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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF LAKE FOREST, Plaintiff and Respondent, v. EVERGREEN HOLISTIC COLLECTIVE, Defendant and Appellant.	G043909 (Super. Ct. No. 30-2009-00298887) O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed and remanded.

D|R Welch Attorneys at Law and David Ryan Welch for Defendant and Appellant.

Best Best & Krieger, Jeffrey V. Dunn and Laura A. Dahl for Plaintiff and Respondent.

The trial court granted the City of Lake Forest's (the City's) request in this nuisance abatement proceeding for a preliminary injunction shutting down Evergreen Holistic Collective's (Evergreen's) medical marijuana dispensary based on a citywide ban against dispensaries. The trial court determined the City's decision not to recognize dispensaries as a permitted property use, and to prohibit unpermitted uses, established a complete ban against the activity. Evergreen contends dispensaries are authorized by Health and Safety Code section 11362.775's endorsement of "collective[]" and "cooperative[]" medical marijuana activities, and, therefore, what the Legislature has authorized, the City may not ban.[1]

We conclude local governments may not prohibit medical marijuana dispensaries altogether, with the caveat that the Legislature authorized dispensaries only at sites where medical marijuana is "collectively or cooperatively . . . cultivate[d]." (§ 11362.775.) Section 11362.775 exempts qualified medical marijuana patients and their primary caregivers not only from criminal prosecution for authorized collective or cooperative activities, but also from nuisance abatement proceedings. Thus, the Legislature has determined the activities it authorized at collective or cooperative cultivation sites, including a dispensary function, do not constitute a nuisance.

Under the City's municipal code, in contrast, violation of its zoning ordinances constitutes a per se, categorical nuisance. Under the City's ban, a medical marijuana dispensary always constitutes a nuisance, though the Legislature has concluded otherwise. Because the City's ban directly contradicts state law, it is preempted and furnishes no valid basis for a preliminary injunction in the City's favor. Rather, the City must show Evergreen did not grow its marijuana on-site or otherwise failed to comply

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

with applicable state medical marijuana law or permissible local regulations. Because the trial court granted the City's injunction request solely on the basis of the City's total ban, we must reverse the preliminary injunction and remand the matter for further proceedings.

I

FACTUAL AND PROCEDURAL BACKGROUND

The City filed its nuisance complaint against Evergreen under the general nuisance statute (Civ. Code, § 3479) alleging a public nuisance (Civ. Code, § 3480). The City pleaded two nuisance causes of action against Evergreen. First, the City alleged Evergreen's dispensary activities constituted a per se nuisance because City ordinances effectively banned medical marijuana dispensaries and, therefore, operating a dispensary constituted a categorical nuisance under its municipal law. The City's second cause of action alleged operation of the dispensary created an actual nuisance "injurious to health, . . . indecent and offensive to the senses, and an obstruction to the free use of property, so as to interfere with the comfortable use and enjoyment of property, which affects an entire community and, as such, is a public nuisance . . . ." The trial court eventually granted the City's request for a preliminary injunction on the first ground only.

Specifically, the City asserted its zoning code established medical marijuana dispensaries constituted a per se public nuisance by omitting dispensaries as an authorized property use at Evergreen's location in the "Commercial Community" zoning district. As the City's complaint put it, the City effectively had banned dispensaries because "marijuana dispensaries are neither enumerated as a permitted use, nor as any other type of conditional or temporary use *in any zoning district in the City*." (Italics added.) For example, the relevant zoning provisions governing the commercial

community district identified permitted uses, uses permitted with a permit, temporary permitted uses, accessory uses, and prohibited uses, and none included marijuana dispensaries.[2] (Lake Forest Municipal Code (LFMC), §§ 9.88.020-9.88.060.)

In particular, LFMC section 9.88.020 identified certain "principal" property uses as permitted uses in the commercial community zoning district, including for example, "Administrative and professional offices," "Animal Clinics," "Automobile repair specialty shops," "Cinemas and theaters," "Civic and government uses," "Day (care) nurseries," "Instructional studios," "Restaurants," "Retail businesses," "Service businesses," "Wholesale businesses without warehousing," and "Adult Businesses." Of these, only adult businesses required City preapproval.

The zoning code also specified other uses in the commercial community district were permitted subject to a use permit, including for example, "Automobile service stations," "Health clubs," "Hospitals," "Hotels and motels," "Kennels," "Massage establishments" as specified in another chapter of the code, "Mini-storage facilities," "Mortuaries and crematories," and "Vehicle washing facilities." (LFMC, § 9.88.030.) Authorized temporary uses included "Commercial coaches" and seasonal holiday uses such as "Christmas tree sales" and "Halloween pumpkin" patches. (LFMC, § 9.88.040.) Valid accessory uses included fences, walls, and signs. (LFMC, § 9.88.050.)

In LFMC section 9.88.060, the zoning code identified the following uses as "specifically prohibited" in the commercial community district where Evergreen was located: "Automobile wrecking, junk and salvage yards," "Bottling plants," "Cleaning, dyeing and laundry plants," "Contractors' storage and equipment yards, work and

[2] We grant the City's request to take judicial notice of the relevant portions of its municipal code and zoning code, also judicially noticed by the trial court. (Evid. Code, §§ 452, subd. (b), 459.)

fabricating areas," "Rental and sales agencies for agricultural, industrial and construction equipment," "Vehicle engine/transmission rebuilding, tire retreading, fender and body repair and paint shops," and "Welding shops and metal plating." The code also prohibited uses not enumerated in the foregoing sections. (LFMC, § 9.88.060 [prohibiting the above-listed uses and "Uses not permitted by [s]ections 9.88.020 through 9.88.050"].)

Seeking a preliminary injunction, the City argued Evergreen's medical marijuana activities constituted a per se nuisance because the City zoning code did not authorize Evergreen's venture for the commercial community zoning district, or elsewhere within City borders. Phrased differently, dispensing medical marijuana violated the City's zoning ordinances because it fell under no approved use category, and the violation constituted a per se public nuisance based on City law providing that any violation of its municipal code or zoning code constituted a public nuisance. (See LFMC, § 1.01.240(B) ["any condition caused or permitted to exist in violation of any of the provisions of any code adopted by reference by this Code, or of the provisions of any other City ordinance, shall be deemed a public nuisance which may be abated by the City Attorney in a civil judicial action"]; see also *id.*, § 6.14.002(A) [public nuisances designated to include "[a]ny violation of any section of the Lake Forest Municipal Code"]; *id.*, § 9.208.040(B) ["any use of property contrary to the provisions of the Zoning Code shall be and the same is hereby declared to be unlawful and a public nuisance"].)

Evergreen opposed the City's request for a preliminary injunction on grounds the City failed to establish its activities constituted a public nuisance, either in the ordinary sense or as a per se public nuisance. On the per se issue, Evergreen pointed out that the City Council's express moratorium on medical marijuana dispensaries had

lapsed four years earlier. Evergreen suggested the City's assertion of an implied ban — based on the omission in the City code of dispensaries as a permitted use — did not rise to the level of an express legislative judgment necessary to make a particular use a nuisance per se. Specifically, Evergreen argued that relying on the City's supposed ban was too vague to support a preliminary injunction, and violated due process by failing to notify the public what activities were prohibited. Evergreen asserted its activities fell within the "Retail businesses" category authorized as a permitted use in the commercial community zoning district. Alternatively, Evergreen argued it had not violated the City's municipal code because the City did not require a business license before a new enterprise opened its doors. Evergreen also argued state medical marijuana law, including the Legislature's endorsement of cooperative and collective (§ 11362.775) distribution endeavors, prevented the City from banning dispensary activities as a public nuisance.

The trial court concluded Evergreen's operation of a medical marijuana dispensary constituted a nuisance per se under City ordinances. The court explained: "The LFMC lists all principal uses permitted . . . in the Commercial Community zoning district. . . . Since dispensaries are not a permissible use or a conditional or temporary use, the LFMC prohibits any such unmentioned use." Thus, the court determined Evergreen's "distribution is a nuisance per se and must be enjoined."

The trial court did not determine Evergreen failed to qualify as a cooperative or collective (§ 11362.775) or otherwise failed to comply with California medical marijuana law. The City's complaint and preliminary injunction motion included no such allegations. Instead, the court's ruling was based solely on Evergreen's per se nuisance violation of City ordinances, which did not permit medical marijuana

dispensaries. The trial court found unpersuasive the dispensaries' argument that because the City did not require a business license, they violated no municipal law. The court explained that the City's "zoning scheme effectively regulates what is and is not allowed in the City of Lake Forest, thereby obviating the need for a business license requirement."[3]

II

DISCUSSION

Evergreen contends the trial court erred by granting the City's preliminary injunction shutting down the dispensary as a per se nuisance. We agree. An order granting a preliminary injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6); *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 445.) The standards governing the trial court's consideration of a motion for a preliminary injunction are well-settled. "In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*) However, "[t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual

[3] The court also rejected Evergreen's claim it fit within the "Retail business" category. Whether Evergreen "fits" within any particular category is intertwined with its claim those categories were too vague and therefore violated due process by rendering all other uses a per se violation of the City's zoning code. "Mindful of the prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statutory basis for resolution exists" (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190), we do not reach Evergreen's due process or related constitutional claims. This appeal turns instead on the intersection of local ordinances and statutory medical marijuana law.

questions, our review is de novo." (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463; see, e.g., *Citizens for Better Streets v. Board of Supervisors* (2004) 117 Cal.App.4th 1, 6 [where preliminary injunction ruling "depends on the construction of a statute, it is to that extent reviewed de novo"].)

A. *Section 11570 and Civil Code Section 3479*

We begin by reviewing the statutory bases on which a city or other local government entity may obtain an injunction to abate a public nuisance for drug-related activities. Section 11570 and its related code sections provide for injunctive relief to combat the use of property for illegal drug activity. (See, e.g., *Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 871 (*Lew*).) The Legislature enacted section 11570 in 1972 as a key component of the Drug Abatement Act to address, with a "special[]" focus, "premises where controlled substances are manufactured, kept and sold." (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 762, 765.) To that end, section 11570 defines as a public nuisance "[e]very building or place used for the purpose of *unlawfully* selling, serving, storing, keeping, manufacturing, or giving away any controlled substance . . . ." (Italics added.) Nothing in section 11570 provides for criminal sanctions. Rather, the primary enforcement remedy is injunctive relief obtained in nuisance abatement proceedings against "the owner, lessee, or agent of the building . . . ." (§ 11571; see *Lew*, at p. 872). Further remedies include the public sale of chattels used in maintaining the nuisance, a one-year closure of the building for any use, damages in lieu of closure, and a civil penalty up to $25,000. (§ 11581; *Lew*, at p. 872.)

In *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, the court held the Compassionate Use Act (CUA), adopted by the voters to allow medical marijuana uses under certain conditions (see § 11362.5), did not prevent the Attorney

General from obtaining an injunction under section 11570 against an Oakland medical marijuana dispensary known as the Cannabis Buyers' Club (*Peron*, at p. 1390). The court observed that the CUA addressed only the cultivation and possession of marijuana, and did not authorize medical marijuana patients or their primary caregivers to engage in sales of the drug. Specifically, the court noted the new enactment mandated only that "'[s]ection 11357, relating to the possession of marijuana, and [s]ection 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.'" (*Peron*, at p. 1389.) The court concluded the CUA thus provides a "'partial defense'" in the medical marijuana context, applying "to charges of possession [and cultivation], but not to charges of selling marijuana or possessing marijuana for sale." (*Ibid.*; see also *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1547 (*Trippet*) [same; also observing the CUA's literal terms exposed primary caregivers to criminal charges for transporting marijuana down a hallway to their patients].)

The Legislature responded in 2003 with the Medical Marijuana Program Act (MMPA, § 11362.7 et seq.), which includes provisions pertaining to the sale and transportation of marijuana and to section 11570 and similar state law provisions barring the use of property for illegal drug transactions. For example, section 11362.775 of the MMPA provides that "[q]ualified 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 [s]ection 11357 [possession of controlled

substances, including marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away, or use of marijuana], 11366.5 [making real property available for the manufacture, storage, or distribution of controlled substances], or *11570* [abatement of nuisance created by premises used for manufacture, storage, or distribution of controlled substance]." (Italics added.)

Section 11362.765 of the MMPA similarly immunizes specified individual, rather than collective or group, activities including the administration[4] of medical marijuana to a qualified patient, instructing qualified patients and their primary caregivers in "the skills necessary to cultivate or administer marijuana for medical purposes," and transporting or delivering a qualified patient's medical marijuana. (§ 11362.765, subd. (a)(1)-(3); see *id.*, subd. (a) ["Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or *11570*," italics added].) Thus, sections 11362.765 and 11362.775 expressly negate section 11570 as a nuisance remedy against the medical marijuana activities identified in those sections.

In addition to section 11570, general nuisance law independently arms cities and other local governments with injunctive relief to combat illegal drug-related property use. Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, *including, but not limited to, the illegal sale of controlled substances* . . . ." (Italics added.) A public nuisance "may be abated by any public body or officer authorized thereto by law" (Civ. Code, § 3494), including the city attorney (Code Civ.

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[4] Section 11002 defines "[a]dminister[ing]" as "the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs . . . ."

Proc., § 731 [city attorney may file nuisance abatement action in the People's name]; Civ. Code, § 3491 [authorizing civil action as a nuisance remedy]). As used by California courts, the term "abatement" "includes termination or removal of a nuisance by way of injunctive process." (47 Cal.Jur.3d (2012) Nuisances, § 62; accord, *Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244, fn. 4 (*Flahive*).) The city attorney may obtain an injunction to quell a public nuisance. (See, e.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1099-1101 (*Acuna*).) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.)

B. *Per Se Nuisances*

A city council may, by ordinance, declare what constitutes a public nuisance. (Gov. Code, § 38771; *Flahive*, *supra*, 72 Cal.App.4th at p. 244.) This authority inheres in a municipality's general police power over matters that may generate nuisances. (*People v. Johnson* (1954) 129 Cal.App.2d 1, 6-8; see, e.g., 47 Cal.Jur.3d, *supra*, Nuisances, § 5.) Moreover, understanding the "*community* aspect of [a] public nuisance" (see *Acuna*, *supra*, 14 Cal.4th at p. 1105) requires "consideration and balancing of a variety of factors" (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1206-1207 (*Beck*)) uniquely suited to the legislative process. Thus, "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."

(*Ibid*.) "'Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.' [Citations.] [Fn. omitted.]" (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 382, fn. omitted.)

Nevertheless, local government nuisance determinations are not immune from judicial scrutiny. (*Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835, 852-854; see, e.g., 47 Cal.Jur.3d, *supra*, Nuisances, § 5.) For example, a municipality may not, either at common law or under statutory power, designate property use a nuisance by mere declaration, when in fact it is not. (*Flahive*, *supra*, 72 Cal.App.4th at p. 244, fn. 4; *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718.) It also remains true under overriding state nuisance law that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482.)

C. *California Law Provides for Dispensaries as a Matter of Statewide Concern*

1. Procedural Posture, Evergreen's Contentions, and Civil Code Section 3482

As noted, the City filed its nuisance complaint against Evergreen under the general nuisance statute (Civ. Code, § 3479) alleging a per se public nuisance (Civ. Code, § 3480) because its zoning code omitted dispensaries as a permitted use. Evergreen contends state medical marijuana law authorizes the formation and operation of medical marijuana dispensaries, and therefore local governments cannot ban them as a nuisance per se. Instead, the local entity must prove that the particular manner in which a dispensary operates creates a public nuisance. Although an activity authorized by statute cannot be deemed a nuisance (Civ. Code, § 3482), the manner in which the activity is performed may constitute a nuisance. (*Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 160 (*H Street*); *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 129.) For example, "[w]here an improvement is erected *improperly*,

it cannot 'be fairly stated that the legislature contemplated the doing of the very act' causing damage." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104, original italics; see 47 Cal.Jur.3d, *supra*, Nuisances, § 35 ["A lawful business may by its particular method of operation or by its location constitute a nuisance"]; see, e.g., *Vowinckel v. N. Clark & Sons* (1932) 216 Cal. 156, 164.)

Statutory immunity for an alleged nuisance arises "only where the acts complained of are authorized by the express terms of the statute . . . or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." (*Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1179 (*Zack's, Inc.*), internal quotation marks and citations omitted.) In other words, the conduct said to be a nuisance must be "exactly what was lawfully authorized . . . ." (*Jacobs Farm/Del Cabo Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1532 (*Jacobs Farm*).) Accordingly, courts must scrutinize the statutes in question to determine whether the Legislature intended to sanction the alleged nuisance. (*Zack's, Inc.*, at p. 1179.) Statutory authorization may be evident "'by the plainest and most necessary implication from the powers expressly conferred' by the legislative scheme." (*H Street, supra*, 20 Cal.App.4th at p. 162.)

2. Standard of Review

"Statutory interpretation is a question of law [citation] in which we ascertain the Legislature's intent '"with a view to effectuating the purpose of the statute, and construe the words of the statute in the context of the statutory framework as a whole"' [citation]." (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 183.) "The Legislature declares state public policy, not the courts"

(*In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 628), and courts must "'follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, """whatever may be thought of the wisdom, expediency, or policy of the act""""" (*Larry Menke, Inc. v. DaimlerChrysler Motors Co.* (2009) 171 Cal.App.4th 1088, 1093). In interpreting a voter initiative, "we apply the same principles that govern statutory construction" (*People v. Rizo* (2000) 22 Cal.4th 681, 685), and "our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure" (*In re Littlefield* (1993) 5 Cal.4th 122, 130).

3. The CUA and MMPA

California medical marijuana law is embodied in two enactments, the CUA and MMPA, which we briefly summarize. First, California voters approved Proposition 215 in 1996, codified as the Compassionate Use Act at section 11362.5. (See generally *Trippet*, *supra*, 56 Cal.App.4th at p. 1546.) Subdivision (d) of section 11362.5 provides: "Section 11357, relating to the possession of marijuana, and [s]ection 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

Examining this language, the court in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 772-773 (*Urziceanu*), explained that "the Compassionate Use Act is a narrowly drafted statute designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use despite the penal laws that outlaw these two acts for all others." The *Urziceanu* court observed that, apart from possession and cultivation, "the Compassionate Use Act did not alter the other

statutory prohibitions related to marijuana, including those that bar the transportation, possession for sale, and sale of marijuana." (*Id.* at p. 773.) The *Urziceanu* court continued: "When the people of this state passed [the CUA], they declined to decriminalize marijuana on a wholesale basis. As a result, the courts have consistently resisted attempts by advocates of medical marijuana to broaden the scope of these limited specific exceptions. We have repeatedly directed the proponents of this approach back to the Legislature and the citizenry to address their perceived shortcomings with this law." (*Ibid.*) Accordingly, *Urziceanu* held: "A cooperative where two people grow, stockpile, and distribute marijuana to hundreds of qualified patients or their primary caregivers, while receiving reimbursement for these expenses, does not fall within the scope of the language of the Compassionate Use Act or the cases that construe it." (*Ibid.*)

Urziceanu, *supra*, 132 Cal.App.4th at p. 773, acknowledged that the exemptions provided in the CUA for a qualified patient to possess and cultivate medical marijuana also apply to his or her primary caregiver. The CUA defines a "primary caregiver" as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (§ 11362.5, subd. (e); see *People v. Mentch* (2008) 45 Cal.4th 274, 283 [primary caregiver must "(1) consistently provide[] caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana"].) It follows, however, that because the CUA authorizes for primary caregivers no more than the same exemptions limiting a patient to marijuana cultivation and possession (§ 11362.5, subd. (d)), the CUA did not authorize marijuana cooperatives or dispensaries operated by or for primary caregivers any more

than it did for patients. (See *Urziceanu*, at p. 773.) Nevertheless, the CUA was not silent on the issue of distribution.

The electorate, in enacting the CUA, "directed the state to create a statutory plan to provide for the safe and affordable distribution of medical marijuana to qualified patients." (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1014 (*Hochanadel*).) The electorate expressly stated its intent in enacting the CUA was three-fold: first, 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 in the treatment of [designated illnesses] or any other illness for which marijuana provides relief"; second, 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"; and third, 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." (§ 11362.5, subd. (b)(1)(A)-(C), italics added.)

The electorate's express reference to "Californians" and "all patients in medical need" plots a course for statewide policy action rather than, for example, trial implementation in one or more localities. By its terms, it does not contemplate local exclusion of some California patients. Similarly, the electorate's intent to motivate the state and federal governments to work together toward lawful medical marijuana accessibility manifests a policy concern broader than local interests. To implement the voters' express goal in passing the CUA to prompt state and federal measures to allow safe and affordable medical marijuana distribution, the Legislature enacted the MMPA.

(*Hochanadel, supra,* 176 Cal.App.4th at p. 1014.) Reduced to its essence, this statewide plan envisions locally-grown, locally-accessible medical marijuana. As we explain, that does not mean medical marijuana patients or their primary caregivers are confined to individualized efforts to grow a supply of their own medicine. Rather, they may band together with others to meet their need. But they must do so locally, in local cultivation projects, with distribution tethered to the cultivation site.

The Legislature enacted the MMPA, effective January 1, 2004, by adding sections 11362.7 through 11362.83 to the Health and Safety Code. (See *People v. Wright* (2006) 40 Cal.4th 81, 93.) Again, the enacting body's express intent warrants emphasis. The Legislature expressly stated its intent in enacting the MMPA was to: "(1) Clarify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. [¶] (2) *Promote uniform and consistent application of the act among the counties within the state*. [¶] (3) *Enhance* the *access* of patients and caregivers to medical marijuana *through collective, cooperative cultivation projects.*" (Stats. 2003, ch. 875, § 1, subd. (b)(1)-(3), italics added, reproduced in Historical and Statutory Notes, 40 pt. 2 West's Ann. Health & Saf. Code (2007 ed.) foll. § 11362.7, pp. 365-366.)

Plainly, the Legislature expressly contemplated collective, cooperative cultivation projects as a lawful means to obtain medical marijuana under California law. The Legislature also expressly chose to place such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis that the project involves medical marijuana activities. Specifically, section 11362.775 exempts members of collective or cooperative medical marijuana cultivation projects not only from state

criminal sanction for project activities involving marijuana possession (§ 11357), cultivation (§ 11358), possession for sale or distribution (§ 11359), transportation (§ 11360), maintaining a place for the sale, use, or distribution of marijuana (§ 11366), and using property to manufacture, store, or distribute controlled substances (§ 11366.5), but also expressly prohibits nuisance prosecution under section 11570.[5]

Although section 11362.775 refers to "criminal sanctions," the statute does not provide immunity against criminal prosecution under section 11570 because, as noted above, there is no such enforcement remedy. The Legislature only provided civil remedies to enforce section 11570. (§§ 11571, 11581; *Lew, supra,* 20 Cal.App.4th at p. 872). To give effect to the Legislature's inclusion of section 11570 among the penal provisions that section 11362.775 renders inoperative for collective or cooperative medical marijuana cultivation projects, we must conclude section 11362.775 also supplants the purely civil remedies afforded by section 11570. Any other construction renders section 11362.775's express reference to section 11570 mere surplusage, a result we must avoid. (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1468 (*PacifiCare*) [courts give significance to all the words chosen by the Legislature to manifest its intent].)

We have noted that section 11570 is more specifically aimed at enjoining or otherwise curbing the use of property for illegal drug activity than Civil Code section 3479, the general nuisance statute. Accordingly, the "special over the general"

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[5] Section 11362.775 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 and boldface added.)

rule of statutory construction suggests that the Legislature in section 11362.775 intended not only to bar civil nuisance prosecutions under section 11570, but also to preclude nuisance claims under Civil Code section 3479. (See *People v. Jenkins* (1980) 28 Cal.3d 494, 505 ["The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent"].) To permit a nuisance prosecution under Civil Code section 3479 when it is precluded under section 11570 would frustrate the Legislature's express intent to exempt from nuisance abatement the medical marijuana activities it identified in section 11362.775. In any event, Civil Code section 3482 precludes this contradictory result by specifying that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482.) Stated another way, when the Legislature has "contemplated the doing of the very act" said to be injurious, it cannot be deemed a nuisance under Civil Code section 3479. (*Zack's, Inc.*, *supra*, 165 Cal.App.4th at p. 1179, internal quotation marks omitted.) As noted, however, to avoid nuisance abatement, the conduct must be "exactly what was lawfully authorized . . . ." (*Jacobs Farm*, *supra*, 190 Cal.App.4th at p. 1532.)

Now, some 15 years after the electorate passed the CUA and almost a decade after the Legislature adopted the MMPA to implement the voters' call for a safe and affordable medical marijuana distribution plan for seriously ill Californians, we must decide what medical marijuana activities the Legislature intended to immunize in section 11362.775 and whether the Legislature intended to allow local entities to ban these activities as a nuisance. In *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 748 (*Qualified Patients*), we acknowledged the Attorney General has concluded under section 11362.775 and the MMPA that so-called "storefront"

dispensaries may be lawful, but we did not reach the issue. (See "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" (A.G. Guidelines, or Guidelines) <http://ag.ca.gov/cms_attachments/press/pdfs/n1601_ medicalmarijunaguidelines.pdf> (as of Feb. 24, 2012).) We now do so.

4. The Attorney General Guidelines

Relying on the A.G. Guidelines, Evergreen contends medical marijuana dispensaries are authorized by section 11362.775's endorsement of "collective[]" and "cooperative[]" activities, and, therefore, Lake Forest may not ban what the Legislature has authorized. We briefly review the A.G. Guidelines. "While the Attorney General's views do not bind us [citation], they are entitled to considerable weight [citation]." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

The Legislature in the MMPA directed the Attorney General to "develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the [CUA]." (§ 11362.81, subd. (d).) The A.G. Guidelines, issued in August 2008, articulate their purpose as follows: to "(1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law." (Guidelines, at p. 1.)

The Legislature did not define the terms "collective" or "cooperative" used in its statement of intent in the MMPA (Stats. 2003, ch. 875, § 1, subd. (b)(3)), nor the terms "collectively" and "cooperatively" in section 11362.775. The Guidelines fill this

gap by explaining that medical marijuana patients or caregivers seeking to invoke section 11362.775 must organize themselves as a cooperative or collective. "No business may call itself a 'cooperative' (or 'co-op') unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code." (A.G. Guidelines, at p. 8; Corp. Code, § 12200 et seq.; Food & Agr. Code, § 54001 et seq.; see generally David C. Gurnick, Consumer Cooperatives: What They Are and How They Work (Aug. 1985) 8 L.A. Lawyer, Vol. 8, No. 5, p. 22; A. James Roberts III, Understanding Agricultural Cooperatives (1984) 4 Cal. Lawyer, Vol. 4, No. 2, p. 13.)

The Guidelines observe that a cooperative "must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. [Citation.] . . . Cooperative corporations are 'democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons.' [Citation.]" (Guidelines, at p. 8.) Further, "[c]ooperatives must follow strict rules on organization, articles, elections, and distributions of earnings, and must report individual transactions from individual members each year." (*Ibid.*) Turning to the dictionary, the A.G. Guidelines define a "collective" as "'a business, farm, etc., jointly owned and operated by the members of a group.' [Citation.]" (*Ibid.*) Given this joint ownership and operation requirement, "a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members — including the allocation of costs and revenues." (*Ibid.*)

The Guidelines also specify that distribution or sale to nonmembers is prohibited: "State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not

distribute medical marijuana to any person who is not a member in good standing of the organization." (Guidelines, at p. 10.)

In providing for "collective" and "cooperative" medical marijuana activity, the MMPA does not use or define the term "dispensary." (See § 11362.775.) The A.G. Guidelines address the topic under the heading, "Storefront Dispensaries." (Guidelines, at p. 11.) The Attorney General concludes in the Guidelines that although "dispensaries, as such, are not recognized under the law," "a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law . . . ." (*Ibid.*) It is not enough, however, that the MMPA uses the terms "collective," "collectively," "cooperative," and "cooperatively"; rather, we must analyze those terms in their context to ascertain the Legislature's intent. "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

5. State Medical Marijuana Law Only Authorizes Grow-Site Dispensaries

In its statement of intent in the MMPA, the Legislature envisioned: "Enhance[d] . . . access of patients and caregivers to medical marijuana *through collective, cooperative cultivation projects.*" (Stats. 2003, ch. 875, § 1, subd. (b)(3), italics added.) What medical marijuana activities did the Legislature expressly contemplate would occur at these sites? Section 11362.775 identifies those activities and immunizes them from nuisance and criminal prosecution, as follows: marijuana possession (§ 11357), cultivation (§ 11358), possession for sale or distribution (§ 11359), transportation (§ 11360), maintaining a place for the sale, use, or distribution of marijuana (§ 11366), and using property to grow, store, or distribute marijuana

(§ 11366.5). A dispensary is nothing more than "a place where medicines or medical or dental aid are dispensed to ambulant patients . . . ." (Webster's 3d New Internat. Dict. (1993) p. 653, col. 2 (Webster's).) In no less than three ways, the Legislature in section 11362.775 expressly contemplated a dispensary function at collective or cooperative cultivation sites, by authorizing a place for the sale, use, and distribution of marijuana (§ 11366), using property to grow, store, and distribute marijuana (§ 11366.5), and lawful distribution of medical marijuana (§ 11359). Accordingly, we conclude a dispensary may be located at the site where its members collectively and cooperatively cultivate their marijuana.

Of critical importance, the Legislature immunized the activities specified in section 11362.775 *ancillary to cultivation*. In other words, the Legislature did not provide blanket nuisance and penal immunity to medical marijuana patients and their caregivers for these activities, but only insofar as they gathered "collectively or cooperatively *to cultivate* marijuana for medical purposes . . . ." (§ 11362.775, italics added.) The words the Legislature chose in section 11362.775 and in its prologue about the purposes of the MMPA demonstrate an intent to tether the immunized medical marijuana activities to "cultivation project[]" sites. (Stats. 2003, ch. 875, § 1, subd. (b)(3).) Evergreen argues that off-site dispensaries serve the Legislature's intent to enhance patient and caregiver "access . . . to medical marijuana" (*ibid.*). But it does not follow from a bare, liberalizing intent that every means of increased access to medical marijuana is authorized. Rather, the words the Legislature chose matter. The specific words the Legislature chose only authorize "[e]nhance[d] . . . access of patients and caregivers to medical marijuana *through collective, cooperative cultivation projects.*" (*Ibid.*, italics added; accord, § 11362.775.)

We discern no intent in the MMPA to authorize dispensaries to operate independently from a cultivation site. Unlike a dispensary located at a cultivation site, an off-site dispensary requires transporting marijuana from a cultivation site or sites to the dispensary to be held for distribution. Marijuana stocked at an off-site dispensary inevitably would exceed the amount authorized for any single medical marijuana user (see §§ 11362.5, subd. (d); 11362.77) because, simply put, opening a dispensary as an outlet for only one person would be pointless. Under well-established principles of constructive possession, the gross quantity of marijuana at the site would rest in the possession of every individual at the dispensary authorized to handle or dispense it. (See, e.g., *People v. Francis* (1969) 71 Cal.2d 66, 73 [authority to sell or otherwise distribute a narcotic necessarily entails its actual or constructive possession]; *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1046 [possession may be established by physical or constructive control over an item, even where it is nonexclusive or shared with others].) The CUA and MMPA, however, are clear in limiting virtually all marijuana activities to personal usage amounts. This is true in the CUA for possession and cultivation, which is authorized only in quantities "for the personal medical purposes of the patient . . . ." (§ 11362.5, subd. (d).)

The same is true in the MMPA for all medical marijuana activities *except* those identified in section 11362.775, which by necessary implication are authorized in group quantities given the authorization for collective and cooperative cultivation. Specifically, the Legislature's endorsement of group cultivation projects entitles qualified patients and primary caregivers to produce medical marijuana not just for themselves (or the primary caregiver's patient or patients), but in larger amounts to meet the needs of all the cooperative's or collective's members. The Legislature undoubtedly intended this

result because seriously ailing patients and overburdened primary caregivers may not be able to cultivate medical marijuana themselves, as contemplated in the CUA. (§ 11362.5, subd. (d).) As noted, section 11362.775 authorizes several medical marijuana-related activities if they are ancillary to group cultivation, including transportation (§ 11360). A cooperative or collective member may thus move more than personal quantities of marijuana *around the cultivation site*, whether in planting, tending, harvesting, storing, or dispensing the marijuana as contemplated in the activities authorized in section 11362.775 (e.g., using property to grow, store, or distribute marijuana, and maintaining a place for the sale, use, or distribution of marijuana). (See *Trippet*, *supra*, 56 Cal.App.4th at p. 1547 [statute's terms scrutinized for scope of authorized transportation].)

Section 11362.765 of the MMPA, in contrast, authorizes transportation and other activities involving medical marijuana in terms that are in one sense more liberal than in section 11362.775, but in other ways more restrictive. (We set out the terms of section 11362.765 in footnote 6 following this paragraph, and the reader may refer back to the terms of section 11362.775 in footnote 5 above.) The language the Legislature chose in section 11362.765 authorizes greater latitude for transportation than in section 11362.775 because it omits the word "cultivate" and therefore imposes no discernible geographic boundary restricting transportation to the cultivation site. Section 11362.765 is more limited, however, because it also omits the words "collectively or cooperatively" found in section 11362.775, and therefore individuals lack authorization to transport collective or cooperative quantities of marijuana. Indeed, section 11362.765 expressly limits the purposes of authorized transportation to those serving an individual rather than a group need. In particular, section 11362.765

authorizes transportation of marijuana *only* for a qualified patient's "*own personal medical use*" (subd. (b)(1), italics added) or, if transported by a primary caregiver, "only *to* the qualified patient of the primary caregiver . . ." (subd. (b)(2), italics added).[6]

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[6] Section 11362.765 is lengthy, with three subdivisions. Subdivision (a), states: "Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit."

Subdivision (b) of section 11362.765 exempts from nuisance and criminal prosecution as provided in subdivision (a), "all of the following: [¶] (1) A qualified patient or a person with an [MMPA] identification card who transports or processes marijuana *for his or her own medical use*. [¶] (2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77 [e.g., eight ounces of dried marijuana for an individual patient], *only to* the qualified patient of the primary caregiver, or *to* the person with an [MMPA] identification card who has designated the individual as a primary caregiver. [¶] (3) Any individual who provides assistance to a qualified patient or a person with an [MMPA] identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person." (Italics added.)

The Supreme Court in *People v. Kelly* (2010) 47 Cal.4th 1008, 1030, concluded the MMPA's specified quantity restrictions in section 11362.77, subdivision (a), on an individual's authorized amount of medical marijuana constituted an unlawful legislative amendment of a more general authorization of *reasonable* amounts of medically necessary marijuana intended by the electorate in the CUA in section 11362.5. Nothing about this conclusion, however, remotely suggests a primary caregiver may transport under section 11362.765, subdivision (b)(2), more marijuana on a delivery to an individual patient than the patient reasonably needs. Thus, subdivision (b)(2) of section 11362.765 is not a means for a primary caregiver to transport more marijuana than his or her individual patients need, or to otherwise divert marijuana to an off-site dispensary instead of making delivery, as authorized by the statutory language, "only to" his or her qualified patient.

Thus, while section 11362.765 allows a qualified patient to transport medical marijuana from the cultivation site in an amount limited to his or her personal medical need and similarly authorizes a primary caregiver to relay marijuana only for his or her patients' needs, section 11362.765 is not an avenue by which marijuana lawfully may be transported from a cultivation site to off-site dispensaries. It is a limited transportation pathway for individuals carrying individual quantities of marijuana, not a distribution highway. Nowhere else does the MMPA address transportation, except in section 11362.775, which allows for transportation of medical marijuana in collective amounts *at the cultivation site,* as discussed. Accordingly, we conclude off-site dispensaries are not authorized by California medical marijuana law because nothing in the law authorizes the transportation and possession of marijuana to stock an off-site location. Marijuana stocked at an off-site dispensary is held ancillary to transportation, not cultivation. State law does not authorize this. Rather, section 11362.775 requires that any collective or cooperative activity involving quantities of marijuana exceeding a patient's personal medical need must be tied to the cultivation site.

At oral argument, the City insisted a collective or cooperative may not distribute medical marijuana even at its cultivation site because section 11362.775 uses the word "cultivate" and not distribution or similar terminology. In other words, the City views section 11362.775 as no broader than the CUA in authorizing only cultivation of

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Subdivision (c) of section 11362.765 contemplates that a primary caregiver may be paid for his or her assistance in helping a patient use medical marijuana. Specifically: "A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under [s]ection 11359 [possession for sale] or 11360 [transportation]."

medical marijuana (§ 11362.5, subd. (d)) and presumably also possession of cultivated marijuana (*ibid.*), but not "distribution" or other activities. The plain terms of section 11362.775 dispel this notion. As noted above, the Legislature in no less than three ways in section 11362.775 expressly contemplated and provided for a dispensary function at collective or cooperative cultivation sites, by authorizing a place for the sale, use, and distribution of marijuana (§ 11366), using property to grow, store, and distribute marijuana (§ 11366.5) and, more generally, the legal distribution of marijuana (§ 11359). The *Urziceanu* court thus correctly observed, in distinguishing the MMPA from the CUA: "This new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers . . . . Its specific itemization of the marijuana sales law indicates it contemplates 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." (*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.)

We reject the City's suggestion at oral argument that a patient or primary caregiver personally must engage in the physical cultivation of marijuana to obtain the same at a collective or cooperative project site. This unsupported notion conflicts with the MMPA's purpose to enhance ailing patients' access to medical marijuana by authorizing group cultivation projects. Indeed, the City's interpretation is again no more than a wishful reversion to the CUA. In other words, if the patient or primary caregiver only may access medical marijuana that he or she personally has grown, that is no different than what the CUA authorizes. This construction of section 11362.775 as nothing more than a restatement of the CUA renders the provision mere surplusage, contrary to the rules of statutory interpretation. (*PacifiCare*, *supra*, 198 Cal.App.4th at

p. 1468.) This baseless construction is also contrary to California law governing cooperatives. A person may participate in a lawful cooperative without any requirement that he or she personally must create goods to stock the shelves of a consumer cooperative or grow the produce in an agricultural one. (See Corp. Code, § 12200 et seq.; Food & Agr. Code, § 54001 et seq.) Consequently, there is no merit to the view that a qualified patient's or primary caregiver's participation in a cooperative or collective must include personal physical cultivation of marijuana.

In sum, in responding to the electorate's authorization in the CUA for a plan to make medical marijuana available to all seriously ill Californians (§ 11362.5, subd. (b)(1)), the Legislature in the MMPA did not envision a distribution system of cultivation sites connected by transportation routes to off-site dispensaries, or networks of off-site dispensaries shuttling marijuana between each other. Instead, it is clear the Legislature — whatever the wisdom of its policy choice, which we do not evaluate — provided only for locally-grown, locally-available medical marijuana through collective or cooperative "cultivation projects."[7] Because they are strictly local, these projects necessarily would be sited throughout the state to ensure "all" "Californians" "in medical need" (§ 11362.5, subd. (b)(1)(A)-(C)) have "[e]nhance[d] . . . access . . . to medical marijuana through [these] projects," with "uniform and consistent application of the act" in this respect "among the counties within the state" (Stats. 2003, ch. 875, § 1, subd. (b)(2) & (3)).

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[7] We note the prohibition against transportation to off-site dispensaries is consistent with the Legislature's interest in ensuring the security and nondiversion of medical marijuana. (§ 11362.81, subd. (d).) Additionally, restricting the movement of more than individual amounts of medical marijuana might further the voter's goal of obtaining federal cooperation (or at least tacit noninterference) in California's policy decision that safe and affordable medical marijuana should be available to all Californians in medical need (see § 11362.5, subd. (b)(1)(C)).

We now turn to whether local entities may ban dispensary activities the Legislature has expressly contemplated at these projects.

6. State Medical Marijuana Law Preempts a Local Per Se Ban on Dispensaries

We conclude the trial court's decision to grant a nuisance injunction based on the City's purported per se ban on medical marijuana dispensaries violates state medical marijuana law. As discussed, the Legislature in the MMPA contemplated the lawful operation of medical marijuana dispensaries in the circumstances specified in section 11362.775, expressly immunized that activity from nuisance abatement, and "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482.) In other words, the Legislature has "contemplated the doing of the very act" (*Zack's, Inc.*, *supra*, 165 Cal.App.4th at p. 1179, internal quotation marks omitted) that the City claims is *always* a nuisance, and therefore the City's per se position against dispensaries cannot support a nuisance injunction.

Instead, the City must show the dispensary did not grow its marijuana on-site or otherwise failed to comply with applicable state medical marijuana law or permissible local regulations. Put another way, the City's purported per se nuisance bar against medical marijuana dispensaries directly contradicts the Legislature's intent to shield collective or cooperative activity from nuisance abatement "solely on the basis" that it involves distribution of medical marijuana authorized by section 11362.775, and because the Legislature has determined the issue is a matter of statewide concern, the City's ban is preempted.

"The first step in a preemption analysis is to determine whether the local regulation explicitly conflicts with any provision of state law. [Citation.]" (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 291.) A directly conflicting regulation or

ordinance is preempted by state law. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 704.) "[W]hether state law preempts a local ordinance . . . is a pure question of law subject to de novo review." (*Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1133.)

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7; see Gov. Code, § 37100.) Local power thus necessarily embraces municipal affairs. The Constitution does not forbid counties and cities from legislating on matters of statewide concern, but state laws control over local ordinances with regard to local matters if the subject matter is also of statewide concern.

"[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (*Big Creek Lumber*), original italics.) However, "'[i]f 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*).) "A conflict exists if the local legislation duplicates, *contradicts*, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Ibid.*, italics added, internal quotation marks omitted.) A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law. (*Id.* at p. 898.) A local ordinance that prohibits what a statute authorizes, or authorizes what the statute prohibits, is inimical to the statute. (*Big Creek Lumber*, at p. 1161.)

Here, the City's per se ban on medical marijuana dispensaries prohibits what the Legislature authorized in section 11362.775, namely a place for the lawful distribution of medical marijuana and, more generally, using property to grow, store, and distribute medical marijuana. The Legislature has declared that these dispensary activities shall not be subject to nuisance prosecution "solely on the basis" that they exist at a collective or cooperative authorized in section 11362.775. Yet the City claims it is entitled to a nuisance declaration and injunction in *all* cases solely on the basis of this use since, under a per se ban, "no proof is required, beyond the actual fact of . . . existence, to establish the nuisance. No ill effects need be proved." (*McClatchy v. Laguna Lands, Ltd.* (1917) 32 Cal.App. 718, 725, cited in *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1167 (*Kruse*).) The contradiction is direct, patent, obvious, and palpable.

The City attempts to justify the contradiction on grounds that it does not seek an injunction solely based on the dispensary's existence, but based on Lake Forest's asserted per se zoning ban against dispensaries. The distinction is specious. As discussed, and as emphasized in the City's briefing, the categorical bar erected by a per se ban is triggered solely on the basis of the existence of the prohibited activity. (See *Beck*, *supra*, 44 Cal.App.4th at p. 1207 ["no inquiry beyond [a per se nuisance's] existence need be made"].) The City's distinction simply ignores that its ban erects a total bar contradicting state law. If the City did not rely on its total ban, our analysis would be different and would turn on whether there was a likelihood of success the City could show Evergreen did not comply with state medical marijuana law or permissible local regulations. But the City obtained the preliminary injunction solely on the basis of its per se nuisance cause of action.

At oral argument, the City justified its position on grounds that its authority to regulate nuisances derives from the state Constitution, while the MMPA is merely statutory. The City overlooks that the very source of its authority declares a local entity may not make or enforce local decrees "in conflict with general laws." (Cal. Const., art. XI, § 7.) In essence, the City attempts to invoke its power to enact per se nuisance zoning ordinances, and yet disavow on appeal any contradiction with state law because the per se result is a matter of local zoning law. This the City may not do. The City does not suggest it is a home rule, charter city. (Cal. Const. art., XI, § 5.) But even if it were, the result would be the same.

"Under the 'home rule' doctrine, California's Constitution reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws . . . ." (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1813.) The subject of the local regulation must be a "municipal affair," rather than one of "statewide concern." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399.) Thus, for home-rule and non-home-rule cities alike, state law regulating a matter of statewide concern preempts a conflicting local ordinance or rule. (*City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 883 (*Watsonville*).) "This is so even where the local measure involves a traditionally municipal affair." (*Ibid.*) "[T]he question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.) "If . . . the subject of the state statute is one of statewide concern and . . . the statute is reasonably related to its resolution, then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto" and the Legislature may "address[] the statewide dimension by its own tailored enactments." (*Ibid.*) Where there is

statewide preemption, "home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters . . . ." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.)

The Attorney General has concluded that "the establishment and protection of a right to possess and use medical marijuana notwithstanding state criminal statutes is *plainly* a matter of statewide concern." (88 Ops.Cal.Atty.Gen. 113, 117, fn. 5 (2005), italics added [concluding a city may not implement its own registry and identification card program for medical marijuana users because it would duplicate a similar county-based program under the MMPA].) We agree that California medical marijuana law by its nature and terms plainly has statewide application. As discussed, the stated intent in both the CUA and MMPA reflect a statewide concern. The electorate's express reference in the CUA to "Californians" and "*all* patients in medical need" (§ 11362.5, subd. (b)(1)(A) & (C), italics added) does not contemplate the per se exclusion of patients in a particular locality.

The Legislature in the MMPA responded to the electorate's call for "the safe and affordable distribution" of medical marijuana and federal-state cooperation (§ 11362.5 subd. (b)(1)(C)) by immunizing dispensary functions where qualified persons collectively or cooperatively cultivate medical marijuana (§ 11362.775). As discussed, the immunity applies *only* where collective or cooperative cultivation occurs and does not allow for the transportation of marijuana to off-site dispensaries. The Legislature expressly immunized the medical marijuana dispensary activities it contemplated in section 11362.775 not only from penal prosecution, but also from nuisance abatement. The MMPA expressly calls for the "uniform and consistent application of the act among the counties within the state" and for "[e]nhance[d] . . . access of patients and caregivers

to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1, subd. (b)(2) & (3).) In our view, to allow total, per se local nuisance prohibitions against dispensary activity at a collective or cooperative directly contradicts what the Legislature intended to allow and would frustrate the Legislature's vision of a statewide plan consisting of locally-grown, locally-available medical marijuana.

7. The City Asserts It May Ban Dispensaries Despite State Law

The City asserts that local governments may impose a per se ban on medical marijuana dispensaries (MMD's) without contradicting state law. We disagree. The City does not dispute that the Legislature in section 11362.775 authorizes lawful MMD's. Thus, the City's position is that a locality may bar what state law authorizes, and shield that contradiction of state law simply by labeling it a "zoning" matter. But the City fails to address or discuss whether the express statements of intent in the CUA and MMPA reflect a statewide concern. As noted, local contradiction of state law on a matter of statewide concern is preempted. (*Watsonville*, *supra*, 133 Cal.App.4th at p. 883; *Barajas*, *supra*, 15 Cal.App.4th at p. 1813.)

Similarly, the City's preemption case quotations identify contradiction of state law as a basis for preemption, but the City fails to confront the issue. Instead, the City merely observes that the Legislature did not expressly prohibit cities from enacting zoning regulations banning MMD's or from bringing a nuisance action enforcing such ordinances. The City apparently believes a contradiction triggering preemption arises only from an express legislative statement. Preemption, however, need not be express. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 897.) Rather, a contradiction is enough. (*Ibid.*) And a contradiction arises when a local ordinance prohibits what a statute authorizes,

rendering the local ordinance inimical to the statute. (*Big Creek Lumber, supra*, 38 Cal.4th at p. 1161.)

The City devotes considerable attention to other categories of preemption besides local contradiction of state law on a matter of statewide concern. The City discusses express preemption and preemption arising where a local law duplicates state law, and concludes neither applies. The City discusses whether the Legislature stated an intent to fully occupy the field concerning medical marijuana activities, and concluded unremarkably that it did not, given the MMPA's express provision that "[n]othing in this article shall prevent a city or other local governing body from adopting and enforcing . . . [¶] . . . laws consistent with this article." (§ 11362.83, subd. (c).) The City also extensively analyzes whether the Legislature impliedly occupied the field of medical marijuana regulation and if so, whether it did so completely and fully, or only partially, concluding it did neither. (See *Kruse, supra,* 177 Cal.App.4th at pp. 1175-1176.)

The City's thorough discussion of preemption categories other than local contradiction of state law does nothing to resolve, and instead obfuscates, the core contradiction that section 11362.775 authorizes lawful MMD's, but the City prohibits them.

This lacuna, as we see it, in the City's analysis is compounded by disregard for Civil Code section 3482's specification that nothing done under statutory authority can be deemed a nuisance. The City observes this statutory nuisance immunity applies narrowly, only "where the alleged nuisance is *exactly* what was lawfully authorized . . . ." (*Jacobs Farm, supra,* 190 Cal.App.4th at p. 1532, italics added.) But, as discussed, dispensary activity at collective or cooperative cultivation sites *is exactly* among the uses the Legislature immunized from penal or nuisance interdiction "solely on the basis" of

that activity. (§ 11362.775.) Specifically, the Legislature expressly contemplated patients and caregivers maintaining a place for the sale or distribution of marijuana at collectives and cooperatives, and using that property to store and distribute marijuana, which amounts to operating a dispensary. (*Ibid.*) A local per se ban on this use proscribes it and subjects it to nuisance prosecution solely on the basis that it occurs at the site, directly contradicting state law.

In our view, the City unpersuasively evades this contradiction by noting that the Legislature did not expressly prohibit cities from enacting zoning regulations banning MMD's. But as discussed, the Legislature need not expressly preempt a particular type of ordinance; rather, a contradiction requiring preemption arises when a local ordinance prohibits what the statute authorizes. The preemptive effect of Civil Code section 3482 arises not because the Legislature has expressly stated its *preemptive* intent in a particular statute, but rather where it has determined "'*the acts* complained of'" are not a nuisance. (*Zack's, Inc.*, *supra*, 165 Cal.App.4th at 1179, italics added.) That is the case here for dispensaries at collective or cooperative cultivation sites under section 11362.775. While this section does not use the term "dispensary," it immunizes from nuisance prosecution the core acts of storing and distributing marijuana that take place at a dispensary. "[W]here the acts complained of are authorized by the express terms of the statute . . . or by the plainest and most necessary implication from the powers expressly conferred, . . . it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury, " and Civil Code section 3482 applies to prevent a nuisance prosecution. (*Zack's, Inc.*, at 1179, internal quotation marks omitted.)

We therefore disagree that local entities may ban dispensaries and obtain a per se nuisance injunction solely on that basis, despite contrary state law.[8]

8. Section 11362.768 and Lawful Local Regulation of Dispensaries

The City relies on a January 2011 amendment to the MMPA, codified at section 11362.768, as authority for local governments to ban medical marijuana dispensaries. Section 11362.768 now provides that in zoning districts where a local government requires a local business license, no medical marijuana project with a storefront or mobile retail outlet may be located within 600 feet of a school. (§ 11362.768, subds. (b) & (e).)[9]

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[8] The City does *not* argue the Legislature in Government Code section 37100 implicitly engrafted onto local codes the federal criminal prohibitions against marijuana-related activities. The trial court apparently held this view. Government Code section 37100 provides generally that local legislative bodies "may pass ordinances not in conflict with the Constitution and laws of the State *or the United States*." (Italics added.) Citing Government Code section 37100, the trial court commented that for a city "[t]o allow . . . the operation of businesses that engage in the sale of substances made illegal under federal law . . . flies in the face of long standing principles of federal law supremacy . . . ."

As we explain below, however, the supremacy of federal law under the United States Constitution does not extend to dictating the contents of state or local law, nor to conscripting state or local officials to bolster federal law. Indeed, the opposite is true: the Constitution prohibits this usurpation. (See fn. 12, *infra*.) In any event, unlike the CUA and MMPA, Government Code section 37100 does not address medical marijuana at all. Perhaps for this reason, the City does not rely on the trial court's theory that, in effect, Government Code section 37100 determines statewide medical marijuana policy by requiring lockstep local mirroring of federal law. Instead, the City abandons any reliance on Government Code section 37100, describing it as "completely irrelevant to this case" because the City had not attempted to enact permissive medical marijuana ordinances purportedly conflicting with federal law. Therefore, we do not address the issue further.

[9] In full, these subdivisions state: "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

As amended, section 11362.768 also provides: "Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further *restrict* the location and establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." (§ 11362.768, subd. (f), italics added.) The amendment further provides: "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." (§ 11362.768, subd. (g), italics added.)

Courts "should give to the words of [a] statute their ordinary, everyday meaning . . . ." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.) The words actually used by the Legislature serve as the surest touchstone for its intent because those words, and not others, have "successfully braved the legislative gauntlet." (*Ibid.*) "The words of the statute must be construed in context, keeping in mind the statutory purpose" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387), which requires harmonizing "statutes or statutory sections relating to the same subject . . . to the extent possible" (*id.* at p. 1387).

If there was ever any doubt the Legislature intended to allow medical marijuana cooperatives and collectives to dispense marijuana, and we do not believe there was, the newly enacted section 11362.768 has made clear by its repeated use of the

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radius of a school." (§ 11362.768, subd. (b).) "This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license." (§ 11362.768, subd. (e).) Subdivision (d) of section 11362.768 specifies that the 600-foot radius does not apply to a licensed residential medical or elder care facility that utilizes medical marijuana. And subdivision (h) defines a "school" as "any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in private homes."

term "dispensary" that a dispensary function is authorized by state law. (§ 11362.768, subds. (b), (c), (d), (e), (f) & (g).)

We disagree with the City that in using the words "regulate" and "restrict" in section 11362.768, the Legislature intended to authorize local governments to ban medical marijuana dispensaries that are otherwise lawful "pursuant to this article" (§ 11362.768, subd. (b)), i.e., lawful under California medical marijuana law as enacted in the CUA and MMPA. The Legislature did not use the words "ban" or "prohibit." The City relies on the dictionary meanings of "regulate," "regulation," and "restriction," all of which, as one would expect according to the ordinary meaning of those words, import at most only "controlling by rule or restriction" or "A limitation or qualification." (Black's Law Dict. (8th ed. 2004) pp. 1311, 1341.) The ordinary meaning of these phrases suggest something less than a total ban or prohibition against activities contemplated by the Legislature. Notably, the City omits from its discussion any definition of "ban," which means "to prohibit, esp[ecially] by legal means." (Webster's, *supra*, at p. 169). We conclude the Legislature's decision not to include an outright ban or prohibition among the local regulatory powers authorized in section 11362.768 was not accidental.[10]

Read in context with section 11362.775 and with the purpose of California's medical marijuana statutory program, the words "regulate" and "restrict" do not bear the City's conclusion that the terms authorize a "Complete Ban" at the municipal level. The City relies on dicta from inapposite cases stating generally that "'[r]egulation means the prohibition of something'" and "Prohibition does not, therefore, establish a per se excess of regulatory power." (*Personal Watercraft Coalition v. Marin County Bd. of*

[10] At oral argument, the City insisted that its total regulatory exclusion of medical marijuana dispensaries did not amount to a ban. We remain mystified by the assertion, which contradicts the City's position below and borders on Orwellian doublespeak.

Supervisors (2002) 100 Cal.App.4th 129, 150 [county ban on personal watercraft upheld, where not contrary to state law]; cf., e.g., *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 557-562 [upholding city prohibition against routine cat declawing, absent any discernible, contrary state intention].) But none of these cases involved the scenario here, where a local entity has attempted to ban as a per se nuisance activities the Legislature expressly exempted from nuisance abatement.

The City also relies on the fact, reiterated in the legislative history of section 11362.768 and confirmed in the statute's express terms, that subdivisions (f) and (g) of section 11362.768 do not preempt, but instead authorize *more* restrictive local regulation of dispensaries than subdivision (b)'s 600-foot school radius.[11] But nothing in the legislative history or express terms of section 11362.768 supports the City's reading of the statute as authority for total local bans against medical marijuana dispensaries.

As discussed, a local government cannot ban as a nuisance *exactly* what the Legislature contemplated would occur at cooperative and collective medical marijuana cultivation sites. The Legislature decided in section 11362.775 to insulate medical marijuana collectives and cooperatives from nuisance prosecution "solely on the basis" that they engage in a dispensary function. We therefore cannot interpret the words "regulate" and "restrict" in section 11362.768 to mean that local governments may impose a blanket nuisance prohibition against dispensaries. To do so would, as discussed, frustrate the Legislature's intent to authorize locally-grown, locally-available medical marijuana at collective, cooperative cultivation projects accessible to all Californians in medical need.

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[11] We grant the City's request to take judicial notice of section 11362.768's legislative history. (Evid. Code, §§ 452, subd. (c), 453; *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316.)

That is not to say that cities and counties do not have wide authority to regulate and restrict medical marijuana dispensaries. Their authority is as wide as the general police power to legislate for the health, safety, and welfare of their residents (Cal. Const., art. XI, § 7; see, e.g., *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 296-297 [general legitimacy of zoning for public welfare]), and enjoys presumptive validity "when local government regulates in an area over which it traditionally has exercised control," such as oversight of land use (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149). This, however, is subject to the preemptive command of state law that nothing authorized by statute may be deemed a nuisance, including dispensary activities "solely on the basis" that they occur at a medical marijuana collective or cooperative as provided in section 11362.775.

9. Other Medical Marijuana Case Law

We emphasize that our opinion depends, as it must, on the facts before us. We do not consider, for example, a municipal regulatory scheme that permits, subject to specified conditions, medical marijuana dispensaries at cooperative or collective cultivation projects *in certain zoning districts but not in others* within the local jurisdiction. Among other factors, such a scheme would have to be evaluated against the Legislature's intent to permit locally-grown, locally-accessible medical marijuana for sick patients, including those whose medical condition may not allow them to travel far, nor allow their primary caregivers to leave their side for long. Arguably, such a scheme may be consistent with California medical marijuana law because it does not bar dispensary activities authorized by section 11362.775 "solely on the basis" that they occur at a collective or cooperative, but instead based on their location in a prohibited zoning district when a permissive district in the jurisdiction is available instead. In other

words, depending on the facts, such a scheme might not trigger preemption by disclosing a local legislative judgment that medical marijuana dispensary activity constitutes a per se nuisance, contrary to state law.

But *here* we confront precisely such a local regime in which the City's ordinances create a per se bar against medical marijuana dispensaries in all instances, without requiring the City to establish that the defendant collective or cooperative does not comply with California medical marijuana law or permissible local regulations. Thus, this case is unlike those on which the City relies to support a preliminary injunction against a dispensary, including *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861 (*Hill*), *Kruse*, *supra*, 177 Cal.App.4th 1153, and *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418 (*Naulls*). These cases instead provide examples of permissible local measures that do not purport to institute a per se, permanent ban on medical marijuana dispensaries authorized under California law in section 11362.775.

The earliest of these cases, *Naulls*, involved a medical marijuana dispensary operator who violated city code provisions when he failed to disclose the nature of his proposed use, failed to obtain a business license that accurately reflected his proposed use, failed to obtain city or planning department approval, and failed to seek a variance, an amendment to the city's zoning plan, or otherwise follow established procedures to qualify as a "similar use" to those expressly permitted within the city zoning scheme. (*Naulls*, *supra*, 166 Cal.App.4th at pp. 428-429, 432-433.)

Similarly in *Kruse* the dispensary operator ignored the city's business license and tax certificate requirements and the required procedure for approval of uses "difficult to categorize" or not listed in the city code, and instead opened his

establishment without a license, a certificate, or the required city approval. (*Kruse, supra,* 177 Cal.App.4th at p. 1159.)

In *Hill*, county ordinances expressly authorized medical marijuana dispensaries in "C-1" zoning districts, subject to certain requirements. The county brought a nuisance action against the dispensary and its operator for failing to meet several of those requirements, including failure to obtain a business license, a conditional use permit, and a zoning variance to locate within a 1,000 foot radius of a public library. (*Hill, supra,* 192 Cal.App.4th at p. 865.)

A common thread among *Naulls*, *Kruse*, and *Hill* is that local ordinances that are "applicable to all businesses" (*Hill, supra*, 192 Cal.App.4th at p. 865), such as the requirement of a business license, validly apply to medical marijuana dispensaries and furnish grounds for injunctive relief when violated. Such provisions are facially neutral concerning medical marijuana dispensaries and do not purport to bar them, contrary to section 11362.775, "solely on the basis" of dispensary activities the Legislature determined are not a nuisance. Here, in contrast, the City code did not require a business license and the City instead attempted to rely on its alleged per se nuisance bar against dispensaries.

Kruse and *Naulls* also both involved temporary local moratoriums on medical marijuana dispensaries, which the City here chose not to renew. During the pendency of the appeal in *Hill*, Los Angeles County enacted a ban against medical marijuana dispensaries (*Hill, supra,* 192 Cal.App.4th at p. 866, fn. 4), but neither the county nor the reviewing court relied on the ban in addressing the validity of the preliminary injunction that issued based on the dispensary's code violations (*id.* at pp. 866, fn. 4, 869, fn. 6).

The *Kruse* court found that state medical marijuana law neither expressly nor impliedly preempted the City of Claremont's moratorium on medical marijuana dispensaries, and therefore did not preclude the city from denying the dispensary a business license or permit based on the moratorium. (*Kruse*, *supra*, 177 Cal.App.4th at pp. 1168-1176.) The court, however, did not address Civil Code section 3482 and, like the City here, did not confront the contradiction inherent in a local ordinance that designates as a nuisance dispensary activities the Legislature has determined in section 11362.775 are not, "solely on the basis" of those activities, a nuisance. We therefore find the analysis in *Kruse* incomplete and unpersuasive on the issue presented here.

Apart from addressing requirements that apply to all businesses, *Hill* further stands as an example under section 11362.768 that local governments may regulate dispensaries directly and distinct from other businesses or property uses, restricting with conditions their location, establishment, and operation.[12] The court in

[12] Presumably those conditions would not require local officials to directly engage in any aspect of marijuana production, for example, by handling marijuana for on-site or off-site testing or any other purpose. Possession and other marijuana-related activities are still barred by federal law in most instances as a criminal offense, and requiring local government employees to engage in conduct prohibited by federal law would invite federal preemption of the ordinance based on an irreconcilable conflict. Such a conflict occurs where "'simultaneous compliance'" by the affected person "'with both [the local] law and federal directives is impossible.' [Citation.]" (*Qualified Patients*, *supra*, 187 Cal.App.4th at p. 758.) Local conditional use permits issued to dispensaries on other grounds, however, generally would not trigger federal preemption because issuing a permit does not constitute a local government command to operate a dispensary. (See *ibid.*) Simply put, a permit holder need not act on the permit. In other words, no one *must* do what a permit or permit condition exempts from state or local interdiction. The necessity of obtaining the permit functions, in effect, as an additional condition authorized by state law (§ 11362.83 [authorizing local regulations consistent with state law]) for exemption from state criminal law and from nuisance abatement. As we observed in *Qualified Patients*, at page 759, "The fact that some individuals or

Hill observed, and we agree, "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." (*Hill*, *supra*, 192 Cal.App.4th at p. 868.) The Legislature has codified *Hill* by expressly providing that "local ordinances that regulate

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collectives or cooperatives might choose to act in the absence of state criminal law in a way that violates federal law does not implicate the city in any such violation."

Similarly, as shown in *Qualified Patients*, to conclude that a local government may not abide by section 11362.83 by imposing criminal and nuisance exemption conditions consistent with state law is to conclude, contrary to basic federalism precepts, that the locality *must* instead enforce federal law. Thus, "'the unstated predicate'" of the thesis that a further local condition on an exemption from state drug law triggers preemption of the condition as an obstacle to the enforcement of federal law is "'that the federal government is entitled to conscript a state's law enforcement officers [or a local entity's public officials] into enforcing federal enactments, over the objection of that state . . . .'" (*Qualified Patients*, *supra*, 187 Cal.App.4th at p. 761.) "The Federal Government," however, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." (*Printz v. United States* (1997) 521 U.S. 898, 935.) We therefore find patently erroneous the notion that a further local condition on exemption from state drug law or nuisance law triggers federal preemption because it "[f]oster[s]" drug activity (cf. *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729, 742 (dis. opn. of Morrison, J.)) or demonstrates an intent of local officials to aid and abet federal law violations. The flawed premise of this position is again simply the unconstitutional federal conscription of local resources.

If anything, a local permit framework may *aid* federal officials in formulating and enforcing federal policy concerning medical marijuana. The result may be negative, viewed from California's perspective, if federal authorities gain access to local government records to identify and shut down dispensary cultivation sites that California has determined are lawful. Or it may be positive by identifying, by their nonparticipation in the permit process, rogue sources of illicit marijuana against whom federal, state, and local authorities may join forces, or otherwise cooperate as contemplated by the people in enacting the CUA. In any event, these are policy choices for state, local, and federal officials to weigh, not the courts.

the location, operation, or establishment of a medical marijuana cooperative or collective" are consistent with California medical marijuana law (§ 11362.83).[13]

We also agree with *Hill* that nothing in section 11362.775 prevents local governments from regulating dispensaries. As *Hill* explained, "By its terms, [section 11362.775] 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. . . . *The statute does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose*. The County'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." (*Hill*, *supra*, 192 Cal.App.4th at p. 869, second italics added.) Put another way, although an activity authorized by state law cannot be a nuisance (Civ. Code, § 3482), local governments may regulate and enforce by nuisance abatement law the manner in which the activity is performed (§§ 11362.768, 11362.83).

Here, unlike in *Hill*, the City did not obtain its nuisance injunction based on the manner in which Evergreen operated, but instead based on a total ban against dispensaries rendering them a per se nuisance, contrary to state law determining dispensary activities are not necessarily a nuisance. As a matter of law, the City therefore

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[13] Section 11362.83 states in full: "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."

could not prevail on its per se nuisance cause of action, and the trial court erred in granting the preliminary injunction.

III

CONCLUSION

We recognize our conclusions today may disappoint the parties in this case and the opposing sides in California's ongoing debate concerning medical marijuana: dispensaries because they may wish to operate independently of cultivation sites, and some cities and other local governments because they want to ban dispensaries altogether. We emphasize that these are policy outcomes outside our power to reach or grant because we are constrained by the voters' and the Legislature's enactments. Although courts will continue to resolve disputes over the meaning of the CUA and MMPA, policy choices about the role of medical marijuana in this state, including any changes or adjustments that may be made, rest ultimately with the people and their representatives.

IV

DISPOSITION

The preliminary injunction is reversed, our stay of the injunction is dissolved when the remittitur issues from this court, and the matter is remanded for further proceedings not inconsistent with this opinion. Evergreen is entitled to its costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.