SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 08/15/2011 TIME: 04:32:00 PM DEPT: C20

JUDICIAL OFFICER PRESIDING: David Chaffee
CLERK: Cora Bolisay
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: Schallie Valencia

CASE NO: **07CC09524** CASE INIT.DATE: 09/04/2007
CASE TITLE: **QUALIFIED PATIENTS ASSOCIATION VS CITY OF ANAHEIM**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

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EVENT ID/DOCUMENT ID: 71298125

EVENT TYPE: Court Trial

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 5/16/2011, now makes the following ruling:

Trial on the above entitled action having been conducted, the matter having been argued and submitted, the Court now finds and orders:

On August 7, 2007, the City Council for the City of Anaheim enacted Ordinance No. 6067. The ordinance (heretofore known as Anaheim's ordinance) bans "medical marijuana dispensaries," thereby restricting mass distribution of medical marijuana. "It shall be unlawful for any person or entity to own, manage, conduct, or operate any Medical Marijuana or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity, in any Medical Marijuana Dispensary in the City of Anaheim." Anaheim Municipal Code 4.20.030 provides: "'Medical Marijuana Dispensary or Dispensary' is any facility where medical marijuana is made available to and/or distributed by or to three or more of the following: a qualified patient, a person with an identification card, or a primary caregiver. Each of the terms herein and shall be interpreted in strict accordance with California Health and Safety Code Sections 11362.5 and 11362.7 et seq. as such sections may be amended from time to time." Anaheim's ordinance does not completely ban medical marijuana distribution; but it does proscribe mass distribution of medical marijuana. The City Council of the City of Anaheim enacted the ordinance because of the significant evidence of the secondary effects of "medical marijuana dispensaries" presented by Anaheim's Police Chief John Welter at a City Council meeting on July 31, 2007. Exhibits 8 and 9. Anaheim's ordinance is a valid exercise of powers allocated to the City by the California Constitution.

Section 7 of Article IX of the California Constitution provides that "[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." One type of ordinance that falls into this broad category is a public nuisance abatement ordinance; the kind of ordinance that Anaheim created in an attempt to limit the mass distribution of medical marijuana. "A public nuisance is one which affects at the same time an entire community or neighborhood, or an considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Civil Code § 3480. "[A] nuisance per se arises 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." *Beck Development Company v. Southern Pacific Transportation Company*, 52 Cal.Rptr.2d 518, 44 Cal.App.4th 1160, 1206-07 (1996). It is clear that Anaheim has the power to enact its ordinance abating the nuisance per se of "medical marijuana dispensaries," provided that it is not preempted by existing California law.

In California, the party that asserts state law preemption over local ordinance bears the burden of proof. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1149 (2006). Here, Qualified Patients Association and Lance Mowdy bear that burden, as they are the ones who are asserting that the CUA and the MMPA, in addition to the California Uniform Controlled Substances Act (heretofore "UCSA") § 11570, preempt the Anaheim ordinance. In other words, Qualified Patients Association and Lance Mowdy must demonstrate that there is state law already in place that would preempt a city from being able to establish a valid ordinance abating the nuisance per se of "medical marijuana dispensaries."

In order to determine whether the CUA and the MMPA serve to preempt Anaheim's ordinance, one must look to see if the alleged conflict falls into one of three preemption categories. Those three categories are laid out in *Action Apartment Association, Incorporated v. City of Santa Monica*, 41 Cal.4th 1232 (2007). "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *Id* at 1242.

Qualified Patients Association and Lance Mowdy assert that the Anaheim ordinance is duplicative of UCSA § 11570. UCSA § 11570 proscribes the use of property to grow, make, store, or distribute a controlled substance. However, Health and Safety Code § 11362.775 provides the following exception: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards . . . shall not . . . be subject to state criminal sanctions under Section . . . 11570." See, Health and Safety Code § 11362.5(b)(1)(B). But see, *People ex rel. Lungren v. Peron*, 59 Cal.App.4th 1383, 1389-1400. As noted by the City, nothing in the statutory scheme for the abatement of illegal drug sales forecloses other remedies. Indeed, Health & Safety Code section 11573.5(f) specifies that the remedies provided in that section "shall be in addition to any other existing remedies for nuisance abatement actions." The Court notes that neither Civil Code sections 3479 nor 3480 are exempted by the MMP.

Qualified Patients Association and Lance Mowdy also argue that the CUA and MMPA preempt Anaheim's ordinance. They allege that the Anaheim ordinance directly contradicts, and falls into an area of law fully occupied by, the CUA and the MMPA. To the contrary, neither law directly speaks to mass distribution of medical marijuana. However, the CUA does have the goal of protecting qualified patients and primary caregivers from being subject to criminal sanctions. This goal conflicts directly with the uncodified section of Anaheim's ordinance, that imposes criminal sanctions if the ordinance is violated. As explained more fully below, this portion may be severed from the codified section of Anaheim's

ordinance as there is no apparent conflict between the CUA and the codified portion of Anaheim's ordinance.

There is no such conflict present between the MMPA and Anaheim's ordinance. The MMPA does state that UCSA § 11570 does not apply to qualified patients and primary caregivers engaged in communal cultivation of medical marijuana, but that is limited to the activity of communal cultivation. "By its terms, the statute exempts qualified patients and their primary caregivers (who collectively or cooperatively cultivate marijuana for medical purposes) from nuisance laws '*solely on the basis* of [the] fact' that they have associated collectively or cooperatively to cultivate marijuana for medical purposes." *County of Los Angeles v. Hill*, 192 Cal.App.4th 861, 869, 121 Cal.Rptr.3d 722, 729 (2011). Anaheim's ordinance targets mass distribution; not communal cultivation. The court in *County of Los Angeles v. Hill*, is quite clear that UCSA § 11570 only applies to the actual activity of communal cultivation, rather than apply broadly to every instance where medical marijuana is involved. "The statute does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense medical marijuana anywhere they choose. [A local government's] constitutional authority to regulate the particular manner and location in which a business may operate (Cal. Const., art. XI, § 7) is unaffected by section 11362.775." *Id* at 869, 729. It is readily apparent that the statute does not protect mass distribution from designation by a local governmental entity as a nuisance. There is nothing in the MMPA that contradicts Anaheim's ordinance.

As to whether the CUA or the MMPA fully occupies the field of medical marijuana distribution, the Court must look to the language to see if either lawfully occupies the area, whether expressly or impliedly. In *People v. Urizceanu*, 33 Cal.Rptr.3d 859, 132 Cal.App.4th 747 (2005), the court held that the CUA does not provide for communal cultivation or communal distribution. *Id* at 758. Rather, the only mention of distribution made in the CUA is contained within a provision that merely encourages the state to work with the federal government to implement a plan to provide safe and affordable distribution of medical marijuana to qualified patients. Health & Safety Code § 11362.5(b)(1)(C). It is clear that the CUA does not fully occupy the area of medical marijuana distribution law, leaving medical marijuana distribution to be resolved at a later date. Prior legislative history, particularly SB 1887, makes clear that the legislature anticipated that cities and counties ultimately govern medical marijuana distribution even as State government works with the federal government to implement a distribution plan. Exhibit B(3), p. 4. The CUA expressly states that it does not supersede laws that protect individual and public safety. Health and Safety Code § 11362.5(b)(2). Simply stated, a city can enact a valid nuisance law against certain activities involving medical marijuana if those activities pose a threat to public safety. The CUA clearly does not occupy the field of medical marijuana distribution.

As for the MMPA, it also does not fully occupy the area of medical marijuana distribution law. In *Urizceanu*, the court stated that the MMPA "represent[ed] a dramatic change in the prohibitions on the use, distribution, and cultivation for...qualified patients [and] primary caregivers." *Id* at 883, 785. However, the word "distribute" and variations of it are only mentioned three times within the whole text of the MMPA. Senate Bill 420 § 1(a)(4), Health and Safety Code § 11362.719(c), 11362.765(a). All other mention and implication of medical marijuana being given to a qualified patient employ the words "delivery," "give," and "administer," including variations of those words, implying singular interaction as opposed to mass interaction between multiple parties. *See, for example,* Health and Safety Code § 11362.71(e), 11362.765(b)(2), 11362.765(b)(3). In *Claremont v. Kruse*, 177 Cal.App.4th 1153 (2009), the court stated that "the MMP[A] expressly states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article'." *Id* at 1176. "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local

regulations." *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal.3d 476, 485, 683 P.2d 1150, 1156, 204 Cal. Rptr. 897, 903 (1984).

The legislative history of the MMPA demonstrates the Legislature's intention to allow local legislation to "fill in the gaps" that exist in state medical marijuana law. For example, Senator Vasconcellos praised the success of San Francisco's qualified patient identification card registry in his "Author's Statement" in the Assembly Republican Bill Analysis for the Public Safety Committee for State Bill 420, which contains a plan for a state-wide qualified patient identification card registry. Exhibit A(17), p. 84. While apparently relying on local laws to be the testing ground for state legislation regarding medical marijuana, the Legislature appears hesitant to exert control over medical marijuana distribution. The first draft of Senate Bill 848 called for the State to establish a distribution. Exhibit C(1). However, all language concerning a distribution plan was replaced with the identification card registry plan by the very next draft. *Id.* There is a history of legislative action that suggests a desire to avoid fully occupying the area of medical marijuana distribution, and to allow local governments to regulate such distribution. See, e.g., Health & Safety Code section 11362.768(f, (g).

It is clear that the CUA only partially preempts Anaheim's ordinance, while the MMPA does not preempt Anaheim's ordinance at all. The CUA does not fully occupy the area of medical marijuana distribution, whether expressly or impliedly. Instead, it implicates a portion of Anaheim's ordinance that is severable. Unlike the CUA, the MMPA does not contradict any part of the Anaheim ordinance, nor does it fully occupy the area of medical marijuana distribution law. Both pieces of legislation expressly allow local governments to create and enforce ordinances that address medical marijuana, so long as those ordinances do not directly contradict or reiterate the CUA or the MMPA.

A city ordinance may still be valid if the invalid portion of the ordinance is severable. *See Santa Barbara School District v. Superior Court*, 530 P.2d 605, 13 Cal.3d 315 (1975). "It is also true that in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part." *In re Blaney*, 184 P.2d 892, 900, 30 Cal.2d 643,655 (1947). Section 4 of the Anaheim ordinance is a severability clause, which implies that the rest of the ordinance may be valid and not contradictory of the MMPA if the criminal portion is severed. In order for an invalid portion of a local law to be severable, that "invalid portion must be grammatically, functionally, and volitionally severable." *Calfarms Insurance Company v. Deukmejian*, 771 P.2d 1274, 1256, 48 Cal.3d 805, 822 (1989). In other words, the invalid portion must be able to be separated from the rest of the law without changing the grammar or meaning of the law. The legislative body that created the law must have had the intention to pass the law even if the invalid portion was removed from the law.

The criminal portion of the Anaheim ordinance meets these criteria. First, the criminal portion is grammatically severable. The section is easily removable as it is an individually codified portion of the ordinance. Second, the portion is functionally severable, as its removal will not change the purpose of the law or the intent of the City Council in enacting the ordinance. Clearly, the ordinance will still provide mass distribution of medical marijuana be limited, and make medical marijuana dispensaries a nuisance. Third, Anaheim's City Council would have likely passed the ordinance even if it did not include the criminal portion because the ordinance would still accomplish the goal of restricting the mass distribution of medical marijuana within the City's borders by making medical marijuana dispensaries a nuisance per se. By striking the reference to the uncodified criminal sanction section, Anaheim's ordinance is not preempted by the CUA or the MMPA.

As Anaheim's ordinance without the criminal portion falls within the powers that are given to a city under

the Constitution of the State of California and is not preempted by existing state law, it is thus valid. Qualified Patients Association and Lance Mowdy have, therefore, failed to meet their burden of proof. **Accordingly, the Court finds for City of Anaheim.**

Counsel for the City of Anaheim to prepare the judgment pursuant to the foregoing.

Court orders Clerk to give notice.