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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.)

[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.