.App.4th at p. 1169.*) Inland Empire Center argues that allowing Riverside to ban MMD's would lead to nonuniform application of the law, with MMD's concentrated in limited areas or not existing in entire regions of the state. We recognize that, as Inland Empire Center stresses, the Legislature intended in enacting the MMP to promote uniform application of the CUA and enhance access to medical marijuana through MMD's (*ß 11362.7*; Historical and Statutory Notes, 40 pt. 2 West's Ann. Health & Saf. Code (2007 ed.) foll. *ß 11362.7*; Stats. 2003, ch. 875, ßß 1, 3, pp. 6422, 6434). Nevertheless, [**31] nothing in the CUA or MMP suggests that cities are required to accommodate the use of medical marijuana and MMD, by allowing MMD's within every city. Nothing stated in the CUA and MMP precludes cities from enacting zoning ordinances banning MMD's within their jurisdictions. Furthermore, those who wish to use medical marijuana are not precluded from obtaining it by means other than at an MMD in Riverside.

As concluded in *Kruse, supra, 177 Cal.App.4th at page 1176*, "neither the CUA nor the MMP provides partial coverage of a subject that "'is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit"' to the City. [Citation.] '[A] local ordinance is not impliedly preempted by conflict with state law unless it "mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates." [Citation.] That is because, when a local ordinance "does not prohibit what the statute commands or command what it prohibits," the ordinance is not "inimical to" the statute. [Citation.]' [Citation.] Neither the CUA nor the MMP compels the establishment of local [**32] regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP." (*Kruse, at p. 1176*; see *Sherwin-Williams, supra, 4 Cal.4th at p. 898.*)

Inland Empire Center urges this court to disregard *Kruse, supra, 177 Cal.App.4th 1153* and *City of Corona v. Naulls (2008) 166 Cal.App.4th 418 [83 Cal. Rptr. 3d 1]*, because these cases are not dispositive for reasons noted in *Qualified, supra, 187 Cal.App.4th 734*. We agree *Kruse* and *Naulls* are factually distinguishable from the instant case because *Kruse* and *Naulls* [*905] involve temporary MMD moratoriums, whereas the instant case involves a permanent ban. Nevertheless, the analysis in *Kruse*, addressing the issue of preemption, is applicable in the instant case.

4. *Complete Ban*

Inland Empire Center argues that, although local governments can regulate MMD's under *subdivisions (f)* and *(g) of section 11362.768*, this statute only concerns restricting MMD's located near schools. But it is clear from *subdivisions (f)* and *(g)*, in conjunction with the MMP as a whole, that the Legislature intended to allow local governments to regulate MMD's beyond the limited provisions included in the [**33] CUA and MMP, as long as the local provisions are consistent with the CUA and MMP. Zoning ordinances banning MMD's are not inconsistent with the CUA and MMP, as discussed above.

Inland Empire Center also argues that *subdivisions (f)* and *(g) of section 11362.768* do not authorize local governments to enact ordinances totally banning MMD's. Local government can only "restrict" or "regulate" the location or establishment of MMD's. (*ß 11362.768, subds. (f), (g).*) Inland Empire Center asserts that restricting and regulating MMD's is more limited than completely banning MMD's and therefore Riverside did not have authority under *section 11362.768* to ban all MMD's. We disagree.

(16) We construe the words in *section 11362.768* in "their context and harmonize them according to their ordinary, common meaning. [Citation.] ... We consider the consequences which would flow from each interpretation and avoid constructions which defy common sense or which might lead to mischief or absurdity. [Citations.] By doing so, we give effect to the legislative intent even though it may be inconsistent with a strict, literal reading of the statute." (*Friedman v. City of Beverly Hills (1996) 47 Cal.App.4th 436, 441-442 [54 Cal. Rptr. 2d 882].*)

In [**34] determining whether *section 11362.768* authorizes local government to ban MMD's, we look to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." The term "regulate" is defined in the dictionary as: "[T]o govern or direct according to rule ... [or] laws ... ." (Webster's 3d New Internat. Dict. (1993) p. 1913.) The term "regulation" is defined in Black's Law Dictionary as: "1. The act or process of controlling by rule or restriction ... . 3. A rule or order, having legal force, usu. issued by an administrative agency ... ." (Black's Law Dict. (8th ed. 2004) p. 1311.) "Restriction" is defined as: "1. A limitation or qualification. 2. A limitation (esp. in a deed)

placed on the use or enjoyment of property." (Black's Law Dict., *supra*, p. 1341.)

(17) Applying these definitions, we conclude Riverside's prohibition of MMD's in Riverside through enacting a zoning ordinance banning MMD's is [*906] a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. (*Leyva v. Superior Court (1985) 164 Cal.App.3d 462, 473 [210 Cal. Rptr. 545]* [Fourth Dist., Div. Two].) A ban or prohibition is simply a type [**35] or means of restriction or regulation. Riverside's ban of MMD's is not preempted by the CUA or MMP.

5. *Nuisance Per Se*

Inland Empire Center's MMD constitutes a violation of Riverside's valid and enforceable zoning ordinance banning MMD's in Riverside. In turn, the code violation constitutes a nuisance per se subject to abatement. Since Riverside is likely to prevail on the merits at trial, the trial court did not abuse its discretion issuing a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside. (*Alliant Ins. Services, Inc. v. Gaddy, supra, 159 Cal.App.4th at p. 1300.*)

(18) A nuisance per se exists "'when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. ... [T]o rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law.' [Citation.] '[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made ... .' [Citation.] ' "Nuisances *per se* are so regarded because [**36] no proof is required, beyond the actual fact of their existence, to establish the nuisance." [Citations.]' [Citation.]" (*Kruse, supra, 177 Cal.App.4th at pp. 1163-1164.*)

In *Naulls*, the court affirmed a trial court order granting a preliminary injunction closing down an MMD on the ground the MMD [*907] constituted a nuisance per se subject to abatement because there was no express code provision permitting MMD's and no request for a variance. It was presumed in *Naulls* that the MMD was impermissible and was a nuisance per se subject to abatement. (*City of Corona v. Naulls, supra, 166 Cal.App.4th at pp. 428, 432-433.*) The *Naulls* court held: "[T]he court was presented with substantial evidence that Naulls, by failing to comply with the City's various procedural requirements, created a nuisance per se, subject to abatement in accordance with the City's municipal code. Issuance of a preliminary injunction was therefore a proper exercise of the court's discretion." (*Id. at p. 433.*)

Citing *Naulls*, the court in *Kruse, supra, 177 Cal.App.4th 1153* also upheld injunctive relief enjoining operation of an MMD anywhere in the city. (*Id. at p. 1158.*) The *Kruse* court stated, "[w]e find *Naulls* persuasive here. [**37] Kruse's operation of a medical marijuana dispensary without the City's approval constituted a nuisance per se under section 1.12.010 of the City's municipal code and could properly be enjoined." (*Kruse, supra, 177 Cal.App.4th at p. 1166.*) No showing the MMD caused any actual harm was required to establish a nuisance per se. (*Ibid.*)

Likewise, here, Inland Empire Center's MMD constitutes a municipal code violation and nuisance per se. (RMC, ßß 6.15.020.Q, 1.01.110.E.) The trial court therefore did not abuse its discretion in granting Riverside injunctive relief based upon Inland Empire Center's MMD constituting a nuisance per se subject to abatement.

VIII

DISPOSITION

The judgment is affirmed. Plaintiff is awarded its costs on appeal.

Hollenhorst, Acting P. J., and Miller, J., concurred.

Exhibit B

Filed 11/9/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF RIVERSIDE, Plaintiff and Respondent, v. INLAND EMPIRE PATIENT'S HEALTH AND WELLNESS CENTER, INC. et al., Defendants and Appellants.	E052400 (Super.Ct.No. RIC10009872) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

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

Gregory P. Priamos, City Attorney, Neil Okazaki, Deputy City Attorney; Best Best & Krieger, Jeffrey V. Dunn and Lee Ann Meyer for Plaintiff and Respondent.

I

INTRODUCTION

Defendants and appellants Inland Empire Patient's Health and Wellness Center

Inc., et al.[1] (Inland Empire Center) appeal from a judgment entered in favor of plaintiff and respondent, the City of Riverside (Riverside), after the trial court found that Inland Empire Center's medical marijuana dispensary (MMD)[2] constituted a public nuisance per se and issued a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside.

Inland Empire Center contends Riverside's ordinance banning MMD's throughout Riverside is preempted by state law; specifically, the Compassionate Use Act of 1996 (CUA) (Health & Saf. Code, § 11362.5)[3] and the Medical Marijuana Program (MMP) (§§ 11362.7-11362.83). We conclude Riverside's ordinance banning MMD's is not preempted by state law. We therefore affirm the preliminary injunction and judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

Inland Empire Center is a nonprofit mutual benefit corporation established for the purpose of facilitating an MMD located in Riverside. Inland Empire Center's MMD is a nonprofit collaborative association of patient members, who collectively cultivate medical marijuana and redistribute it to each other. Inland Empire Center has operated

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[1] Defendants and appellants also include William Joseph Sump II, Lanny David Swerdlow, Angel City West, Inc., Meneleo Carlos, and Filomena Carlos.

[2] When referring to MMD's, we use the term MMD broadly to include cooperatives, collectives, and dispensaries, despite any technical differences that may exist between them.

[3] Unless otherwise noted, all statutory references are to the Health and Safety Code.

its MMD in Riverside since 2009.

Defendant Lanny Swerdlow (Swerdlow) is a registered nurse and manager of an adjacent, separate medical clinic, THCF Medical Clinic, unassociated with the MMD. Defendant William Joseph Sump II is an Inland Empire Center board member and general manager of Inland Empire Center's Riverside MMD. Defendants Meneleo Carlos and Filomena Carlos (the Carloses) own the property upon which the MMD is located and lease the property to Swerdlow. Defendant Angel City West, Inc. (Angel) provides management services for the property.

In January 2009, Riverside's Community Development Department planning division sent Swerdlow a letter stating that Riverside's zoning code prohibits MMD's in Riverside. In May 2010, Riverside filed a complaint against Angel, Swerdlow, Sump,[4] the Carloses, East West Bancorp, Inc.,[5] and THCF Health and Wellness Center,[6] for injunctive relief to abate public nuisance. The complaint alleges Inland Empire Center's MMD constitutes a public nuisance, in violation of Riverside's zoning code, Riverside Municipal Code (RMC) section 6.15.020(Q). Riverside notified Swerdlow of the violation. Nevertheless, Swerdlow continues to operate the MMD.

Riverside's complaint includes two causes of action, both alleging public nuisance, and prays for injunctive relief enjoining Inland Empire Center from operating

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[4] Sump is added as Doe 1 in an amendment to the complaint.

[5] East West Bancorp, Inc. is not a party to this appeal.

[6] Riverside added Inland Empire Center by amendment to the complaint as Doe 2.

its MMD in Riverside. Riverside alleges in the complaint that Inland Empire Center is located in a commercial zone. Under Riverside's zoning code, MMD's are prohibited. (RMC, §§ 19.150.020, 19.910.140.) Riverside's zoning code further states that any use which is prohibited by state and/or federal law is strictly prohibited in Riverside. (RMC, § 19.150.020.) Any violation of Riverside's municipal code is deemed a public nuisance under RMC sections 1.01.110 and 6.15.020(Q). Inland Empire Center's MMD violates Riverside's zoning code and is therefore a public nuisance subject to abatement.

Riverside filed a motion for a preliminary injunction, seeking to close Inland Empire Center's MMD in Riverside. Riverside Police Detective Darren Woolley (Woolley) concluded in his supporting declaration that the medical clinic, "THCF Medical Clinic," where Swerdlow worked as a nurse, was connected to Inland Empire Center's MMD and referred patients to the MMD. Riverside requested the trial court to take judicial notice of various documents, including a report entitled, "California Police Chiefs Association's Task Force On Marijuana Dispensaries" and a report by the Riverside County District Attorney's Office, entitled, "Medical Marijuana: History and Current Complications." Inland Empire Center objected to judicial notice of these documents. The court did not rule on the judicial notice request.

In support of Inland Empire Center's opposition to Riverside's motion for a preliminary injunction, Swerdlow states in his declaration that he managed the medical clinic Woolley claimed was associated with the MMP. According to Swerdlow, the medical clinic is not connected with the MMD. Woolley erroneously referred to Inland

Empire Center's MMD as the THCF Medical Clinic, which is at a different location nearby.

Inland Empire Center's general manager, Sump, also provided a declaration supporting Inland Empire Center's opposition, stating that Inland Empire Center had advised Riverside that it would be operating an MMD in Riverside. Sump further stated that Inland Empire Center had been lawfully operating its MMD and it did not constitute a nuisance to the surrounding community.

On November 24, 2010, the trial court heard Riverside's motion for a preliminary injunction and granted the motion, concluding *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 (*Kruse*) controlled and therefore Riverside could use zoning regulations to prohibit MMD's, "especially given the conflict between state and federal law." The trial court added it was not finding that federal law preempted state law in this instance. The court acknowledged there was case law holding that there was no federal law preemption. The trial court entered a written order enjoining Inland Empire Center from operating its MMD on the Carloses' property.

III

STANDARD OF REVIEW

In this appeal, Inland Empire Center challenges the trial court's order granting Riverside's request for a preliminary injunction. "We review an order granting a preliminary injunction, under an abuse of discretion standard, to determine whether the trial court abused its discretion in evaluating the two interrelated factors pertinent to issuance of a preliminary injunction – (1) the likelihood that the plaintiffs will prevail on

the merits at trial, and (2) the interim harm that the plaintiffs are likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued. [Citation.] Abuse of discretion as to either factor warrants reversal. [Citation.]" (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1299-1300.) "'[W]e interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order. [Citations.]' [Citations.]" (*Id.* at p. 1300.)

Here, the validity of the injunction and likelihood Inland Empire Center will prevail at trial turn on a question of law: whether Riverside's zoning code banning MMD's in Riverside is valid and enforceable. The underlying facts demonstrating a violation of the zoning code are undisputed. Inland Empire Center was operating an MMD on Riverside property, owned, leased, used and/or managed by the Inland Empire Center defendants. Inland Empire Center argues the zoning code prohibiting MMD's is invalid and unenforceable because it is preempted by state law (the CUA and MMP). "'Whether state law preempts a local ordinance is a question of law that is subject to de novo review. [Citation.]' [Citation.] 'The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. [Citation.]' [Citation.]" (*Kruse, supra,* 177 Cal.App.4th at p. 1168.)

Since the material facts relevant to preemption are undisputed, this is a question of law which we review de novo. (*Kruse, supra,* 177 Cal.App.4th at p. 1168.) Inland Empire Center bears the burden of demonstrating preemption. We conclude Inland Empire Center has not met this burden and therefore the trial court did not abuse its

discretion in granting a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside.

IV

PREEMPTION PRINCIPLES

The general principles governing state statutory preemption of local land use regulation are well settled. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 (*Big Creek Lumber*); *Kruse, supra,* 177 Cal.App.4th at p. 1168.) Under article XI, section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." "'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.'" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) Three types of conflict give rise to state law preemption: a local law (1) duplicates state law, (2) contradicts state law, or (3) enters an area fully occupied by state law, either expressly or by legislative implication. (*Kruse,* at p. 1168; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.)

Where, as here, there is no clear indication of preemptive intent from the Legislature, we presume that Riverside's zoning regulations, in an area over which local government traditionally has exercised control, are not preempted by state law. (*Kruse, supra,* 177 Cal.App.4th at p. 1169.) "'[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses,

California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute. [Citation.]'" (*Kruse, supra,* 177 Cal.App.4th at p. 1169, quoting *Big Creek Lumber, supra,* 38 Cal.4th at p. 1149.) This court thus must presume, absent a clear indication the Legislature intended to regulate the location of MMD's, that such regulation by local government is *not* preempted by state law.

V

CALIFORNIA MEDICAL MARIJUANA LAWS

In determining whether Riverside's zoning code banning MMD's is preempted by state law, we first consider the scope and purpose of California's medical marijuana laws, specifically the CUA and MMP.

In 1996, California voters approved a ballot initiative, Proposition 215, referred to as the "Compassionate Use Act of 1996." (§ 11362.5.) The CUA is intended to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana . . . ." (*Id.*, subd. (b)(1)(A).) The CUA is also intended to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (*Id.*, subd. (b)(1)(B).) In addition, the CUA is intended to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (*Id.*, subd. (b)(1)(C).) The CUA

provides a limited defense from prosecution for cultivation and possession of marijuana. The CUA is narrow in scope. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 929-930; *Kruse, supra,* 177 Cal.App.4th at p. 1170.) It does not create a statutory or constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana by MMD's. (*Ross* at p. 926, *Kruse,* at pp. 1170-1171; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773-774 (*Urziceanu*).)

In 2003, the Legislature added the MMP. (§§ 11362.7-11362.83.) The purposes of the MMP include "'[promoting] uniform and consistent application of the [CUA] among the counties within the state' and '[enhancing] the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.' [Citation.]" (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 864 (*Hill*).) The MMP "includes guidelines for the implementation of the CUA. Among other things, it provides that qualified patients and their primary caregivers have limited immunity from prosecution for violation of various sections of the Health and Safety Code regulating marijuana including [section 11570,] the 'drug den' abatement law. (§§ 11362.765, 11362.775.)" (*Ibid.,* fn. omitted.)

With regard to "drug den" abatement, the MMP "provides a new affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana. [Citation.]" (*Kruse, supra,* 177 Cal.App.4th at p. 1171.) For instance, section 11362.775 of the MMP provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who

associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570."[7] In addition, section 11362.765 provides limited immunity for transporting, processing, administering, and cultivating medical marijuana.

VI

APPLICABLE RIVERSIDE MUNICIPAL CODE PROVISIONS

Chapter 19.150 of the RMC enumerates permissible and impermissible land uses. RMC section 19.150.020 states that table A of section 19.150.020 "identifies those uses that are specifically prohibited. Uses not listed in Tables are prohibited unless,- the Zoning Administrator, pursuant to Chapter 19.060 (Interpretation of Code), determines that the use is similar and no more detrimental than a listed permitted or conditional use. Any use which is prohibited by state and/or federal law is also strictly prohibited." (RMC, § 19.150.020.) Table A states that MMD's constitute a "Prohibited Use" throughout Riverside. (RMC, § 19.150.020.) Riverside's zoning code further states that "persons vested with enforcement authority . . . shall have the power to . . . use whatever judicial and administrative remedies are available under the Riverside Municipal Code" to enforce the zoning code. (RMC, § 19.070.020.)

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[7] These penal statutes criminalize possession of marijuana (§ 11357); cultivation of marijuana (§ 11358); possession of marijuana for sale (§ 11359); transportation of marijuana (§ 11360); maintaining a place for the sale, giving away, or use of marijuana (§ 11366); making available premises for the manufacture, storage, or distribution of controlled substances (§ 11366.5); and abatement of nuisance created by premises used for manufacture, storage, or distribution of controlled substances (§ 11570).

RMC further provides that "any condition caused or permitted to exist in violation of any of the provisions of this Code, or the provisions of any code adopted by reference by this Code, shall be deemed a public nuisance and may be abated by the City, . . ." (RMC, § 1.01.110(E).) RMC section 6.15.020, enumerating acts constituting nuisances, states: "It is unlawful and is hereby declared a nuisance for any person owning, leasing, occupying or having charge or possession of any property . . . in the City to maintain the property in such a manner that any of the following conditions are present: [¶] . . . [¶] Q. Any other violation of this code pursuant to section 1.01.110E." This encompasses a violation of Riverside's zoning code, such as the provision banning MMD's. Under the RMC, Inland Empire Center's MMD is a zoning violation, constituting a public nuisance which is amenable to abatement and injunctive relief by civil action.

VII

PREEMPTION

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

A. Federal Preemption of State Law

Inland Empire Center argues that under *Qualified Patients Assoc. v. City of Anaheim* (2010) 187 Cal.App.4th 734 (*Qualified*), local municipalities cannot enact a total ban of MMD's based solely on federal law preemption. The court in *Qualified* stated: "The city may not justify its ordinance solely under federal law [citations], nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance. The city's obstacle preemption argument therefore fails." (*Qualified,* at p. 763, fn. omitted.) In other words, the city cannot rely on the proposition that federal law, which criminalizes possession of marijuana, preempts state law allowing limited use of medical marijuana and MMD's.

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

B. State Law Preemption of Local Law

We reject the proposition that local governments, such as Riverside, are preempted by the CUA and MMP from enacting zoning ordinances banning MMD's. Riverside's zoning ordinance does not duplicate, contradict, or occupy the field of state law legalizing medical marijuana and MMD's.

1. *Duplicative and Contradictory Rules*

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

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

The MMP merely implements the CUA and also provides immunity for those involved in lawful MMD's. The CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's. The state statutes do not preclude local governments from regulating MMD's through zoning ordinances. The establishment and operation of MMD's is thus subject to local zoning and business licensing laws. There is nothing stated to the contrary in the CUA or MMP. The CUA and MMP do not expressly mandate that MMD's shall be permitted within every city and

county, nor do the CUA and MMP prohibit cities and counties from banning MMD's. The operative provisions of the CUA and MMP do not speak to local zoning laws. (*Kruse, supra,* 177 Cal.App.4th at pp. 1172-1173, 1175.) Although the MMP provides limited immunity to those using and operating lawful MMD's, the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting MMD's.

Inland Empire Center argues Riverside's ordinance banning MMD's is invalid because it is inconsistent with the MMP, which provides limited immunity for operating and using MMD's. For instance, section 11362.775 of the MMP provides immunity for a nuisance claim arising from a violation of section 11570, which encompasses operating an MMD. Section 11570 provides civil nuisance liability: "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . and every building or place wherein or upon which those acts take place, *is a nuisance which shall be enjoined, abated, and prevented*, and for which damages may be recovered, whether it is a public or private nuisance." (Italics added.) Section 11362.775 of the MMP provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, *shall not solely on the basis of that fact be subject to state criminal sanctions* under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or ***11570***." (Italics added.)

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

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

Inland Empire Center asserts that, because section 11362.775 exempts an operator of an MMD from liability for nuisance, Riverside's zoning ordinance, banning MMD's and declaring them a nuisance, is preempted by state law. We disagree. Here, Inland Empire Center is prosecuted for a zoning violation, and not "solely on the basis" Inland Empire Center used the premises for operating an MMD. Although section 11362.775 allows lawful MMD's, a municipality can limit or prohibit MMD's through zoning

regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief. Protection under Civil Code section 3482 is applied very narrowly, only "where the alleged nuisance is *exactly* what was lawfully authorized." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1532, italics added.) Inland Empire Center's reliance on Civil Code section 3482 is misplaced since, here, the Legislature did not expressly prohibit cities from enacting zoning regulations banning MMD's or from bringing a nuisance action enforcing such ordinances. Therefore Riverside's zoning ordinance banning MMD's does not duplicate or contradict the CUA and MMP statutes.

2. Expressly Occupying the Field of State Law

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

In *Kruse, supra,* 177 Cal.App.4th 1153, the court stated that the CUA did not expressly preempt the city's zoning ordinance which temporarily prohibited MMD's: "The CUA does not expressly preempt the City's actions in this case. The operative provisions of the CUA do not address zoning or business licensing decisions. The statute's operative provisions protect physicians from being 'punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes' (§ 11362.5, subd. (c)), and shield patients and their qualified caregivers from criminal

liability for possession and cultivation of marijuana for the patient's personal medical purposes if approved by a physician (§ 11362.5, subd. (d)). The plain language of the statute does not prohibit the City from enforcing zoning and business licensing requirements applicable to defendants' proposed use." (*Kruse, supra,* 177 Cal.App.4th at pp. 1172-1173.)

The *Kruse* court further explained that the city's temporary moratorium on MMD's was permissible because: "The CUA does not authorize the operation of a medical marijuana dispensary [citations], nor does it prohibit local governments from regulating such dispensaries. Rather, the CUA expressly states that it does not supersede laws that protect individual and public safety: 'Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . .' (§ 1362.5, subd. (b)(2).) The CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries, enacted as an urgency measure 'for the immediate preservation of the public health, safety, and welfare.'" (*Kruse, supra,* 177 Cal.App.4th at p. 1173.)

The *Kruse* court also concluded the city's zoning ordinance was not expressly preempted by the MMP. The *Kruse* court noted, "The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances." (*Kruse, supra,* 177 Cal.App.4th at p. 1175.) Furthermore, "[m]edical marijuana dispensaries are not mentioned in the text or history of the MMP. The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries. Rather, like the CUA, the

MMP expressly allows local regulation. . . . Nothing in the text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries." (*Ibid.*) As in *Kruse*, the CUA and MMP do not expressly preempt Riverside's zoning ordinance regulating MMD's, including banning them.

3. Impliedly Occupying the Field of State Law

Riverside's zoning ordinance banning MMD's is not impliedly preempted by state law since Riverside's ordinance does not enter an area of law fully occupied by the CUA and MMP by legislative implication. (*Kruse, supra,* 177 Cal.App.4th p. 1168.) """[L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature . . . has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." [Citation.]' [Citation.]" (*Id.* at p. 1169.)

This court rarely finds implied preemption: "We are reluctant to invoke the doctrine of implied preemption. 'Since preemption depends upon *legislative intent,* such

a situation necessarily begs the question of why, if preemption was legislatively *intended,* the Legislature did not simply say so, as the Legislature has done many times in many circumstances.' [Citation.] '"In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme."' [Citations.] Indeed, preemption will not be implied where local legislation serves local purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes. [Citation.] There is a presumption against preemption." (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.)

(a) Complete Coverage

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

Inland Empire Center cites *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 521, *Cohen v. Board of Supervisors* (1985) 40 Cal.3d

277, 293, *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068-1069, and *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103 - 104 for the proposition the MMP preempts Riverside's ordinance banning MMD's. These cases are factually inapposite. They do not concern medical marijuana, the CUA, the MMPA, or local ordinances regulating or banning MMD's. While the cases address general preemption principles, they are not dispositive of the issues raised in the instant case.

Inland Empire Center also lists numerous state statutes which Inland Empire Center claims demonstrate the MMP encompasses a comprehensive scheme intended to regulate just about every aspect of the administration of medical marijuana, including MMP's. Inland Empire Center argues that the CUA and MMP impliedly and expressly preempt local regulations prohibiting MMD's by fully occupying the area of law through statutes, such as sections 11362.765 and 11362.775 of the MMP. We disagree. The CUA and MMP do not preclude Riverside from enacting zoning ordinances prohibiting MMD's in the city. In addition, the MMP provides immunity only as to lawful MMD's. An MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful.

(b) State Law Tolerating Local Action

The CUA and MMP do not provide "general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action[.]" (*Kruse, supra,* 177 Cal.App.4th at pp. 1169, 1176; *Sherwin-Williams, supra,* 4 Cal.4th at p. 898.) Because the state statutory scheme (the CUA and MMP) expresses an intent to permit local regulation of MMD's, preemption by implication of legislative

intent may not be found here. (*Kruse,* at p. 1176.) In *Kruse*, the court explained that the CUA and MMP did not preclude local action regarding medical marijuana, "except in the areas of punishing physicians for recommending marijuana to their patients, and according qualified persons affirmative defenses to enumerated penal sanctions. (§ 11362.5, subds. (c), (d), 11362.765, 11362.775.) The CUA expressly provides that it does not 'supersede legislation prohibiting persons from engaging in conduct that endangers others' (§ 11362.5, subd. (b)(2)), and the MMP expressly states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article' (§ 11362.83)." (*Ibid.*)

In addition, after *Kruse* was decided, the Legislature added section 11362.768 in 2010. With regard to this new provision, the court in *Hill, supra,* 192 Cal.App.4th 861 noted that "the Legislature showed it expected and intended that local governments adopt additional ordinances" regulating medical marijuana. (*Id.* at p. 868.) Section 11362.768 states that: "(f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. [¶] (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." As the *Hill* court noted regarding this statute, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768, has made clear that local

government may regulate dispensaries." (*Ibid.*) The *Hill* court added that a local government can zone where MMD's are permissible (*id.* at p. 870) and apply nuisance laws to MMD's that do not comply with valid ordinances. (*Id.* at pp. 868, 870.)

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

(c) Balancing Adverse Effects and Benefits of Local Law

Inland Empire Center has also not established the third indicium of implied legislative intent to "fully occupy" the area of regulating MMD's. Inland Empire Center has not shown that any adverse effect on the public from Riverside's ordinance banning MMD's outweighs the possible benefit to the city. (*Kruse, supra,* 177 Cal.App.4th at p. 1169.) Inland Empire Center argues that allowing Riverside to ban MMD's would lead to nonuniform application of the law, with MMD's concentrated in limited areas or not existing in entire regions of the state. We recognize that, as Inland Empire Center stresses, the Legislature intended in enacting the MMP to promote uniform application of the CUA and enhance access to medical marijuana through MMD's (§ 11362.7, Historical and Stat. Notes, 40, Pt. 2 West's Ann. Health & Saf. Code (2007) foll. § 11362.7, §§ 1 and 3 of Stats. 2003, c. 875 (S.B. 420)). Nevertheless, nothing in the CUA or MMP suggests that cities are required to accommodate the use of medical marijuana and MMD, by allowing MMD's within every city. Nothing stated in the CUA and MMP precludes cities from enacting zoning ordinances banning MMD's within their

jurisdictions. Furthermore, those who wish to use medical marijuana are not precluded from obtaining it by means other than at an MMD in Riverside.

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

Inland Empire Center urges this court to disregard *Kruse, supra,* 177 Cal.App.4th 1153 and *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, because these cases are not dispositive for reasons noted in *Qualified, supra,* 187 Cal.App.4th 734. We agree *Kruse* and *Naulls* are factually distinguishable from the instant case because *Kruse* and *Naulls* involve temporary MMD moratoriums, whereas the instant case involves a permanent ban. Nevertheless, the analysis in *Kruse*, addressing the issue of preemption, is applicable in the instant case.

4. Complete Ban

Inland Empire Center argues that, although local governments can regulate MMD's under subdivisions (f) and (g) of section 11362.768, this statute only concerns restricting MMD's located near schools. But it is clear from subdivisions (f) and (g), in conjunction with the MMP as a whole, that the Legislature intended to allow local governments to regulate MMD's beyond the limited provisions included in the CUA and MMP, as long as the local provisions are consistent with the CUA and MMP. Zoning ordinances banning MMD's are not inconsistent with the CUA and MMP, as discussed above.

Inland Empire Center also argues that subdivisions (f) and (g) of section 11362.768 do not authorize local governments to enact ordinances totally banning MMD's. Local government can only "restrict" or "regulate" the location or establishment of MMD's. (§ 11362.768, subds. (f), (g).) Inland Empire Center asserts that restricting and regulating MMD's is more limited than completely banning MMD's and therefore Riverside did not have authority under section 11362.768 to ban all MMD's. We disagree.

We construe the words in section 11362.768 in "their context and harmonize them according to their ordinary, common meaning. [Citation.] . . . We consider the consequences which would flow from each interpretation and avoid constructions which defy common sense or which might lead to mischief or absurdity. [Citations.] By doing so, we give effect to the legislative intent even though it may be inconsistent with a strict,

literal reading of the statute." (*Friedman v. City of Beverly Hills* (1996) 47 Cal.App.4th 436, 441-442.)

In determining whether section 11362.768 authorizes local government to ban MMD's, we look to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." The term "regulate" is defined in the dictionary as: "[T]o govern or direct according to rule . . . [or] laws . . . ." (Webster's 3d New Internat. Dict. (1993) p. 1913.) The term "regulation" is defined in Black's Law Dictionary as: "1. The act or process of controlling by rule or restriction . . . . 3. A rule or order, having legal force, usu. issued by an administrative agency . . . ." (Black's Law Dict. (8th ed. 2004) p. 1311.) "Restriction" is defined as: "1. A limitation or qualification. 2. A limitation (esp. in a deed) placed on the use or enjoyment of property." (Black's Law Dict., *supra,* p. 1341.)

Applying these definitions, we conclude Riverside's prohibition of MMD's in Riverside through enacting a zoning ordinance banning MMD's, is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 473 [Fourth Dist., Div. Two].) A ban or prohibition is simply a type or means of restriction or regulation. Riverside's ban of MMD's is not preempted by the CUA or MMP.

5. Nuisance Per Se

Inland Empire Center's MMD constitutes a violation of Riverside's valid and enforceable zoning ordinance banning MMD's in Riverside. In turn, the code violation constitutes a nuisance per se subject to abatement. Since Riverside is likely to prevail on

the merits at trial, the trial court did not abuse its discretion issuing a preliminary injunction enjoining Inland Empire Center from operating its MMD in Riverside. (*Alliant, supra,* 159 Cal.App.4th at p. 1300.)

A nuisance per se exists "'when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. . . . [T]o rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law.' [Citation.] '[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made. . . .' [Citation.] '"Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance." [Citations.]' [Citation.]" (*Kruse, supra,* 177 Cal.App.4th at pp. 1163-1164.)

In *Naulls*, the court affirmed a trial court order granting a preliminary injunction closing down an MMD on the ground the MMD constituted a nuisance per se subject to abatement because there was no express code provision permitting MMD's and no request for a variance. It was presumed in *Naulls* that the MMD was impermissible and was a nuisance per se subject to abatement. (*City of Corona v. Naulls, supra,* 166 Cal.App.4th at pp. 428, 432-433.) The *Naulls* court held: "[T]he court was presented with substantial evidence that Naulls, by failing to comply with the City's various procedural requirements, created a nuisance per se, subject to abatement in accordance with the City's municipal code. Issuance of a preliminary injunction was therefore a proper exercise of the court's discretion." (*Id.* at p. 433.)

Citing *Naulls*, the court in *Kruse, supra,* 177 Cal.App.4th 1153 also upheld injunctive relief enjoining operation of an MMD anywhere in the city. (*Id.* at p. 1158.) The *Kruse* court stated, "[w]e find *Naulls* persuasive here. Kruse's operation of a medical marijuana dispensary without the City's approval constituted a nuisance per se under section 1.12.010 of the City's municipal code and could properly be enjoined." (*Kruse, supra,* 177 Cal.App.4th at p. 1166.) No showing the MMD caused any actual harm was required to establish a nuisance per se. (*Ibid.*)

Likewise, here, Inland Empire Center's MMD constitutes a municipal code violation and nuisance per se. (RMC, §§ 6.15.020(Q), 1.01.110(E).) The trial court therefore did not abuse its discretion in granting Riverside injunctive relief based upon Inland Empire Center's MMD constituting a nuisance per se subject to abatement.

VIII

DISPOSITION

The judgment is affirmed. Plaintiff is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

s/Codrington
J.

We concur:

s/Hollenhorst
Acting P.J.

s/Miller
J.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 33(b), I hereby certify that this petition for review is 6749 words in length and is written in 13 point Times New Roman font.

I declare under penalty of perjury the forgoing is correct, executed in Riverside County California, on December __, 2011.

_____

J. David Nick

CERTIFICATE OF SERVICE

Title of Action: City of Riverside v. I.E.P.H.W.C, No. E052400; Riverside County Superior Court Case No. RIC10009872

I, the undersigned, am employed in the County of Mendocino, State of California; my business address is 345 Franklin Street, San Francisco, CA 94102. I am over the age of eighteen years and not a party to the within action. On the date below I caused the following papers to be served as follows:

PETITION FOR REVIEW

Causing a true copy thereof to be delivered to the office of each party shown below at the address indicated and by leaving the same with a person apparently in charge and over the age of eighteen years;

[X] Placing a true copy thereof, enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Santa Rosa, California, addressed as follows:

Gregory P. Priamos City Attorney Attn: Neil Okazaki 3900 Main Street Riverside, CA 92522 Jeffrey V. Dunn Best Best & Krieger LLP 5 Park Plaza, Suite 1500 Irvine, CA 92614	Clerk of the Court California Court of Appeal Fourth Appellate District, Div 2 3389 Twelfth Street Riverside, CA 92501 Superior Court, County of Riverside Honorable John D. Molloy 4050 Main Street Riverside, CA 92501

I declare under penalty of perjury that the foregoing is true and correct, executed at Sonoma County, California, on December ___, 2011

J. David Nick _____