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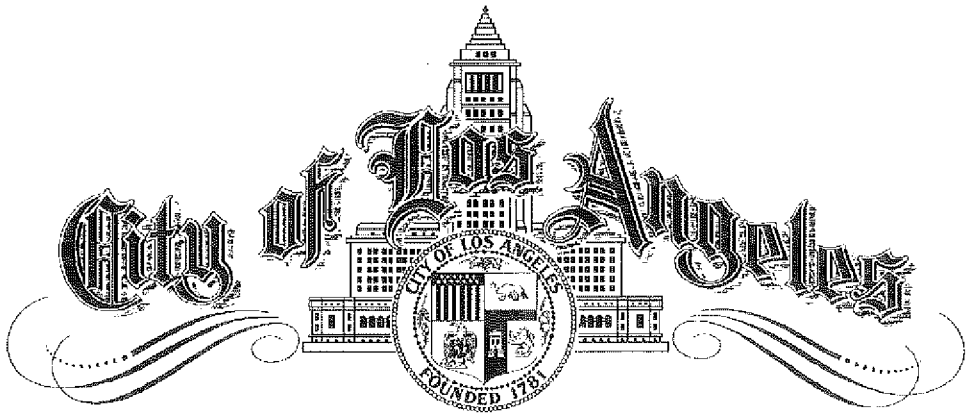

CARMEN A. TRUTANICH
City Attorney

REPORT NO. R12-0010

JAN 06 2012

REPORT RE:

PROPOSED ORDINANCE AMENDING ARTICLE 5.1 OF CHAPTER IV OF THE LOS ANGELES MUNICIPAL CODE TO IMPLEMENT RECENT APPELLATE COURT DECISIONS CONCERNING REGULATION OF MEDICAL MARIJUANA, INCLUDING *PACK v. SUPERIOR COURT*, 199 CAL.APP.4TH 1070 (2011)

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, CA 90012

Council File Nos. 11-1737 and 11-1737-S1

Honorable Members:

This Office has prepared and now transmits for your consideration a draft ordinance (Attachment 1), approved as to form and legality. The draft ordinance would amend Article 5.1 of Chapter IV of the Los Angeles Municipal Code (LAMC) to implement recent appellate court decisions concerning regulation of medical marijuana, including the ruling in *Pack v. Superior Court*, 199 Cal.App.4th 1070 (2011). This Office has prepared the draft ordinance on an expedited basis in part in response to the Parks-Perry motion (CF 11-1737) and the Huizar-Englander motion (CF 11-1737-S1), due to the Council's abbreviated December 2011 calendar, and to enable the City to be responsive to both the *Pack* ruling and the City's ongoing medical marijuana litigation.

The draft ordinance would ban medical marijuana *businesses* consistent with the *Pack* decision and with state law. The draft ordinance excludes from the definition of medical marijuana business, any location, hospice, licensed health care facility, and vehicle, when in use by a primary caregiver to deliver or give away marijuana to a qualified patient consistent with the Compassionate Use Act (CUA) and the Medical

Marijuana Program Act (MMPA). The effect of the draft ordinance would be to ban all forms of dispensaries where persons who are not lawfully designated as a primary caregiver in accordance with the requirements of the CUA, MMPA, and state law are distributing marijuana to others. The draft ordinance would have no impact upon the ability of seriously ill patients and their primary caregivers to collectively cultivate and access their medical marijuana, as provided for in state law.

Council Requests

On October 12, 2011, Councilmembers Parks and Perry introduced Motion CF 11-1737, noting the spike in criminal activity accompanying the passage of local medical marijuana ordinances, including incidents of robberies and other crimes at medical marijuana dispensaries in Los Angeles. The Motion states that, in light of the Court of Appeal ruling [in *Pack*], "it is prudent for the City to begin the process of moving away from regulating medical marijuana dispensaries and toward eventual elimination of any sanctioned/permitted medical marijuana activity in the City." The Motion requests that the Planning Department, with the assistance of the City Attorney, "report with recommendations and a plan to phase out the City's current medical marijuana ordinance in conformance with the criminal justice issues identified in this Motion, the recent California Court of Appeals decision [in *Pack*] . . . , and federal law which firmly makes the possession and sale of this drug illegal." On November 16, 2011, the Motion was referred to the Public Safety Committee.

On November 23, 2011, Councilmembers Huizar and Englander introduced Motion CF 11-1737-S1, also noting neighborhood complaints about the disruption and public safety issues presented by medical marijuana businesses operating in Los Angeles. The Motion requests that the City Attorney prepare language to: "(1) repeal the MMO and TUO in light of *Pack*; (2) ban marijuana businesses in the City until the *Pack* decision is modified to grant the City the tools to affirmatively regulate and control marijuana businesses; (3) provide *amicus* support to the City of Long Beach petition for review of *Pack*, affirming the need for California Supreme Court finality regarding the scope of permissible local regulation; and (4) confirm the City's commitment to safe access consistent with State criminal immunities (as provided by the CUA and MMPA) through personal participation in medical marijuana cultivation by qualified patients and their primary caregivers, and not though storefront, mobile commercial growing, or other dispensing operations, so long as the laws regarding local regulation remain unsettled."

Regulatory and Litigation Background

In January 2010, the City established a comprehensive legislative framework to balance the unregulated proliferation of medical marijuana businesses with access by seriously ill patients to marijuana pursuant to state law as codified in the CUA and MMPA. The regulatory program, known as Medical Marijuana Ordinance No. 181069 (MMO), added Article 5.1 to Chapter IV, Public Welfare, of the LAMC. The MMO was

modestly amended several times. Its final substantive amendments were adopted by the City Council in January 2011 by Temporary Urgency Ordinance No. 181530 (TUO).

The MMO and its amendments became the subjects of nearly two years of contentious and voluminous litigation. Although the Los Angeles Superior Court issued a narrow injunction against certain provisions of the MMO in December 2010, the same Court upheld and refused to enjoin the TUO on October 14, 2011. (Attachment 2.) MJ Collectives Litigation: *Americans for Safe Access et al. v. City of Los Angeles*, Los Angeles Superior Court, Lead Case No. BC433942 (and all related actions).

On October 4, 2011, the Second Appellate District of the California Court of Appeal ruled in *Pack* (Attachment 3) that significant provisions of the City of Long Beach's medical marijuana ordinance, which was modeled after Article 5.1, Chapter IV of the LAMC, are preempted by the Controlled Substances Act (CSA) because this federal law bans marijuana for all purposes. The court held that while cities may enact prohibitions that restrict and limit collectives, cities are preempted under the CSA from enacting affirmative regulations that permit or authorize collectives and marijuana-related activities. Both a lottery and a City-imposed cap on the number of collectives were expressly stricken by the *Pack* court; both are guiding provisions of the MMO and TUO. *Pack* disables the City from proceeding with the MMO or TUO and from enacting new comprehensive rules with affirmative regulations unless the California Supreme Court overturns or substantially modifies the *Pack* appellate court ruling.[1]

On November 10, 2011, the City of Long Beach filed a Petition for Review of the *Pack* decision with the California Supreme Court. On December 8, 2011, the League of California Cities submitted an Amicus Curiae Letter in support of the Petition for Review. On December 22, 2011, the City of Los Angeles submitted an Amicus Curiae Letter in support of the Petition for Review.

On December 21, 2011, the Attorney General, after conducting nearly one year of conversations with representatives from law enforcement, cities, counties, and the patient and civil rights communities across the state, sent letters to the State Assembly and localities expressing concerns over the exploitation of California's medical marijuana laws by gangs, criminal enterprises, and others, and urging the State Assembly to establish clear rules governing medical marijuana. (Attachments 4 and 5.)

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[1] In its October 14, 2011 ruling, which followed on the heels of *Pack* by ten days, the Superior Court in the MJ Collectives Litigation declined to resolve the issue of federal preemption of the City's medical marijuana regulations. It observed, however, that *Pack* could have a "profound impact" on the City's regulations which bear "more than a passing resemblance to the Long Beach medical marijuana ordinance."

Summary of Ordinance Provisions

The draft ordinance would ban medical marijuana businesses, as has been upheld by recent appellate rulings, consistent with the *Pack* decision and state law. The draft ordinance pertains to the transport, delivery, or giving away of medical marijuana. It also excludes from the definition of medical marijuana business: (1) any location when in use by a primary caregiver to deliver or give away marijuana to a qualified patient; (2) hospices and licensed clinics, facilities and home health agencies where qualified patients receive medical care or supportive services and designate the owner, operator, or employee designated by the owner or operator, of the clinic, facility, hospice, or home health agency as a primary caregiver; and (3) any vehicle when in use by a qualified patient for his/her personal medical use or primary caregiver to transport, deliver, or give away marijuana to a qualified patient consistent with the CUA and MMPA.

The effect of the draft ordinance would be to ban all forms of dispensaries where persons who are not lawfully designated as a primary caregiver in accordance with the requirements of the CUA, MMPA, and state law are distributing marijuana to others. The draft ordinance would have no impact upon the ability of seriously ill patients and their primary caregivers to collectively cultivate and access their medical marijuana, as provided for in state law.

CEQA Determination

We recommend that, prior to adoption of the draft ordinance, you determine that your action is exempt from the California Environmental Quality Act (CEQA) under State CEQA Guidelines sections 15060(c)(2) and (3) because it will not result in a direct, or reasonably foreseeable indirect physical change in the environment, for the reasons set forth in the CEQA Narrative prepared by the Planning Department and transmitted herewith as Attachment 6.

We also recommend that the Council determine that adoption of the draft ordinance is exempt from CEQA pursuant to State CEQA Guidelines Sections 15301, 15305, 15308 and 15321, and the corresponding City CEQA Guidelines, for the reasons set forth in the CEQA Narrative prepared by the Planning Department and transmitted herewith.

If the City Council concurs in the above, it may comply with CEQA by making one or more of the above determinations prior to or concurrent with its adoption of the draft ordinance. Council should thereafter direct staff to cause the filing of a Notice of Exemption similar in form to the Notice of Exemption transmitted herewith as Attachment 7.

Council Rule 38 Referral

Pursuant to Council Rule 38, we sent a copy of the draft ordinance to the Los Angeles Police Department and the Department of Building and Safety and requested that any comments be presented directly to the City Council or its Committees when this matter is considered.

Recommended Actions

In conjunction with your adoption of the draft ordinance, we recommend that you take the following actions:

1. DETERMINE that the Proposed Ordinance is exempt under the California Environmental Quality Act, for the reasons set forth in the draft Notice of Exemption and CEQA Narrative submitted by staff.

2. DIRECT that the Department of City Planning file the Notice of Exemption with the County Clerk immediately after the Proposed Ordinance is approved and passed in final by the City Council.

If you have any questions regarding this matter, please contact Special Assistant City Attorney Jane Usher at (213) 978-8100. She or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

CARMEN A. TRUTANICH, City Attorney

By 
WILLIAM W. CARTER
Chief Deputy City Attorney

WWC:SNB:ac

Attachments
1 -- Draft Ordinance
2 -- Judge Mohr's October 14, 2011 Ruling in MJ Collectives Litigation
3 -- *Pack v. Superior Court*, 199 Cal.App.4th 1070 (2011)
4 -- December 21, 2011 Letter by Office of the Attorney General to California State Assembly
5 -- December 21, 2011 Letter by Office of the Attorney General to California Law Enforcement, Cities, Counties, and the Patient and Civil Rights Communities
6 -- CEQA Exemption and Narrative
7 -- Notice of Exemption

Attachment 1

ORDINANCE NO. _____

An ordinance amending Article 5.1 of Chapter IV of the Los Angeles Municipal Code in order to implement recent appellate court decisions, including the ruling issued in *Pack v. Superior Court*, 199 Cal.App.4th 1070 (2011).

WHEREAS, the Compassionate Use Act ("CUA"), adopted by the voters in 1996, and the Medical Marijuana Program Act ("MMPA"), enacted by the State Legislature in 2003, provided California's qualified patients and their primary caregivers with limited immunities to specified criminal prosecutions under State law for the purpose of enabling access to marijuana for medical purposes;

WHEREAS, commencing in 2007, according to local media reports and neighborhood sightings and complaints, more than 850 medical marijuana businesses randomly opened, closed and reopened storefront shops and commercial growing operations in the City without any land use approval under the Los Angeles Municipal Code ("LAMC") and, since that time, an unknown number of these businesses continue to randomly open, close, and reopen in Los Angeles, each with no regulatory authorization from the City;

WHEREAS, the Los Angeles Police Department ("LAPD") has reported that, as the number of marijuana dispensaries and commercial growing operations proliferated without legal oversight, the City and its neighborhoods have experienced an increase in crime and the negative secondary harms associated with unregulated marijuana businesses, including but not limited to, murders, robberies, the distribution of tainted marijuana, and the diversion of marijuana for non-medical and recreational uses;

WHEREAS, in January 2010, the City established a comprehensive regulatory framework to balance the unregulated proliferation of medical marijuana businesses, access by seriously ill patients to medical marijuana, and public safety, by adopting the Medical Marijuana Ordinance ("MMO"), adding Article 5.1, Chapter IV, of the LAMC, subsequently amended by ordinances including, in 2011, Temporary Urgency Ordinance No. 181530 (the "TUO");

WHEREAS, the City's efforts to foster compassionate patient access to medical marijuana, while capping the number of dispensaries through priority registration opportunities for earlier existing collectives, a drawing, and mandatory geographic dispersal, resulted in an explosion of lawsuits by medical marijuana businesses, the continued opening and operation of unpermitted businesses, unending neighborhood complaints regarding crime and negative secondary effects, an inappropriate drain upon civic legal and law enforcement resources, and the inability of the City to implement its regulations in the face of aggressive dispensary litigation;

WHEREAS, on October 4, 2011, the Second Appellate District of the California Court of Appeal, whose decisions bind the City of Los Angeles, ruled in the case of *Pack v. Superior Court*, 199 Cal.App.4th 1070 (2011), that significant provisions of the

medical marijuana ordinance of the City of Long Beach, which was modeled after Article 5.1, Chapter IV of the LAMC, are preempted by the federal Controlled Substances Act ("CSA") [21 U.S.C. section 801, et seq.], which bans marijuana for all purposes;

WHEREAS, the *Pack* court held that while cities may enact prohibitions that restrict and limit collectives, cities are preempted under the CSA from enacting affirmative regulations that permit or authorize collectives and marijuana related activities, specifically stating: "The City's ordinance, however, goes beyond decriminalization into authorization. Upon payment of a fee, and successful participation in a lottery, it provides permits to operate medical marijuana collectives. It then imposes an annual fee for their continued operation in the City. In other words, the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives. A law which `authorizes [individuals] to engage in conduct that the federal Act forbids . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' and is therefore preempted. [citation]." 199 Cal.App.4th 1070, 1093;

WHEREAS, the *Pack* court also briefly raised the specter of violation of federal law through the actions of individual city officials, commenting in a footnote, "There may also be an issue of whether the ordinance requires certain City officials to violate federal law by aiding and abetting (or facilitating (21 U.S.C. § 843(b))) a violation of the federal CSA. For example, the ordinance requires the City's director of financial management to approve and issue a permit if certain facts are demonstrated. . . ." 199 Cal.App.4th 1070, 1091, fn. 27;

WHEREAS, on October 14, 2011, Los Angeles Superior Court Judge Anthony J. Mohr denied numerous motions to enjoin the City's MMO, as amended by the TUO, in lead case *Americans For Safe Access, et al. v. City of Los Angeles, et al.,* Los Angeles Superior Court Case No. BC433942, holding that those regulations, as currently enacted, do not violate State procedural law or deprive plaintiffs of due process of law or equal protection, and further ruling that plaintiffs have failed to establish any vested right to operate their medical marijuana businesses in the City;

WHEREAS, Judge Mohr declined to address the impact of federal preemption on the City's medical marijuana regulations in light of *Pack* until that case becomes final or until "our Supreme Court decides to weigh in on the federal preemption issue," but observed, "The *Pack* court held that Long Beach's permit provisions and lottery system are federally preempted. This could have a profound impact on the TUO, which bears more than a passing resemblance to the Long Beach medical marijuana ordinance";

WHEREAS, as highlighted by Judge Mohr, the City's TUO, most notably its cap, drawing, and mandatory geographic dispersal provisions, cannot survive *Pack*, and the City is disabled by *Pack* from proceeding with its existing comprehensive regulatory framework or from enacting new comprehensive rules that will necessarily include

affirmative regulations until the California Supreme Court overturns or substantially modifies the *Pack* appellate court ruling;

WHEREAS, so long as the *Pack* ruling remains in effect as currently written, the only legislative tool available to the City at this time for the purpose of regulating the proliferation and operation of medical marijuana businesses is the enactment of prohibitions restricting and limiting such businesses;

WHEREAS, in order to obtain clarity and finality regarding whether California cities are empowered to affirmatively regulate medical marijuana businesses, the City Council has instructed the City Attorney to provide amicus support in favor of California Supreme Court review of the *Pack* decision; and

WHEREAS, regulatory inaction during the pendency of the *Pack* petition is not a responsible option for the City given that medical marijuana businesses have previously, adamantly, and without legal support argued to the courts that the legal effect of no explicit City ordinance is that all medical marijuana businesses may open, close, reopen, and operate at will in perpetuity, with vested rights, in the City.

NOW, THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES
DO ORDAIN AS FOLLOWS:

Section 1. Article 5.1 of Chapter IV of the Los Angeles Municipal Code is amended in full to read:

ARTICLE 5.1

MEDICAL MARIJUANA

SEC. 45.19.6. PURPOSES AND INTENT.

The purpose of this article is to respond to the ruling of the Second Appellate District of the California Court of Appeal in *Pack v. Superior Court*, 199 Cal.App.4th 1070 (2011), which states that California cities may not enact comprehensive regulatory schemes governing medical marijuana. It is also the purpose of this article to staunch the negative impacts and secondary effects associated with the ongoing unregulated medical marijuana operations in the City, including but not limited to the extraordinary and unsustainable demands that have been placed upon scarce City policing, legal, policy, and administrative resources; neighborhood disruption, increased transient visitors, and intimidation; the unavoidable exposure of school-age children and other sensitive residents to medical marijuana; drug sales to both minors and adults; fraud in issuing, obtaining or using medical marijuana recommendations; and murders, robberies, burglaries, assaults, and other violent crimes. It is therefore the further purpose of this article to protect the public health, safety and welfare of the residents of

the City by banning medical marijuana businesses until such time as the City may become authorized to enact a comprehensive medical marijuana regulatory scheme for the benefit of both medical marijuana patients and residents generally. This article is not intended to conflict with federal or state law. It is the intention of the City Council that this article be interpreted to be compatible with federal and state enactments and in furtherance of the public purposes that those enactments encompass.

SEC. 45.19.6.1. DEFINITIONS.

A. The following phrases, when used in this section, shall be construed as defined below. Words and phrases not defined here shall be construed as defined in Section 11.01 of this Code.

"Building" means any structure having a roof supported by columns or walls, for the housing, shelter or enclosure of persons, animals, chattels, or property of any kind.

"Location" means any parcel of land, whether vacant or occupied by a building, group of buildings, or accessory buildings, and includes the buildings, structures, yards, open spaces, lot width, and lot area.

"Marijuana" shall be construed as defined in California Health and Safety Code Section 11018 and further shall specifically include any product that contains marijuana or a derivative of marijuana.

"Medical marijuana business" means either of the following:

(1) Any location where marijuana is delivered or given away to a qualified patient, a person with an identification card, or a primary caregiver.

(2) Any vehicle or other mode of transportation, stationary or mobile, which is used to transport, deliver, or give away marijuana to a qualified patient, a person with an identification card, or a primary caregiver.

(3) Notwithstanding Subparagraphs 1 and 2 above, "medical marijuana business" shall not include any of the following:

(a) Any location when in use by a primary caregiver to deliver or give away marijuana to a qualified patient or person with an identification card who has designated the individual as a primary caregiver, for the personal medical use of the qualified patient or person with an identification card, in accordance with California Health and Safety Code Section 11362.5 and 11362.7 *et seq*.

(b) The location of any clinic licensed pursuant to Chapter 1 (commencing with Section 1200), a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250), a residential care facility for

persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01), a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569), a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725), all of Division 2 of the California Health and Safety Code where: (i) a qualified patient or person with an identification card receives medical care or supportive services, or both, from the clinic, facility, hospice, or home health agency, and (ii) the owner or operator, or one of not more than three employees designated by the owner or operator, of the clinic, facility, hospice, or home health agency has been designated as a primary caregiver pursuant to California Health and Safety Code Section 11362.7(d) by that qualified patient or person with an identification card.

(c) Any vehicle when in use by: (i) a qualified patient or person with an identification card to transport marijuana for his or her personal medical use, or (ii) a primary caregiver to transport, deliver, or give away marijuana to a qualified patient or person with an identification card who has designated the individual as a primary caregiver, for the personal medical use of the qualified patient or person with an identification card, in accordance with California Health and Safety Code Section 11362.765.

"Structure" means anything constructed or erected which is supported directly or indirectly on the earth, but not including any vehicle.

"Vehicle" means a device by which any person or property may be propelled, moved, or drawn upon a street, sidewalk or waterway, including but not limited to a device moved exclusively by human power.

B. The following words or phrases when used in this section shall be construed as defined in California Health and Safety Code Sections 1746, 11362.5, and 11362.7.

"Hospice";
"Identification card";
"Person with an identification card;"
"Primary caregiver"; and
"Qualified patient"

SEC. 45.19.6.2. PROHIBITED ACTIVITIES.

A. It is unlawful to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business, or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity in any medical marijuana business.

B. The prohibition in Subsection A, above, includes renting, leasing, or otherwise permitting a medical marijuana business to occupy or use a location, vehicle, or other mode of transportation.

SEC. 45.19.6.3. SEVERABILITY.

If any provision or clause of this section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application thereof, and to this end the provisions and clauses of this section are declared to be severable.

Sec. 2. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of _____.

JUNE LAGMAY, City Clerk

By _____
Deputy

Approved _____

_____
Mayor

Approved as to Form and Legality

CARMEN A. TRUTANICH, City Attorney

By _____
TERRY P. KAUFMANN MACIAS
Deputy City Attorney

Date JAN 0 6 2012

File No. CF 11-1737-S1

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Attachment 2

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MEDICAL MARIJUANA CASES
PURA VIDA TRES, INC., et al.,

Plaintiffs,

vs.

CITY OF LOS ANGELES, et al.,

Defendants.

Lead Case No.: BC433942

ORDER DENYING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION AGAINST THE CITY OF LOS ANGELES' TEMPORARY URGENCY ORDINANCE

This round of motions represents the second time medical marijuana collectives ("collectives") have applied to the court for an injunction against the City of Los Angeles' ("the City") in connection with its latest ordinance aimed at shutting most of them down. This court's December 10, 2010 order granting a preliminary injunction ("Preliminary Injunction Order") struck down portions of Ordinance No. 181069, contingent upon Plaintiffs posting a bond.[1] Following the Preliminary Injunction Order, the City enacted the Temporary Urgency Ordinance ("TUO"), local Ordinance No. 181530.[2] (*See* Decl. of Dickinson, ¶ 6, Ex. 1.) The TUO represents the City's attempt at remedying the constitutional shortcomings that the Preliminary Injunction Order identified in connection with Ordinance No. 181069. The TUO's express purpose is "to protect the health, safety and welfare of the residents of the City" while the City appeals the court's preliminary injunction. (TUO, § 1.)

[1] Plaintiffs have yet to post any bond.

[2] Los Angeles' medical marijuana ordinance appears at Los Angeles Municipal Code ("LAMC") § 45.19.6 *et seq.* The court refers to the current ordinance either as the "TUO" or "LAMC § __."

Moving parties constitute 29 collectives. LAMC § 45.19.6.2.C.1 requires collectives to submit a notice of intent to register ("2011 NOITR") between 10 and 15 business days after the effective date of the TUO. Two hundred thirty two collectives submitted timely 2011 NOITRs. (Decl. of Dickinson, ¶ 7, Ex. 2.) Twenty seven of the 29 moving Plaintiffs filed 2011 NOITRs, with only Southbay Wellness Network ("Southbay Wellness") and Healthy Life Collective of America ("Healthy Life") failing to file.[3] (*Id.*, at ¶ 8.) Southbay Wellness and Healthy Life are collectives formed after September 14, 2007.

The TUO requires, among other things, that eligible collectives were "operating in the City on or before September 14, 2007." (LAMC § 45.19.6.2.B.2.1.) Melrose Quality Pain Relief, Inc. ("MQPR") filed a separate motion. MQPR was established in 2006. (MQPR Motion, 4:3-4: citing paragraphs of MQPR's First Amended and Supplemental Complaint.) However, MQPR changed its entire ownership in September 2009. (*Id.*, at 13-14.) Continuity of ownership is a requirement of the TUO. (LAMC § 45.19.6.2.B.2.3) The remaining moving Plaintiffs joined together in Pura Vida Tres, Inc.'s ("PVT") motion. The PVT Plaintiffs all qualified for the ICO exemption and would have been permitted to operate (contingent upon finding a suitable location) had Ordinance No. 181069 not been struck down. While Plaintiffs have different motives for challenging the TUO, most of their arguments are the same.

The TUO addressed the constitutional shortcomings of Ordinance No. 181069 in the following ways:

- It contains no sunset provision, instead requiring collectives to re-register every two years (LAMC § 45.19.6.2.J);
- It has no criminal penalties (LAMC § 45.19.6.7);
- It requires a warrant, subpoena, or court order prior to accessing "private medical records." Moreover, it gives members the option of providing either their medical marijuana identification card or their government issued identification, and the collectives must notify members of this option (LAMC § 45.19.6.4.A-C);

[3] The two non-filing Plaintiffs filed their own brief but fail to address this shortcoming.

- The TUO supplants the old "priority registration" with a lottery system that caps the total number of collectives in the City at 100, provides even ineligible collectives the opportunity to challenge the City Clerk's determination regarding eligibility, and provides the opportunity for final appeal to a court (LAMC § 45.19.6.2.C.1.).

II. DISCUSSION:

A. Enacting the TUO did not violate Government Code § 65858:

Plaintiffs argue that the TUO failed to comply with Government Code 65858. They are wrong. Government Code § 65858 states in pertinent part:

> (a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a . . . city . . . to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.
>
> . . .
>
> (f) Notwithstanding subdivision (e), upon termination of a prior interim ordinance, the legislative body may adopt another interim ordinance pursuant to this section provided that the new interim ordinance is *adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances different from the event, occurrence, or set of circumstances that led to the adoption of the prior interim ordinance.*

(Emphasis added.) Plaintiffs assert two arguments. First, that if the TUO is a "public safety ordinance," it should have been adopted in express reliance on City Charter § 253, and the TUO omits any reference to § 253. Second, that the 2007 ICO was the first attempt at an interim ordinance on the topic of medical marijuana in the City, and the TUO—being the second attempt—does not comply with Government Code § 65858(f)'s requirement of changed circumstances.

Plaintiff's first argument fails because the TUO expressly states that it was adopted by the City "pursuant to the police and Charter powers of the City of Los Angeles." (TUO, preamble.) Plaintiffs cite no requirement that an ordinance must explicitly reference the section of the City Charter authorizing the ordinance. Plaintiffs attempt to use the restrictive language in § 253 to prohibit the TUO. Section 253 states:

> The Council may adopt an urgency ordinance that shall take effect upon its publication. An urgency ordinance may only be adopted if required for the immediate preservation of the public peace, health or safety. Any urgency ordinance shall contain a specific statement showing its urgency, and must be passed by a three-fourths vote of Council. *No grant of any franchise, right or privilege shall ever be construed to be an urgency measure.*

(Emphasis added.) Plaintiffs contend that the TUO violates the italicized language because it purports to "grant" collectives the privilege of operation. The converse is actually true. We infer from the Attorney General Guidelines that the CUA and MMPA permit the operation of medical marijuana collectives subject to local restrictions.

Plaintiffs' second argument also fails because the TUO was enacted based on circumstances other than those that existed when the ICO was adopted. Government Code § 65858(a) permits interim legislation. The TUO is interim legislation and purports to base its authority for enactment on § 65858: "pursuant to . . . and to the extent it is deemed to apply, California Government Code § 65858(f). . ." (TUO, preamble.) Plaintiffs paint the TUO as just another medical marijuana interim ordinance with unchanged circumstances. In doing so, they ignore this court's preliminary injunction and the TUO's stated purpose. The court's Preliminary Injunction Order was an event or circumstance other than that which prompted the enactment of the ICO in 2007. But for the preliminary injunction, Ordinance No. 181069 would still be in effect. The explicit purpose of TUO reiterates this basic idea: "the purposes of the [TUO] are . . . to protect the public safety, health, and welfare of the residents of the City . . . until such time as the Preliminary Injunction Order is reversed or permanent amendments to the Medical Marijuana Ordinance are adopted." (TUO § 1.) Because changed circumstances existed and prompted the TUO, Government Code § 65858(f) permits a second interim ordinance. Plaintiffs' Government Code arguments are rejected.

B. While the TUO is "adjudicative" in nature, not "legislative," it provides ample procedural due process protections to collectives prior to shutting them down:

1. Preliminary considerations:

Before addressing whether the TUO provides adequate due process protections, the court must determine two threshold issues: (1) is the TUO adjudicative in nature (because only then is procedural due process "due,") and (2) have Plaintiffs identified a "right" triggering due process protection (i.e., a vested right or statutorily conferred right)? Plaintiffs have shown that the TUO is adjudicative and that they have statutorily conferred rights triggering procedural due process protections:

The first preliminary consideration in deciding whether due process protection is triggered is determining whether the TUO adjudicates individual matters rather than generally affecting the population through legislation. The court in *Horn v. County of Ventura* (1979) 24 Cal.3d 605, explained the legislative acts doctrine:

> Only those governmental decisions which are *adjudicative* in nature are subject to procedural due process principles. *Legislative* action is not burdened by such requirements. . . "[T]he enactment of a general zoning ordinance by a city's voters under the initiative process, being "legislative" in character, required no prior notice and hearing, even though it might well be anticipated that the ordinance would deprive persons of significant property interests. (P. 211.) In so holding, we distinguished "adjudicatory" matters in which "the government's action affecting an individual [is] determined by facts peculiar to the individual case" from "legislative" decisions which involve the adoption of a "broad, generally applicable rule of conduct on the basis of general public policy."

Horn, supra, at 612-13 (quoting *San Diego Building Contractors Ass'n v. City Council* (1974) 13 Cal.3d 205, 212) (emphasis in original.) The City argues that the TUO is legislative stating "all zoning decisions, whatever the size of the parcel affected, are legislative. . ." (Opposition, 18:1-2.) The City argues this position without coming out and stating that the TUO constitutes a "zoning ordinance," because it cannot. The TUO was not referred to the Planning Commission, which would have been required if the TUO was a "zoning ordinance." In any event, the City cannot escape the core

consideration in deciding whether the TUO is adjudicative; namely, whether "the government's action affecting an individual [is] determined by facts peculiar to the individual case?" *Horn, supra*, at 613. Here, the TUO considers *each collective's* date of operation, management/ownership, location, criminal background and more in deciding whether to permit the collective's operation. The inquiry is very "individual" and pointedly considers "facts peculiar to the individual case." The TUO is therefore adjudicative.

The second preliminary consideration is whether Plaintiffs have identified a right triggering procedural due process protection. They have. In *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1048, the court held that a statutorily conferred benefit gives rise to procedural due process protections. Under *Ryan,* Plaintiffs need not point to a property or liberty interest to invoke due process protection; rather, they need only point to a statutorily conferred benefit in order to state a claim for due process protection:

> Although under the state due process analysis an aggrieved party need not establish a protected property interest, the claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution and the Ramirez analysis of what procedure is due. (Citations.) The "requirement of a statutorily conferred benefit limits the universe of potential due process claims: presumably not every citizen adversely affected by governmental action can assert due process rights; identification of a statutory benefit subject to deprivation is a prerequisite."

Ryan, 94 Cal.App.4th at 1069. As explained in the earlier order granting the preliminary injunction, the CUA and MMPA created statutorily conferred rights to collectively cultivate medical marijuana.[4] For these reasons, Plaintiffs' statutory right triggers procedural due process protections.

2. The TUO's procedural due process protections are sufficient:

[4] The court's order stated in pertinent part: "The CUA provided, for the first time, the right for seriously ill Californians to use marijuana for medical purposes when recommended by a physician. The MMPA permitted, for the first time, qualified patients and caregivers of qualified patients to collectively cultivate marijuana for medical purposes with freedom from prosecution. Regardless of whether the City of Los Angeles conferred a right to operate a specific type of business within its borders, the State of California permits collective cultivation by statute.

Plaintiffs argue under *Ryan* that they are entitled to notice and an opportunity to be heard before they are forced to close their doors (i.e., pre-deprivation due process.) (Motion, 12:2-18.) Because Plaintiffs have identified a right triggering procedural due process, the question becomes: what process is due, and when? The United States Supreme Court's decision in *Matthews v. Eldridge* (1976) 424 U.S. 319, is the seminal case on point. The court described the appropriate test:

> These decisions underscore the truism that "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation.) "(D)ue process is flexible and calls for such procedural protections as the particular situation demands. (Citation.) Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. (Citations.) More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> . . .
>
> A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. (Citations.)

Matthews, supra, at 331, 334-35. The private interests (the first *Matthews* factor) impacted by collectives' closures have been depicted in declarations submitted in previous motions detailing the loss of money, investments in the properties, loss of jobs, loss of medical marijuana and loss of tenancies if collectives are shut down. These concerns are repeated in the instant motion. (*See e.g.*, Decl. of Harutyunyan, ¶ 7; Decl. of Hardoon, ¶ 8; Decl. of Bekaryan, ¶ 4.) The risk of erroneous deprivation (the second *Matthews* factor) is not briefed by the parties. The court can imagine that errors might occur in the City Clerk's office causing the City to wrongfully deny an application.[5] The more procedural

[5] The court recalls an instance in the last series of litigation where the City Clerk had approved a Notice of Intent to Register for several collectives only to later withdraw that approval because it subsequently changed its policy to requiring strict compliance with Ordinance No. 181069's filing requirements.

protection offered by the City Clerk, the less likely that it will be to erroneously deny an applicant's application. When one weighs these interests against the City's interests in curtailing crime plus the increased cost of providing formal administrative hearings in order to rule on the applications (the final *Matthews* factor), the balance tips in the City's favor. The City's interest in protecting its citizenry is well documented through prior hearings in this court and in the declaration of Captain Kevin McCarthy. (*See* Decl. of McCarthy, ¶¶ 3-6, 8, 11, 14-17.) Other courts have also acknowledged the detrimental secondary effects associated with increased medical marijuana collectives. *Hill, supra*, at 731. In addition, it is easy to infer that the burden on the City Clerk's office would increase significantly if a majority of the 232 collectives who filed 2011 NOITRs required a formal hearing on the validity of their applications.

The TUO contains sufficient hearing requirements set forth in LAMC § 45.19.6.2.C.1's second paragraph. That provision states in pertinent part:

> The City Clerk's determination of eligibility, ineligibility, and priority order pursuant to this [TUO] shall be final and shall be based *exclusively* on the required forms and documentary proof submitted under penalty of perjury by the collective. . . *Any collective that disputes the City Clerk's decision* that it is ineligible to continue to be considered for preinspection and registration *shall personally deliver its notice of challenge to the City Clerk within five business days* after the date on which the City Clerk posted its determination of the collective's ineligibility on its website. . . The names of all *collectives who submit such challenges shall be provisionally added to the names of eligible collectives for the initial drawing of 100 collective names by the City Clerk. If at any time thereafter a court agrees with the City Clerk's original determination of ineligibility* of the collective, the collective shall be removed from all further participation in the original and any subsequent drawings . . . and *shall immediately cease operation* pursuant to Section 45.19.6.7.

LAMC § 45.19.6.2.C.1 (emphasis added). Plaintiffs first argue that "the TUO does not provide City officials with predetermined courses of action based upon fixed rules that eliminate discretionary review." (Reply, 3:3-4.) This argument is belied by the plain language of the TUO. The TUO not only specifically states what forms are required and what forms suffice as proof that the requirements are met

(*see* LAMC § 45.19.6.2.B.2), but it also expressly limits the City Clerk's consideration to those specific types of proof. (*See* LAMC § 45.19.6.2.C.1: "The City Clerk's determinations of eligibility, ineligibility, and priority order pursuant to this [TUO] shall be final and shall be based exclusively on the required forms and documentary proof submitted under penalty of perjury by the collective pursuant to this section."). By its express terms, the TUO leaves no room for discretion by the City Clerk.

Plaintiffs' second argument is that a predeprivation hearing is required. The *Matthews* court held that "A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. (Citations.)" *Matthews, supra*, at 331. The United States Supreme Court reiterated that holding in a slightly different light in *U.S. v. James Daniel Good Real Property* (1993) 510 U.S. 43:

> We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'"

James Daniel, supra, at 53. *James Daniel* found that predeprivation notice and hearing was too risky prior to seizing a yacht because the vessel could easily be moved out of the jurisdiction of United States courts and lost before seizure could be effected. The question then, is whether the City has articulated a valid interest in postponing the hearing and whether Plaintiffs may obtain the same relief in a post-deprivation hearing? In the recitals of the express purpose of the TUO, the City articulated its reason for expediting the review process and lottery.[6] It is not hard to posit that over one hundred formal review hearings before the lottery and preinspection occur would significantly slow the approval process and

[6] TUO page 1 states in pertinent part "[the TUO's] purpose [is] to protect qualified patients, the neighborhoods, and the larger community of Los Angeles from, among other ills, the distribution of tainted marijuana, the diversion of marijuana for non-medical uses . . . and the negative secondary harms associated with unregulated dispensaries." TUO page 2 states in pertinent part: "The City . . . must simultaneously take all lawful steps to fulfill its obligation to protect patients, neighborhoods, and the larger Los Angeles community from the new and urgent public health and safety risks resulting from the issuance of the [Preliminary Injunction Order] including but not limited to [the TUO goes on to city portions of Preliminary Injunction Order where the court acknowledges the detrimental effects of the Preliminary Injunction Order and the "good chance that a large number of collectives could open once the injunction takes effect. . ."]

allow even more unauthorized collectives to open during the interim. Moreover, the TUO offers full relief via a post-deprivation hearing, for it provides that "collectives who submit [notices of] challenges shall be provisionally added to the names of eligible collectives for the initial drawing of 100 collective names by the City Clerk." LAMC § 45.19.6.2.C.1. Therefore, even if one does not consider the City Clerk's original review a "hearing," the notice of challenge provision suspends any deprivation of rights by provisionally adding the non-compliant collective to the lottery list such that it has the same chance to be chosen as the rest of the collectives. The TUO goes even further by stating that judicial review is still available (". . . If at any time thereafter a court agrees with the City Clerk's original determination of ineligibility of the collective. . .") Surprisingly, Plaintiffs take issue with this provision and argue that it fails to compel prompt judicial review. (Reply, 4:18-23.) As the parties are well aware, there are provisions in the California Code of Civil Procedure and California Rules of Court for instituting emergency proceedings to protect one's rights (e.g., ex parte relief), which have been aptly utilized by the parties in these related cases.

Plaintiffs' final argument is that the procedures are, generically, inadequate (*See* Reply, 4:24-5:2; pg. 5, n. 9), because there are three instances in which collectives may be deemed "ineligible" and forced to shut down without notice. First, if Plaintiffs do not meet the Grandfathering Provision (LAMC § 45.19.6.2.B.2), they will be ineligible. This is really a substantive due process argument, which must be brought in a court, not to the City Clerk, and is properly rejected for reasons stated below. Second, Plaintiffs say that if they are not selected in the lottery, they must close down without a hearing. The legality of the lottery is a separate issue from any denial of due process and is discussed in detail below. Finally, Plaintiffs contend that inspections by the Department of Building and Safety ("DBS") and the cap on a particular community plan area can force a collective to shut down without proper procedural review. Not true. Any denial by the DBS based on a faulty inspection (i.e., if a collective's proposed

location is not far enough from a sensitive use), is, by law, appealable to the Board of Building and Safety Commissioners. LAMC § 98.0403.1(b)(2). Moreover, a collective can always petition the courts for mandamus review of a DBS ruling.

C. The TUO does not violate substantive due process:[7]

In *People v. Ward* (2008) 167 Cal.App.4th 252, the court summarized the requirements of substantive due process as follows:

> "Substantive due process ... deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e., the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (Citation.) "The test of legislation under the due process clause of the Constitution is that there be some evidence on the basis of which the Legislature could enact the statute. [Citations.] Accordingly, no valid objection to the constitutionality of a statute under the due process clause may be interposed 'if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose.' [Citations]." (Citation.)

Ward, supra, at 258-59. Because the TUO's purpose is to promote health, safety and welfare, there is a "strong presumption that [the TUO] must be upheld unless [its] unconstitutionality clearly, positively,

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[7] Plaintiffs' papers conflate principles of equal protection with substantive due process. (*See* MQPR Motion, 6:10-8:1.) MQPR seems to contest the choice of the September 14, 2007 date because it is "arbitrary." This is a substantive due process argument, not an equal protection argument. Equal protection would cast the argument in a different light: focusing on the disparate treatment of pre-September 14, 2007 and post-September 14, 2007 collectives. Equal protection's focus is on the classification, as the court discussed in its Preliminary Injunction Order: ""Both the federal and state constitutions guarantee equal protection of the laws to all persons. *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199. "The first prerequisite to a meritorious claim is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *Id.* at 1199. "The equal protection clause requires more of a state law than nondiscriminatory application within the class it establishes. (Citation.) It also imposes a requirement of some rationality in the nature of the class singled out." *Id.* "When a showing is made that two similarly situated groups are treated disparately, the court must then determine whether the government has a sufficient reason for distinguishing between them." *G.G. Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1111."

and unmistakably appears." *Ward, supra*, at 259. As the *Ward* court explains above the means (the law) must be rationally related to the ends (the law's purpose). A law is only invalidated when this connection is found to be arbitrary.

The TUO and its provisions are not arbitrary. First, as discussed above, the TUO aims to reduce secondary effects associated with increased numbers of collectives within the City. The overall effect of the TUO achieves this purpose: fewer collectives in the City means less crime resulting from those collectives. (*See* Decl. of McCarthy, ¶¶ 3-6, 8, 11, 14-17.) The TUO achieves its purpose by limiting the overall number of collectives within the City. The means are rationally related to the end.

Second, the various provisions of the TUO also reasonably relate to its purpose.

1. The TUO's same ownership and same location requirements are rationally related to the purpose of the TUO:

LAMC §§ 45.19.6.2.B.2.(2)-(3) require collectives to have continuously operated at the same location (save certain exceptions) since September 14, 2007, and that eligible collectives must have maintained at least one of the same owners since September 14, 2007. Plaintiffs claim these requirements have no rational relation to the TUO's purpose. They are wrong.

Logically, the more criteria used to define the population of collectives possibly eligible to operate, the fewer collectives will end up operating. For example, if the only criterion to enter the lottery was that a collective needed to be open on the date the TUO became effective, then all 232 collectives would be eligible to enter the lottery. In that case, 100 collectives would be selected in the lottery and, pending DBS approval, 100 would be open for business. Those 100 collectives would bring with them 100-collectives-worth of secondary effects. However, by requiring that collectives meet 10 criteria, fewer collectives become eligible for the lottery. If that number drops below 100 to, for example, 75 (which all then pass their DBS inspections), then those collectives only bring with them 75-collectives-worth of secondary effects. The TUO and the additional criteria have served their purpose in

limiting the total number of collectives, thus lowering crime. Plaintiffs miss this point when they argue for some direct causal link between the ownership and location provisions, on the one hand, and reduced crime on the other. (Reply 6:12-17.)

The United States Supreme Court upheld using this type of indirect criteria in *City of New Orleans v. Dukes* 427 U.S. 297 (1976). The City of New Orleans sharply limited the number of street and pushcart vendors in their French Quarter "as a means 'to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists.'" *Dukes, supra,* at 304. The major limiting criterion was that valid operators must have been operating for over eight years. The effect of applying that criterion was that there were only two operators who qualified. Thus, many operators were forced to shut down. Even though eight years of operation was not directly linked to preserving the character of the French Quarter, the Court found that it could have been indirectly linked to the purpose of the law, and it deferred to the legislature: "[W]e cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection." *Dukes, supra,* at 305.[8] Therefore, when a law's limiting criteria have the direct effect of lowering the number of businesses (as was the case in *Dukes* and is the case here), which in turn has the direct effect of serving the law's purpose, the initial limiting criteria are rationally related (albeit indirectly) to the purpose of the law. This indirect, but rational relationship, is all that is constitutionally required.

2. The TUO's use of a lottery to select collectives to move onto the DBS inspection stage is not arbitrary and the use of lotteries is permitted by analogous case law:

Plaintiffs claim that the use of a lottery to select eligible collectives to enter the DBS inspection stage is arbitrary because "it has no mechanism to eliminate non-compliant and illegal collectives." (*See* Southbay, Motion, 12:3-4.) This ignores the fact that other parts of the TUO weed out illegal and non-

[8] While the passage from *Dukes* deals with equal protection, the rational basis test and link described by the court is the same analysis used to determine whether a substantive due process violation has occurred. This analysis does not conflate equal protection with substantive due process, as MQPR's analysis does. (*See supra*, footnote 8.)

compliant collectives before the lottery ever takes place. (*See* LAMC § 45.19.6.2.B.2: stating that the requirements of same ownership, location etc., only render a collective "eligible to register and operate if it immediately complies with all provisions of State Law, is assigned a priority order pursuant to the City Clerk's drawing in accordance with 45.19.6.2.C.1. . .(i.e., the lottery provision)"; LAMC 45.19.6.2.C.1 requires, as a prerequisite to being considered for the lottery, compliance with § 45.19.6.2.B.2: "the City Clerk shall notify each collective . . . whether it has satisfied all requirements of Sections 45.19.6.2.B.2 and 45.19.6.2.C.1 and is therefore eligible or ineligible to continue to be considered for preinspection and registration, and shall hold a drawing of all eligible collectives for the purpose of selecting those collectives that shall proceed to preinspection. . .")

Plaintiffs' other argument against a lottery is that the TUO's purpose is not best served because it operates on a random basis and thus the collectives with the best track records will not necessarily be selected for DBS inspection. (*See* Reply 6:18-7:2.) However, substantive due process does not require a perfect fix; rather, as explained many times during hearings in these cases, the fix need only be rationally related to the law's purpose. *Kasler v. Lockyer* (2000) 23 Cal.4th 472, discusses the importance of focusing on the main problem and tightening up legislation in the future:

> The step-by-step approach adopted here-the list plus the add-on provision-does not violate principles of equal protection. As previously stated, both the United States Supreme Court and this court have recognized the propriety of a legislature's taking reform "'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" (Citation.) "[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (Citation.)

Kasler, supra, at 488. The same applies with respect to the TUO and its place in the City's efforts to regulate medical marijuana. The TUO is meant to deal with the main problem: the risk of proliferation of medical marijuana collectives in light of the preliminary injunction. (*See* TUO, pg. 1 and footnote 7 herein.) The TUO is not meant to be the perfect fix, and it does not need to be in order to pass

constitutional muster. All that is required of the lottery is that it rationally relate to the TUO's purpose of reducing crime. By limiting the number of collectives—whether by chance or by careful review of each collective's history of operation—fewer collectives equals less crime. The means are rationally related to the ends.[9]

3. The cap of 100 total collectives is not arbitrary:

Limiting the number of collectives to 100 is not arbitrary. As discussed above, fewer collectives means less crime, a hypothesis that is supported by Captain McCarthy's declaration. As the City's Deputy Director of Planning, Alan Bell, describes in his declaration, the City studied the appropriate number of collectives before it settled on 100. (*See* Decl. of Bell, ¶¶ 9-17.) Specifically, the City Council asked "agencies to submit reports analyzing the potential effects of implementing various caps and dispersal alternatives." (*Id.* at ¶ 8.) The Chief Legislative Analyst responded with the CLA Report, which identified caps at various levels between 70 and 200. (*Id.* at ¶ 11; Ex. 2.) The CLA Report then established a cap range between 94 and 165 for the City of Los Angeles, depending on the methodology employed. *Id.* The City Council's decision to cap the total number of collectives falls squarely within the CLA Report's range and is therefore a rational decision to which this court grants deference.

[9] Plaintiffs insinuate that a heightened level of scrutiny may apply but never argue for it. (*See* Southbay Motion, 11:16-28.) Plaintiffs seem to claim that a lottery is "not an appropriate process to establish access to necessary medicine and dictate Plaintiffs' members' right to associate." *Id.* at 11:17-19. However, Plaintiffs never claim that strict scrutiny applies under these facts. Plaintiffs cannot point to any authority which shows that access to medical marijuana is a fundamental right triggering strict scrutiny. The more complicated issue is the one involving the freedom of association. The court adequately dealt with the freedom of association claim in the Preliminary Injunction Order, where after careful review of the case law, it determined that the City's interests were sufficient to impinge on one's freedom of association: "Plaintiffs argue that by closing down their collective, the City is preventing them from freely associating with other members of that collective. Perhaps this is true. However, because the Ordinance focuses on use, a lesser level of scrutiny controls as was applied in *Ewing* and *Barnes*. Applying the rational basis test, the City has articulated a strong justification for closing down collectives—the Ordinance will "ensur[e] the health, safety and welfare of the residents of the City of Los Angeles." (Ordinance, § 45.19.6.) As noted above, the record reflects an increase in crime corresponding with an increase in collectives. The purpose of the Ordinance is sufficiently related to its restrictive provisions. The Ordinance does not violate Plaintiffs' freedom of association." (Preliminary Injunction Order, 37:1-9.) In any event, Plaintiffs fail to argue the threshold issue of how these collectives, which are entities under the law and not persons, have standing to assert freedom of association claims in the first instance. The court does not believe that a heightened level of scrutiny applies.

4. Any dilution of the lottery pool by provisional collectives that filed Notices of Challenges is not arbitrary because the provisional approval process comports with procedural due process:

Plaintiffs argue that letting provisionally approved collectives into the lottery pool violates substantive due process. Their logic is confusing. Again, any collective whose application is denied has the right to file a Notice of Challenge, which provisionally adds it to the applicant pool from which the 100 collectives are chosen. (LAMC § 45.19.6.2.C.1.)

LAMC § 45.19.6.2.C.1 is not a weed out provision; rather, by its terms it increases the total number of possible collectives in the lottery pool. Moreover, this section is necessary to comport with procedural due process requirements as discussed above. The main focus of LAMC § 45.19.6.2.C.1 is to ensure that the proper collectives are considered for continued operation. The "proper collectives" are those that meet the criteria set forth by City Council, i.e., which rationally relate to the TUO's purpose. Everything else is left to chance.

5. The "Revised Priority Provision" is not arbitrary because it provides an organizational tool for the City Clerk and DBS to ensure that they adequately review each application before deeming a collective eligible to operate:

Plaintiffs' last challenge involves what they call the "Revised Priority Program." The court assumes this refers to the portion of LAMC § 45.19.6.2.C.1 that states "the names of the eligible collectives shall be drawn, up to the maximum of 100 names, and only these collectives shall proceed to preinspection by the [DBS] in the priority order in which their names were drawn by the City Clerk." (*See* TUO, pg. 6.) Because this provision does not assign priority according to first-in-time registered collectives, Plaintiffs complain that it "is the essence of arbitrariness." (Motion, 20:17-21:1.) The "Revised Priority Program" ensures that the City Clerk and the DBS use a common method for evaluating whether collectives chosen in the lottery are eligible to operate within the city. During this process the City Clerk will look at such factors as whether a collective has "been cited for a nuisance or

pubic safety violation of State or local law." (LAMC § 45.19.6.2.B.2.) The DBS will look at whether the collective comports with building requirements, which includes requirements to further public safety. (*See* Ordinance No. 181069, pg. 11 "Conditions of Operation," which include requirements that collectives must maintain closed circuit television systems and burglar alarms. By using a common method, the TUO ensures an accurate method for each collective to be adequately inspected. This promotes the TUO's purpose. While it may not be the "fairest" way to prioritize collectives, as discussed above, it need not be.

D. The TUO's provisions do not constitute a taking of vested rights:

Plaintiffs assert two main takings arguments and an additional hybrid argument that combines principles of takings and preemption. First, they say that Article I § 19 of the California Constitution prohibits closing collectives without providing just compensation. (*See* Southbay Motion, 16:6-17:11.) Next, they claim that the City is estopped from closing down collectives that it has already acknowledged are in compliance with the City's medical marijuana laws, on which those collectives have already relied to their detriment. (*See* PVT Motion, 7:15-9:2.)

1. Article I § 19 of the California Constitution does not require just compensation before closing down collectives:

Article I § 19 of the California Constitution prohibits the taking of vested property rights without just compensation:

> Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

Plaintiffs argue that the TUO operates as a regulatory taking under *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104. *Penn Central* is not helpful to Plaintiffs. The *Penn Central*

court explained regulatory takings and the proper considerations in determining whether just compensation is due:

> [W]hether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it *depends largely "upon the particular circumstances [in that] case."* (Citations.) . . . In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. *The economic impact of the regulation on the claimant* and, particularly, *the extent to which the regulation has interfered with distinct investment-backed expectations are*, of course, relevant considerations. (Citation.) So, too, is *the character of the governmental action.* A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, (citation), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. . . *[The] government may execute laws or programs that adversely affect recognized economic values. . . [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.*

Penn Central, supra, at 124-25 (emphasis added.) While Plaintiffs may be able to show a loss of investment monies by shutting their doors (one factor),[10] they offer no evidence to show interference with distinct investment-backed expectations (another factor.) This is due to the legal requirement that collectives are prohibited from operating for profit. The only "expectations" are the return of money already expended in starting up and maintaining a collective (i.e., paying the employees, property tax or leases, etc.) By law, collectives cannot claim an "expectation" in making profits. This goes to the final factor: the government's purpose behind the law. As *Penn Central* makes clear, destruction of real property interests is permitted when the law's purpose is to protect the "health, safety, morals, or general welfare" of the public. Therefore, not only do Plaintiffs lack a significant investment-backed

[10] Plaintiffs fail to provide documentation showing that they have not recouped investment costs like tax certificate fees and other costs from operation of their collectives to date, nor have they alleged that they have lost money since opening.

expectation in operating their collectives, the City's interest in protecting its citizens prevails when weighed against Plaintiffs' cognizable property interests. The balance tips heavily in the City's favor.

2. Plaintiffs' estoppel argument fails because they cannot show that they relied on any of the City's representations that the continued operation of collectives would be permitted;

Plaintiffs' second takings argument is based on estoppel. Plaintiffs cite *Monterey Sand Company, Inc. v. California Coastal Commission* (1987) 191 Cal.App.3d 169, where the court found estoppel based on the petitioner's vested rights to continue operation of a scrap metal refining business without certain federally required permits. *Monterey* held that "The foundation of the vested rights doctrine is estoppel which protects a party that detrimentally relies on the promises of government." *Monterey, supra*, at 177. The facts in *Monterey* are distinguishable from those in the instant matter:

> [T]here was evidence that, at the time the state negotiated the 1968 settlement and lease, the state was aware that a permit from the Army Corps of Engineers might be required. Nevertheless, the state did not require Monterey Sand to obtain such a permit and allowed it to continue with its sand extraction activities. Then, years later the regional commission relied upon the failure to obtain this additional permit as a basis for denying Monterey Sand's exemption claim. In these circumstances, we have little difficulty in concluding that the state's acquiescence in Monterey Sand's continued extraction activities with knowledge of the possible federal permit requirement estops the state from later relying on the lack of such a permit to assert coastal act permit jurisdiction over Monterey Sand. We hold, therefore, that Monterey Sand's acquisition of an after-the-fact permit in the circumstances of this case did not defeat its assertion of a vested right to continue its existing sand extraction activities free from jurisdiction under the two coastal acts.

Monterey, supra, at 178. Plaintiffs' argument largely presupposes that they applied to open collectives, received approval to do so, and spent large amounts of money in reliance on the City's approval to open collectives only to be later told to shut their doors. This is not how it happened. The PVT collectives have all been operating continuously since at least September 14, 2007. (PVT Motion, 1:25-26.) Before then, the City had no approval process for opening a collective. While the state laws permitted medical marijuana collective cultivation, the organizational procedures for such a venture had yet to be

considered, or formulated, by the City. Unlike the permit process in *Monterey*, there was no approval process for opening a collective in Los Angeles. Even though Plaintiffs invoke the ICO (Motion, 8:12-19), they fail to show that they opened their collectives or incurred a financial hardship by relying on the ICO. Indeed, they cannot make such showing because to be on the ICO "approved" list, the collectives must have been operating before the ICO took effect. Therefore, to say that the PVT collectives "relied" on the City's representations is incorrect. Plaintiffs have failed to show reliance; their estoppel claim fails.

3. Plaintiffs' final vested rights theory, based on preemption, fails because Health and Safety Code §§ 11362.83 11362.768(f) expressly authorize local regulation of collectives:

While the MMPA confers a statutory right to operate a collective in California, the State has since revised the laws curtailing that right and explaining the limits—or lack thereof—on the local regulation of collectives. (*See* Health and Safety Code §§ 11362.83 and 11362.768.)[11] Plaintiffs believe that since they received vested rights to operate medical marijuana collectives under the MMPA, local regulations that prohibit collective cultivation are "incongruous" with the CUA and MMPA. *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 754. (Reply, 11:8-11.)

Health and Safety Code §§ 11362.768(f)-(g) clearly permit local regulation of medical marijuana collectives, regardless of whether those regulations were enacted before or after January 1, 2011. This means that the City had the power to stop medical marijuana collectives from opening. The same argument was rejected during earlier hearings in this matter. Now this "enumerated use" argument

[11] Health and Safety Code § 11362.83 was part of the MMPA and the court has already addressed this section in its earlier Preliminary Injunction Order. This is the portion of the code that states, "nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." *Hill, supra*, discussed the January 1, 2011 amendments to the Health and Safety Code (§ 11362.768(f) and (g)) that state in pertinent part: "(f) nothing in this section shall prohibit a city, county or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana . . . collective . . . (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana . . . collective." *Hill, supra*, at 868.

has new validity because of the express legislative intent not give the MMPA preemptive force over local ordinances.

As the City aptly explains in its opposition, the LAMC has only permitted medical marijuana collectives to operate within the City in accordance with Ordinance No. 181069. (*See* Opposition, 30:3-19.) If a collective was not authorized to operate under 181069, then it remained prohibited from operating because it was not an enumerated use within the City. (*See* LAMC § 12.21.A.1.a.)[12] Therefore, no collective may claim a "vested right" created outside the parameters of 181069 (i.e., outside the time frame when 181069 was valid and effective). In order to be considered eligible to operate under 181069, a collective must have been operating on or before September 14, 2007, and it must have passed a DBS inspection.[13] None of the moving Plaintiffs has shown that they meet both criteria; thus, none can show a vested right under this hybrid theory.

E. Plaintiffs' remaining arguments fail:

1. Plaintiffs state no claim for an equal protection argument, but even if they had, case law permits classifications based on grandfathering:

Well settled case law permits classifications based on grandfathering. As the court explained in its Preliminary Injunction Order, the United State Supreme Court approved distinguishing between similarly situated businesses based on their original dates of operation, also known as grandfathering. In 1972, the City of New Orleans banned many of the peddlers and hawkers, but adopted a "grandfather provision" that allowed peddlers who had registered before January 1972 to stay in existence:

[12] The only building uses allowed within the City of Los Angeles are those expressly permitted by the LAMC. (*See* Defendant's RJN, Ex. 11; LAMC § 12.21.A.1.a.) A medical marijuana collective is not an enumerated use in any zone within the city (*See* Defendant's RJN, Exs. 9-16) and is only a permitted use when operated in full compliance with the City's medical marijuana laws (i.e., Ordinance No. 181069 and the TUO.)

[13] Ordinance No. 181069 did permit collectives to stay open pending the results of their DBS inspection, but that permission could not be construed as a vested right because it was expressly conditioned on passing the DBS inspection.

> It is suggested that the "grandfather provision," allowing the continued operation of some vendors was a totally arbitrary and irrational method of achieving the city's purpose. But rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. . . We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.

Dukes, supra, at 305.

2. Plaintiffs' privacy argument fails:

MQPR renews its privacy argument and claims the TUO does not resolve the problems identified in the Preliminary Injunction Order. MQPR is wrong. (*See* MQPR Motion, 11:10-12:10.) The Preliminary Injunction Order only found fault with the requirement that collectives maintain records pursuant to Section 45.19.6.4, which required records of: "(3) the full name, address, and telephone number(s) of all patient members to whom the collective provides medical marijuana." The TUO changed this requirement and now the City requires a warrant, subpoena, or court order before accessing "private medical records." Patient members now have the option of providing either their medical marijuana identification card or their government issued identification, and the collectives must notify members of this option (LAMC § 45.19.6.4.A-C). There is no requirement that collectives maintain records of patient member's contact information.

3. Plaintiffs' concerns over spatial limitations of the Common Areas do not render the TUO unconstitutional:

The TUO restricts collectives to commercial or industrial areas with a 1,000 foot buffer from schools, public parks, public libraries, religious institutions, licensed child care facilities, youth centers, substance abuse rehabilitation centers, and any other collectives. (LAMC § 45.19.6.3.A.2.(A).)[14] In addition, collectives cannot operate next door, across the street, or share a corner to any residence.

[14] This provision appears in the original Ordinance (No. 181069), and is unaltered by the TUO's amendments to certain provisions of LAMC.

(LAMC § 45.19.6.3.A.2.(B).) This effectively restricts collectives selected in the lottery under the amended ordinance to operating within anywhere from 10,448 to 13,366 acres of land in the City of Los Angeles, 33-45% of the citywide total acreage. (*See* Decl. of Bell, Ex. 3 Pg. 33.) These limitations are compounded by the cap on the number of collectives allowed to operate within a single Community Plan Area as outlined in the TUO.

A city may restrict a type of business or another entity to a certain area, in exercise of its police power, regardless of the fact that "practically none" of the land is actually available to occupy or may not be "commercially viable" to operate in. *Renton v. Playtime Theaters* (1986) 475 U.S. 41, 53-4. In *Renton*, the city passed an ordinance restricting adult movie theaters, only allowing them to operate within 520 specified acres of the city. This constituted a little more than 5% of the city's total acreage. *Id.* at 53. Plaintiff, an adult movie theater, asserted that 520 acres were not actually "available" because there was no undeveloped land for sale or lease and no developed property suitable for an adult movie theater. *Id.* The district court upheld the city ordinance and found 520 acres to be an ample amount of space within the city for operation of an adult movie theater. The United States Supreme Court held that the fact "that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Id.* at 54. Only a "reasonable opportunity to open and operate" is required, and such had been afforded to adult movie theaters in the city. (*Id., see also City of National v. Weiner*, (1992) 3 Cal.4th 832 : "The Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses.").

There are no constitutional issues associated with the City's spatial limitations for collectives. The City asserts that substantial acreage is "reasonably available" for collectives to locate. (Opposition, 25: 1-2.) According to the Declaration of Alan Bell, anywhere from 10,448 to 13,366 acres are

available, which amounts to 33-45% of the City's total acreage. In *Renton*, making available approximately 5% of the city's acreage for an adult movie theater constituted ample space. It follows that 33-45% of citywide acreage is also more than enough. *Renton* instructs that the City need not provide suitable locations that are easily available within that acreage. As long as physical space is available for a party to compete in the marketplace it may be enough that the City provides only a "reasonable opportunity to open and operate."

Plaintiffs assert that the DBS preinspection process places further restrictions on the City's spatial limitations. (Reply, 8: 15-19.) Unlike in *Renton*, where the ordinance placed no cap on the number of adult movie theaters allowed to operate within the area specified, there is a cap on the number of collectives allowed to operate within the City and within each Community Plan Area. Thus, Plaintiffs insist that unlike in *Renton*, our case presents a density issue. Because the TUO places caps on Common Plan Areas and imposes distance requirements between collectives, it is possible that a Common Plan area will meet its cap and one or more collectives drawn in the lottery will have no room to operate because their area is already saturated. Plaintiffs say there would be no way to know whether a collective had secured a certain location prior to applying with DBS, and as a result a subsequently applying collective's application would be denied because the area's density limits would have been reached.

The City submitted a letter dated June 17, 2011, answering Plaintiffs' concerns. The letter states in pertinent part:

> [C]ollectives will be able to learn and react to their competitors' proposed locations throughout the 30 day preinspection application period. Proposed locations will be identified and updated daily, with public access to this information at the Department of Building & Safety's ("DBS") downtown public counter and on the DBS website. Collectives may take the full 30 days to resubmit proposed locations to respond to the locations chosen by their competitors.

(*See* June 17, 2011 Letter from Colleen Courtney.) Thus, collectives will know of the possible locations of other approved collectives prior to submitting their DBS inspection applications. Moreover, a collective will not be penalized for moving to a new location in the event that the density limit in its area has been met. The City tacitly is conceding that it may not deny a collective's application based on its failure to operate continually in the same location under these circumstances. The density limits of Common Plan Areas in the instant case do not make *Renton* inapplicable, because the City has offered a solution: collectives will be allowed to change locations once the DBS has approved the maximum number of collectives for a given area. Plaintiffs' argument regarding spatial limitations fails.

F. Note on federal preemption:

Neither side argued that the TUO is preempted by federal law, to wit, the Controlled Substances Act ("CSA") (21 U.S.C. §§812, 841(a)(1), 844. *See also United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 490.) Then on October 4, 2011, the Court of Appeal decided *Pack v. Superior Court* (2011) ___ Cal.App.4th ___, and one of the attorneys representing certain Plaintiffs requested that the court take judicial notice of the decision and asked for leave to submit additional briefing. While the court is aware of the opinion, it denies the latter request. The *Pack* court held that Long Beach's permit provisions and lottery system are federally preempted. This could have a profound impact on the TUO, which bears more than a passing resemblance to the Long Beach medical marijuana ordinance. As Division Three of the Court of Appeal acknowledges, other opinions hold that California's medical marijuana statutes are not preempted, at least insofar as they seek only to decriminalize certain conduct for the purposes of state law. (*See Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 757; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825-26.) The law appears to be unsettled now, and this court sees no benefit or present need to add to the fray with another ruling. It is better to wait until *Pack* becomes final or until our Supreme Court decides to weigh in on the federal preemption issue.

III. DISPOSITION:

If the court finds the TUO constitutionally sound and DENIES Plaintiffs' motions in their entirety.

IT IS SO ORDERED.

DATED: October 14, 2011

Anthony J. Mohr

Judge of the Los Angeles Superior Court

Attachment 3

Filed 10/4/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

RYAN PACK et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CITY OF LONG BEACH, Real Party in Interest.	B228781 (Los Angeles County Super. Ct. Nos. NC055010/NC055053

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

Matthew S. Pappas for Petitioners.

Scott Michelman, Michael T. Risher and M. Allen Hopper (N. California), Peter Bibring (S. California), and David Blair-Loy (San Diego & Imperial Counties) for American Civil Liberties Union as Amici Curiae on behalf of Petitioners.

Daniel Abrahamson, Theshia Naidoo and Tamar Todd for Drug Policy Alliance as Amicus Curiae on behalf of Petitioners.

Joseph D. Elford for Americans for Safe Access as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Robert E. Shannon, City Attorney (Long Beach), Monte H. Machit, Principal Deputy City attorney, Theodore B. Zinger and Cristyl A. Meyers, Deputy City Attorneys, for Real Party in Interest.

Carmen A. Trutanich, City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, and Heather Aubry, Deputy City Attorney, for Los Angeles City Attorney's Office as Amicus Curiae on behalf of Real Party in Interest.

William James Murphy, County Counsel (Tehama), and Arthur J. Wylene, Assistant County Counsel, for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Real Party in Interest.

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

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

STATUTORY AND REGULATORY BACKGROUND

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

1. *The Federal CSA*

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

The federal CSA includes marijuana[1] on schedule I, the schedule of controlled substances which are subject to the most restrictions. (21 U.S.C. § 812.) Drugs on other schedules may be dispensed and prescribed for medical use; drugs on schedule I may not. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at p. 491.) The inclusion of marijuana on schedule I reflects a government determination

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

that "marijuana has 'no currently accepted medical use' at all." (*Ibid.*) Therefore, the federal CSA makes it illegal to manufacture, distribute, or possess marijuana. (21 U.S.C. §§ 841, 844.) It is also illegal, under the federal CSA, to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance. (21 U.S.C. § 856(a)(1).) The only exception to these prohibitions is the possession and use of marijuana in federally-approved research projects. (*United States v. Oakland Cannabis Buyers' Cooperative, supra,* 532 U.S. at pp. 489-490.)

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

2. *The CUA*

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

The CUA added section 11362.5 to the Health and Safety Code. Its purposes include: (1) "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief"; (2) "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction"; and (3) "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Health & Saf. Code, § 11362.5, subds. (b)(1)(A), (b)(1)(B) & (b)(1)(C).)

To achieve these ends, the CUA provides, "Section 11357, relating to the possession of marijuana,[2] and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver,[3] who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf. Code, § 11362.5,

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

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

subd. (d).) As noted above, this statute, which simply decriminalizes for the purposes of state law certain conduct related to medical marijuana, is not preempted by the CSA. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757.)

3. *The MMPA*

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

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

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[4] Although the MMPA added examples to the definition of "primary caregiver," it retained the restrictive definition set forth in the CUA. (Health & Saf. Code, § 11362.7, subd. (d).) Thus, a person who supplies marijuana to a qualified patient is not an immune primary caregiver under the CUA and MMPA unless the person consistently provided caregiving, *independent of assistance in taking marijuana* at or before the time the person assumed responsibility for assisting the patient with medical marijuana. In short, a person is not a primary caregiver simply by being designated as such and providing the patient with medical marijuana. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1007.)

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

Third, the MMPA set limits on the amount of medical marijuana which may be possessed. Health & Safety Code section 11362.77 provides that, unless a doctor specifically recommends more[6] (Health & Saf. Code, § 11362.77, subd. (b)), a qualified patient or primary caregiver "may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified

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

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

patient."[7] (Health & Saf. Code, § 11362.77, subd. (a).) This provision establishes a "safe harbor" from arrest and prosecution for the possession of no more than these set amounts.[8] (Health & Saf. Code, § 11362.77, subd. (f).)

Fourth, the MMPA decriminalizes the collective or cooperative cultivation of marijuana, providing that qualified patients and their primary caregivers "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under [the same provisions identifying conduct otherwise decriminalized under the MMPA]." (Health & Saf. Code, § 11362.775.)

Two other provisions of the MMPA are relevant to our analysis. First, the MMPA provides for local regulation, stating, "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article."[9] (Health & Saf. Code, § 11362.83.) This has been interpreted to permit cities

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

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

[9] The Legislature has passed, and the Governor has approved, an amendment to this section. The statute amends this section to read as follows: "Nothing in this article

and counties to impose greater restrictions on medical marijuana collectives than those imposed by the MMPA. (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 867-868.)

Second, in 2010, the Legislature amended the MMPA to impose restrictions on the location of medical marijuana collectives. Health & Safety Code section 11362.768, subdivision (b), provides that no "medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school." Subdivision (c) restricts the operation of subdivision (b) to only those providers that have a "storefront or mobile retail outlet which ordinarily requires a business license."[10] In other words, private collectives are immune from this requirement. The section goes on to provide, "Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of

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shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective. (b) The civil and criminal enforcement of local ordinances described in subdivision (a). (c) Enacting other laws consistent with this article." (Stats. 2011, ch. 196, § 1.) While this new statute clarifies the state's position regarding local regulation of medical marijuana collectives, it has no effect on our federal preemption analysis.

[10] The subdivision provides, in full, "This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a business license." Again, the MMPA speaks of collectives "authorized by law to possess, cultivate, or distribute medical marijuana," when, in fact, the operative part of the MMPA simply provides that qualified patients and their caregivers shall not "be subject to state criminal sanctions" under enumerated statutes for their collective medical marijuana activities. (Health & Saf. Code, § 11362.775.)

a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider." (Health & Saf. Code, section 11362.768, subd. (f).) Moreover, the subdivision provides that it shall not preempt local ordinances adopted prior to January 1, 2011 that regulate the locations or establishments of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers. (Health & Saf. Code, section 11362.768, subd. (g).)

In 2008, the Attorney General issued Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Guidelines). (<http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf> [as of Oct. 3, 2011].) The Guidelines addressed several issues pertaining to medical marijuana, including taxation,[11] federal preemption,[12] and arrest under federal law.[13] The Guidelines also discussed collectives, cooperatives, and dispensaries, indicating that they should acquire medical marijuana only from their members, and distribute it

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

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

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

only among their members. (Guidelines, *supra*, at p. 10.) The Guidelines added the following, regarding dispensaries: "Although medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives.[14] [Citation.] It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines [above] are likely operating outside the protections of [the CUA] and the MMP[A], and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash 'donations' – are likely unlawful." (Guidelines, *supra*, at p. 11.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The City's Ordinance*

In 2010, the City adopted an ordinance (Long Beach Ordinance No. 10-0007) intended to comprehensively regulate medical marijuana collectives within the City. The ordinance defines a collective as an association of four or more qualified patients and their primary caregivers who associate at a location within the City to collectively

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

or cooperatively cultivate medical marijuana. (Long Beach Mun. Code, ch. 5.87, § 5.87.015, subd. J.)

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

In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with certain requirements. (Long Beach Mun. Code, ch. 5.87, § 5.87.040.) These include the installation of sound insulation (*id.* at subd. G),

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

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

odor absorbing ventilation (*id.* at subd. H), closed-circuit television monitoring[17] (*id.* at subd. I), and centrally-monitored fire and burglar alarm systems (*id.* at subd. J). Collectives must also agree that representative samples of the medical marijuana they distribute will have been analyzed by an independent laboratory to ensure that it is free of pesticides and contaminants. (*Id.* at subd. T.)

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

The permitted collective system is the exclusive means of collective cultivation of medical marijuana in Long Beach.[18] The ordinance provides that it is "unlawful for

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[17] "The camera and recording system must be of adequate quality, color rendition and resolution to allow the ready identification of an individual on or adjacent to the Property. The recordings shall be maintained at the Property for a period of not less than thirty (30) days." (Long Beach Mun. Code, ch. 5.87, § 5.87.040, subd. I.) According to an amicus curiae brief filed by the American Civil Liberties Union (ACLU) and other entities, the ordinance was amended in 2011 to add a requirement that full-time video monitoring of a collective be made accessible to the Long Beach Police Department in real time without a warrant, court order, or other authorization.

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

any person to cause, permit or engage in the cultivation, possession, distribution, exchange or giving away of marijuana for medical or non medical purposes except as provided in this Chapter, and pursuant to any and all other applicable local and state law."[19] (Long Beach Mun. Code, ch. 5.87, § 5.87.090, subd. A.) The ordinance further provides that no person shall be a member of more than one collective "fully permitted in accordance with this Chapter."[20] (*Id.* at subd. N.) Violations of the ordinance are misdemeanors, as well as enjoinable nuisances per se. (Long Beach Mun. Code, ch. 5.87, § 5.87.100.)

The City set a timeline for its initial permit lottery. Applications were to be accepted between June 1 and June 18, 2010; the City was to review the applications for

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Long Beach will be large dispensaries that require patients to complete a form summarily designating the business owner as their primary caregiver and offer marijuana in exchange for cash "donations" – the precise type of dispensary believed by the Attorney General likely to be in violation of California law.

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

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

compliance from June 21 through September 16, 2010; the lottery would be held on September 20, 2010; and site inspections, public notice and a hearing process would occur between September 21, 2010 and December 15, 2010. However, the City indicated that any collective that did not comply with the ordinance must cease operations by August 29, 2010.

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

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

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

On September 24, 2010, the City opposed the request for preliminary injunction, arguing that the ordinance was not preempted because it did not affect those responsible

for enforcing the federal CSA. The City also raised an unclean hands argument, briefly suggesting that plaintiffs could not complain of any harm because their collectives "opened up for business" in an "unpermitted illegal manner."

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

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

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

On November 15, 2010, plaintiffs filed the instant petition for writ of mandate, challenging the trial court's denial of a preliminary injunction. We issued an order to show cause, seeking briefing on the federal preemption issue. We invited amicus briefing from various entities on both sides of the issue, including other cities considering or enacting medical marijuana collective ordinances, the U.S. Attorneys for

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

California districts, the ACLU, and organizations advocating the legalization of marijuana. We received amicus briefing from: (1) the City of Los Angeles; (2) the California State Association of Counties and League of California Cities; and (3) the ACLU, ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties, Drug Policy Alliance, and Americans for Safe Access. Although the U.S. Attorneys declined to file amicus briefs, we have taken judicial notice of letters and memoranda which illuminate the federal government's position regarding the enforcement of the CSA with respect to medical marijuana collectives.

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

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

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

ISSUE PRESENTED

The sole issue presented by this writ proceeding[23] is whether the City's ordinance is preempted by the federal CSA. We conclude that it is, in part, and therefore grant the plaintiffs' petition.

DISCUSSION

1. *Standard of Review*

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

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

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

[24] That City is a charter city makes no difference to our analysis. As a charter city, City's ordinances relating to matters which are *purely municipal affairs* prevail over state laws on the same subject. (*Home Gardens Sanitary Dist. v. City of Corona* (2002) 96 Cal.App.4th 87, 93). The issue, however, is one of conflict with *federal law* on

2. *Law of Preemption*

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

"There is a presumption against federal preemption in those areas traditionally regulated by the states." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938.) Regulation of medical practices and state criminal sanctions for drug possession are historically matters of state police power. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 757.) More importantly, a local government's land use regulation is an area over which local governments traditionally have control. (*City of Claremont v. Kruse* (2009)

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a matter on which the federal government has chosen to act in the national interest. Indeed, the United States Supreme Court has held that the federal CSA applies to marijuana cultivated and used *solely intrastate*, as a proper exercise of Congress's authority under the Commerce Clause. (*Gonzales v. Raich, supra,* 545 U.S. at pp. 29-30.) While City suggests that its ordinance relates to the purely municipal matters of zoning and land use, it is clear that the regulation of medical marijuana is a matter of state and, indeed, national interest, and the ordinance is thus not concerned *solely* with municipal affairs.

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

177 Cal.App.4th 1153, 1169.) Thus, we assume the presumption against federal preemption applies in this instance. Therefore, " '[w]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 938.)

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

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

It is undisputed that this provision eliminates any possibility of the federal CSA preempting a state statute (or local ordinance) under the principles of field preemption or express preemption (*e.g., Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758). It is also undisputed that, under this provision, the federal CSA would preempt any state or local law which fails the test for conflict preemption. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 823.) One California court has concluded that the federal CSA's preemption language bars the consideration of obstacle preemption. (*Id.* at pp. 823-825.) Another court, without specifically addressing the conflicting authority, concluded that the federal CSA preempts conflicting laws under both conflict and obstacle preemption. (*Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 758.)

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

Indeed, the Supreme Court has cautioned against drawing a practical distinction between these two types of preemption. "This Court, when describing conflict pre-emption, has spoken of pre-empting state law that 'under the circumstances of th[e] particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' – whether that 'obstacle' goes by the name of 'conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,' or the like. [Citations.] The Court has not previously driven a legal wedge – only a terminological one – between 'conflicts' that

prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are 'nullified' by the Supremacy Clause, [citations], and it has assumed that Congress would not want either kind of conflict. The Court has thus refused to read general 'saving' provisions to tolerate actual conflict *both* in cases involving impossibility, [citation], *and* in 'frustration-of-purpose' cases, [citations]. We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable system-wide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of 'conflict' (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or . . . both." (*Geier v. American Honda Motor Company, Inc.* (2000) 529 U.S. 861, 873-874.)

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

a. *Conflict Preemption*

Conflict or "impossibility" preemption "is a demanding defense." (*Wyeth v. Levine, supra,* 555 U.S. at p. ___ [129 S.Ct. at p. 1199].) It requires establishing that it is impossible to comply with the requirements of both laws. (*Ibid.*) At first blush, no impossibility preemption is established by this case. While the federal CSA prohibits

manufacture, distribution, and possession of marijuana, the City ordinance does not *require* any such acts. (See *Qualified Patients Assn. v. City of Anaheim, supra,* 187 Cal.App.4th at p. 759 [stating that a "claim of positive conflict might gain more traction if the [City] *required* . . . individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law"].) Since a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict preemption. (Cf. *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 944 [no conflict preemption because it is not a physical impossibility to simultaneously comply with both a federal law allowing conduct and a state law prohibiting it].)

We are, however, troubled by one provision of the City's ordinance, the provision requiring that permitted collectives have samples of their medical marijuana analyzed by an independent laboratory to ensure that it is free from pesticides and contaminants. (Long Beach Mun. Code, ch. 5.87, § 5.87.040, subd. T.) We question how an otherwise permitted collective can comply with this provision without violating the federal CSA's prohibition on distributing marijuana.[26] In other words, this provision appears to *require* that certain individuals violate the federal CSA. In an amicus brief in support of the City, the California State Association of Counties and League of California Cities argue that the only individuals being required to distribute marijuana

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

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

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

b. *Obstacle Preemption*

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

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

For this reason, we disagree with our colleagues who, in two other appellate opinions, have implied that medical marijuana laws might not pose an obstacle to the

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[stating "[f]ostering the cultivation of marijuana in California, regardless of its intended purpose, violates federal law"].) We are not required to reach the issue.

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

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

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

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

The City's ordinance, however, goes beyond decriminalization into authorization. Upon payment of a fee, and successful participation in a lottery, it provides *permits* to operate medical marijuana collectives. It then imposes an annual fee for their continued operation in the City. In other words, the City determines which

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

collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives. A law which "authorizes [individuals] to engage in conduct that the federal Act forbids . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " and is therefore preempted. (*Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board* (1984) 467 U.S. 461, 478.)

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

Additionally, we have taken judicial notice of letters which set forth the position of the U.S. Attorney General on the purposes of the CSA and the issue of obstacle preemption. While we do not simply defer to its position, we place "some weight" on it. (See *Geier v. American Honda Motor Company, Inc., supra,* 529 U.S. at p. 883 [placing "some weight" on Department of Transportation's interpretation of its own regulations and whether obstacle preemption would apply].) On February 1, 2011, the U.S. Attorney for the Northern District of California sent a letter to the Oakland City Attorney relating to that city's consideration of a licensing scheme for medical

marijuana cultivation and manufacturing. The letter explained, "Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities." (U.S. Attorney Melinda Haag, letter to Oakland City Attorney John A. Russo, February 1, 2011.) It further stated, "The Department is concerned about the Oakland Ordinance's creation of a licensing scheme that permits large-scale industrial marijuana cultivation and manufacturing as it authorizes conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances." (*Ibid.*)

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

license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts.[31] We agree.

The California State Association of Counties and League of California Cities suggest that, although the City's ordinance is phrased in the language of what it will "permit," it is, in truth, merely an identification of those collectives against which it will not bring violation proceedings, and is therefore akin to the CUA as a limited decriminalization. The ordinance cannot be read in that manner. First and foremost, it is the *possession of the permit itself*, not any particular conduct, which exempts a collective from violation proceedings. That is to say, the ordinance does not indicate that collectives complying with a list of requirements are allowed (or, perhaps, "not disallowed") to operate in the City, which then simply issues permits to identify the collectives in compliance. In this regard, the City's permit scheme is distinguishable from the voluntary identification card scheme set forth in the MMPA. A voluntary identification card identifies the holder as someone California has elected to exempt from California's sanctions for marijuana possession. (*County of San Diego v. San Diego NORML, supra,* 165 Cal.App.4th at pp. 825-826.) One not possessing an identification card, but nonetheless meeting the requirements of the CUA, is also immune from those criminal sanctions. The City's permit system, however, provides that collectives with permits may collectively cultivate marijuana within the City *and*

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

those without permits may not. The City's permit is nothing less than an *authorization* to collectively cultivate.

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

c. *Severability*

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

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

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

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

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

DISPOSITION

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

CERTIFIED FOR PUBLICATION

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.

Attachment 4

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

December 21, 2011

The Honorable Darrell Steinberg
President Pro-Tempore
State Capitol, Room 205
Sacramento, CA 95814

The Honorable John A. Perez
Speaker of the Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0046

Re: Medical Marijuana Legislation

Dear Senate Pro-Tempore Steinberg and Speaker Perez:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises and others. My Office recently concluded a long series of meetings with representatives across the state from law enforcement, cities, counties, and the patient and civil rights communities. The primary purpose of the meetings was to assess whether we could clarify the medical marijuana guidelines that my predecessor published in 2008 in order to stop the abuses. These conversations, and the recent unilateral federal enforcement actions, reaffirmed that the facts today are far more complicated than was the case in 2008. I have come to recognize that non-binding guidelines will not solve our problems – state law itself needs to be reformed, simplified, and improved to better explain to law enforcement and patients alike how, when, and where individuals may cultivate and obtain physician-recommended marijuana. In short, it is time for real solutions, not half-measures.

I am writing to identify some unsettled questions of law and policy in the areas of cultivation and distribution of physician-recommended marijuana that I believe are suitable for legislative treatment. Before I get into the substance, however, I want to highlight two important legal boundaries to keep in mind when drafting legislation.

First, the Court of Appeal for the Second Appellate District recently ruled in *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070 that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts and are therefore preempted by the federal Controlled Substances Act. Although the parties involved in that case have sought review of the decision in the California Supreme Court, for now it is binding law. As mentioned below, the decision in *Pack* may limit the ways in which the State can regulate dispensaries and related activities.

Second, because the Compassionate Use Act (Proposition 215) was adopted as an initiative statute, legislative efforts to address some of the issues surrounding medical marijuana might be limited by article II, section 10(c) of the Constitution, which generally prohibits the Legislature from amending initiatives, or changing their scope or effect, without voter approval. In simple terms, this means that the core right of qualified patients to cultivate and possess marijuana cannot be abridged. But, as long as new laws do not "undo what the people have done" through Proposition 215, we believe that the Legislature remains free to address many issues, including dispensaries, collective cultivation, zoning, and other issues of concern to cities and counties unrelated to the core rights created in the Compassionate Use Act.

With this context, the following are significant issues that I believe require clarification in statute in order to provide certainty in the law:

(1) Defining the contours of the right to collective and cooperative cultivation

Section 11362.775 of the Health and Safety Code recognized a group cultivation right and is the source of what have come to be known as "dispensaries." It provides, in full:

> 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.

There are significant unresolved legal questions regarding the meaning of this statute. Strict constructionists argue that the plain wording of the law only provides immunity to prosecution for those who "associate" in order to "collectively or cooperatively . . . cultivate" marijuana, and that any interpretation under which group members are not involved in physical cultivation is too broad. Others read section 11362.775 expansively to permit large-scale cultivation and transportation of marijuana, memberships in multiple collectives, and the sale of marijuana through dispensaries. These divergent viewpoints highlight the statute's ambiguity. Without a substantive change to existing law, these irreconcilable interpretations of the law, and the resulting uncertainty for law enforcement and seriously ill patients, will persist. By articulating the scope of the collective and cooperative cultivation right, the Legislature will help law enforcement and others ensure lawful, consistent and safe access to medical marijuana.

(2) Dispensaries

The term "dispensary" is not found in Proposition 215 and is not defined in the Medical Marijuana Program Act. It generally refers to any group that is "dispensing," or distributing, medical marijuana grown by one or more of its members to other members of the enterprise through a commercial storefront.

Many city, county, and law enforcement leaders have told us they are concerned about the proliferation of dispensaries, both storefront and mobile, and the impact they can have on public safety and quality of life. Rather than confront these difficult issues, many cities are opting to simply ban dispensaries, which has obvious impacts on the availability of medicine to patients in those communities. Here, the Legislature could weigh in with rules about hours, locations, audits, security, employee background checks, zoning, compensation, and whether sales of marijuana are permissible.

As noted, however, the *Pack* decision suggests that if the State goes too far in regulating medical marijuana enterprises (by permitting them, requiring license or registration fees, or calling for mandatory testing of marijuana), the law might be preempted by the Controlled Substances Act. We also cannot predict how the federal government will react to legislation regulating (and thus allowing) large scale medical marijuana cultivation and distribution. However, the California-based United States Attorneys have stated that enforcement priorities were focused on "major drug traffickers," not individuals whose actions were in "clear and unambiguous compliance" with state laws providing for the medicinal use of marijuana.

(3) Non-Profit Operation

Nothing in Proposition 215 or the Medical Marijuana Program Act authorizes any individual or group to cultivate or distribute marijuana for profit. Thus, distribution and sales for profit of marijuana – medical or otherwise – are criminal under California law. It would be helpful if the Legislature could clarify what it means for a collective or cooperative to operate as a "non-profit."

The issues here are defining the term "profit" and determining what costs are reasonable for a collective or cooperative to incur. This is linked to the issue of what compensation paid by a collective or cooperative to members who perform work for the enterprise is reasonable.

(4) Edible medical marijuana products

Many medical marijuana collectives, cooperatives, and dispensaries offer food products to their members that contain marijuana or marijuana derivatives such as cannabis oils or THC. These edible cannabis products, which include cookies, brownies, butter, candy, ice cream, and cupcakes, are not monitored or regulated by state and local health authorities like commercially-distributed food products or pharmaceuticals, nor can they be given their drug content. Likewise, there presently are no standards for THC dosage in edible products.

Commercial enterprises that manufacture and distribute marijuana edibles and candy do not fit any recognized model of collective or cooperative cultivation and under current law may be engaged in the illegal sale and distribution of marijuana. Clarity must be brought to the law in order to protect the health and safety of patients who presently cannot be sure whether the edibles they are consuming were manufactured in a safe manner.

I hope that the foregoing suggestions are helpful to you in crafting legislation. California law places a premium on patients' rights to access marijuana for medical use. In any legislative action that is taken, the voters' decision to allow physicians to recommend marijuana to treat seriously ill individuals must be respected.

Please do not hesitate to contact me if you have questions or concerns.

Sincerely,

KAMALA D. HARRIS
Attorney General

cc: The Honorable Mark Leno
The Honorable Tom Ammiano

Attachment 5

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

December 21, 2011

Re: Medical Marijuana Guidelines

Dear Partners and Colleagues:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises, and others. Senior members of my staff recently concluded an almost yearlong series of meetings with representatives across the state from law enforcement, cities, counties, and the patient and civil rights communities. The primary purpose of the meetings was to assess whether we could clarify the medical marijuana guidelines that my predecessor published in 2008 in order to stop the abuses.

These conversations, as well as the federal government's recent unilateral enforcement actions, reaffirmed that the facts today are far more complicated than was the case in 2008. The consensus from our conversations is that state law itself needs to be reformed, simplified, and improved to better explain how, when, and where individuals may cultivate and obtain physician-recommended marijuana, and to provide law enforcement officers with guidelines for enforcement. In short, it is time for real solutions, not half-measures.

At the same time, almost every group of stakeholders has asked me to postpone issuance of new guidelines until the courts have acted in a number of key cases. Because I have come to recognize that non-binding guidelines will not solve the problems with the state's medical marijuana law, I have decided to honor this request and am urging the California Legislature to amend the law to establish clear rules governing access to medical marijuana.

We cannot protect the will of the voters, or the ability of seriously ill patients to access their medicine, until statutory changes are made that define the scope of the group cultivation right, whether dispensaries and edible marijuana products are permissible, and how marijuana grown for medical use may lawfully be transported.

I have begun discussions with the California Legislature about legislative solutions. One point is certain—California law places a premium on patients' rights to access marijuana for medical use.

1300 I STREET • SUITE 1740 • SACRAMENTO, CALIFORNIA 95814 • PHONE (916) 324-5437

I look forward to working with you on these issues going forward. Please do not hesitate to contact my office if you have questions or concerns.

Sincerely,

KAMALA D. HARRIS
Attorney General

Attachment 6

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) NARRATIVE:

ENV 2011-3306-CE

I. PROJECT DESCRIPTION

A proposed ordinance (Appendix A) amending Article 5.1 of Chapter IV of the Los Angeles Municipal Code in order to implement recent appellate court decisions concerning regulation of medical marijuana, including the ruling issued in *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070.

II. PROJECT HISTORY

In January 2010, the City established a comprehensive framework to balance the unregulated proliferation of medical marijuana businesses, access by seriously ill patients to medical marijuana consistent with State law as codified in the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA), and public safety. The regulatory program, known as Medical Marijuana Ordinance 181069 (MMO), added Article 5.1 to Chapter IV, Public Welfare, of the Los Angeles Municipal Code (LAMC). The MMO was amended several times, with the final substantive amendments adopted by the City Council in January 2011 by Temporary Urgency Ordinance No. 181530 (TUO).

The MMO and its amendments became the subjects of nearly two years of contentious and voluminous litigation. Although the Superior Court issued a narrow injunction against pieces of the MMO in December 2010, on October 14, 2011, the Superior Court issued a ruling in which it upheld and refused to enjoin the TUO. Due to ongoing litigation, neither the MMO nor the TUO were implemented by the City, and medical marijuana business has not been added to the City's list of enumerated uses. Accordingly, any medical marijuana businesses have been and remain an unauthorized use.

On October 4, 2011, just prior to the favorable ruling by the Superior Court, the Second Appellate District of the California Court of Appeal, whose decisions bind the City of Los Angeles, ruled in the case of *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070. The *Pack* decision held that significant provisions of the medical marijuana ordinance of the City of Long Beach, which was modeled after Article 5.1, Chapter IV of the LAMC, are preempted by the federal Controlled Substances Act (CSA), because the CSA bans marijuana for all purposes. A lottery, a cap, and mandatory geographic dispersal, all essential features of the MMO and TUO, are impermissible according to *Pack*.

The proposed ordinance amends Article 5.1 of Chapter IV of the LAMC to ban medical marijuana businesses as those are defined in the ordinance. As written, the proposed amendments have no impact upon the ability of qualified patients, persons with an identification card, or primary caregivers to collectively cultivate and access their medical marijuana consistent with the CUA and MMPA.

III. EXISTING ENVIRONMENT

In January 2010, the City adopted Ordinance 181069, adding Chapter IV, Art. 5.1 §45.19.6 et seq., known as the Medical Marijuana Ordinance (MMO). The MMO limits, among other things, the location of collectives; limits the number of collectives; creates a process by which collectives can apply for status as one of the limited number of allowed collectives; and imposes a number of operating requirements. By Preliminary Injunction Order (PI Order) issued December 10, 2010, modified nunc pro tunc January 10, 2011, the Los Angeles Superior Court ruled that the City improperly relied upon registration under the City's prior Interim Control Ordinance (ICO) as a basis to distinguish between collectives.[1] The court concluded that reliance upon the ICO registration would fail the rational basis test and violate equal protection under the United States and California Constitutions; the court suggested to the City that a date certain for the establishment of the collective might be a lawful grandfathering alternative.

The City responded to the PI Order by Temporary Urgency Ordinance 181530 (TUO) adopted by the City Council in January 2011. The TUO does not rely upon registration under the ICO, but instead limits dispensaries based upon, among other criteria, a drawing from all dispensaries that commenced operating in the City by September 14, 2007. (TUO Sec. 3.) It requires all entities seeking to participate in the drawing to register with the City Clerk no later than February 18, 2011. TUO Sec. 51(a)((1)(2). Two hundred thirty three (233) businesses submitted documentation to the City Clerk by February 18, 2011 ("TUO List"). In analyzing their applications, the City tentatively concluded that only 50-80 of the applicants of the 233 applicants appeared to comply with the application requirements and could move on to the next registration steps. However, the next registration steps, including a lottery, a cap, moving

[1] On August 1, 2007, the Los Angeles City Council passed Interim Control Ordinance 179027 (ICO). The ICO found that the spirit and intent of the Compassionate Use Act has been exploited and abused for both profit and recreational drug abuse by many of the medical marijuana dispensaries in the City. The ICO prohibited the establishment and operation of new medical marijuana dispensaries pending the earlier of the adoption of a permanent ordinance or the passage of one year. (ICO at § 2.) The ICO prohibition did not apply to dispensaries established before September 14, 2007, the effective date of the ICO, if the owner or operator of the dispensary timely submitted a form and additional documentation designated by the Office of the City Clerk. The City Clerk maintains a list of 182 businesses which submitted documentation with the City Clerk pursuant to the ICO.

Section 4 of the ICO provided an exemption from its prohibitions in cases of hardship. The City Clerk assigned each hardship application a separate Council file number. The City Clerk estimates 772 Council files exist relating to separate hardship applications. A handful of these files were acted upon and denied by the Council because there was no support for the false claim of hardship. The remaining Council hardship files expired with the advent of the City's permanent ordinance. No inquiry was ever undertaken to confirm the existence or veracity at any time of these filers.

to compliant locations, and the other registration protocols of the TUO, have not been implemented due to the *Pack* litigation.

In addition to the above, the Office of Finance maintains a list of individuals or entities who have obtained a business tax registration certificate from the City of Los Angeles to pay tax on receipts attributable to medical marijuana ("Certificate List"). It is the policy of the City's tax collection entity, known as the Office of Finance, to provide a business tax registration certificate to, and to collect taxes from, all who apply, without question or verification. As of November 1, 2011, 372 individuals and entities are on the Certificate List. A copy of the Certificate List, dated Nov. 1, 2011 is available in the case file.

It is the City's best estimate that neither the TUO List nor the Certificate List represents the current actual physical environment. It has been the City's experience that the various lists are populated, in part, by individuals or entities who undertook the effort to get on the list in order to attempt to qualify at some future date for permission to operate in the City, but who were not in fact operating a dispensary. It is also the City's experience that its medical marijuana businesses, in part because they remain an unauthorized use citywide and also because they are subject to federal enforcement scrutiny, open, close, and reopen to avoid detection. Nonetheless, as set forth below, the two lists can serve as a rudimentary basis for estimating current conditions.

It has been, and remains, infeasible for the City to undertake to verify that each of the dispensaries on the TUO and Certificate Lists actual physically exist.[2] The efforts by dispensaries to evade enforcement actions cause opening, closure, and relocation at random. This makes it virtually impossible for the City to ascertain at any given time the actual number of dispensaries which physically exist in the City. Nonetheless, the City, based on the above information, conservatively estimates that the actual number of dispensaries which physically exist in the City to be no more than 372—the number which have sought business tax registration certificates. The actual number of dispensaries is likely significantly less than 372 in light of the fact that a lesser number—233—registered under the TUO. In using these numbers to estimate current actual physical conditions, the City in no way concedes that any particular dispensary listed actually does exist, or came into existence at any particular time.

IV. ENVIRONMENTAL REVIEW UNDER CEQA

Staff has concluded that the following CEQA exemptions are appropriate for the proposed ordinance:

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[2] The ICO registrant and hardship applicant lists are simply too old to be reliable for any purpose. By way of example, when the City endeavored in the fall of 2009 to confirm the physical status of the 182 ICO registrants, it concluded that only 100 – 130 remained at that time.

A. 14 California Code of Regulations ("State CEQA Guidelines") Section 15060(c)(2) exempts an activity that "*will not result in a direct or reasonably foreseeable indirect physical change in the environment*"; and

City of Los Angeles Environmental Quality Act Guidelines, Article II, Section 2, Class m consists of "*the adoption of ordinances that do not result in impacts on the physical environment.*"

> Under the California Supreme Court's ruling in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 328, an agency has the discretion to decide the environmental baseline subject to support by substantial evidence. For the proposed ordinance, the environmental baseline currently consists of no legally entitled medical marijuana business that the proposed ordinance will now restrict. Specifically, medical marijuana businesses are not an allowed, enumerated use of land in any zone in the City. The LAMC limits uses to those expressly enumerated in the Zoning Code. Any existing medical marijuana businesses are operating in violation of the Zoning Code. Indeed, the Superior Court in the consolidated case *Americans for Safe Access v. City of Los Angeles*, Lead Case No. BC433942, expressly held that medical marijuana businesses in Los Angeles have obtained no vested rights, while appellate courts elsewhere have confirmed that any medical marijuana business opened in the absence of a land use approval authorizing medical marijuana facilities are illegal (see, *e.g., County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868). Therefore, because currently no medical marijuana businesses are operating in conformance with the Zoning Code and should not be existing uses under the law, for purposes of CEQA the City exercise its discretion to exclude them from the environmental baseline.
>
> The proposed amendments restrict medical marijuana businesses consistent with *Pack* and the Zoning Code. Because the existing baseline of conditions is that existing medical marijuana businesses are operating in violation of the Zoning Code and the proposed ordinance would specifically make medical marijuana businesses a disallowed activity, the proposed ordinance would have no direct or reasonably foreseeable indirect physical change or impact upon the environment.

Should, contrary to the City's determination above, the baseline be construed as including medical marijuana businesses, the following CEQA exemptions are appropriate:

B. State CEQA Guidelines Section 15301 consists of "*the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination*"; and

City of Los Angeles Environmental Quality Act Guidelines, Article III, Class 1 consists of "*the operation, repair, maintenance or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that previously existing.*"

The impact of the proposed ordinance would be to change the operation of a medical marijuana business, which is an operation of a private structure, to another use allowed by right or with further discretionary action and CEQA analysis. Because the proposed ordinance is prohibiting, not allowing the proliferation of, an activity not enumerated in the Zoning Code, the proposed ordinance solely impacts "the operation... of existing... private structures...involving negligible or no expansion of use beyond that" "existing at the time of the lead agency's determination" or "previously existing."

C. State CEQA Guidelines Section 15305 consists of "*minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density...*"; and

City of Los Angeles Environmental Quality Act Guidelines, Article III, Class 5 consists of "*minor alterations in land use limitations in areas with less than a 20% slope which do not result in any changes in land use or density...*"

The proposed ordinance will prohibit an activity that is not enumerated in the Zoning Code. It would prohibit medical marijuana businesses, which is less than a minor alteration in land use limitation, in areas with less than a 20% slope. It does not result in any changes in land use and density because the ultimate result is that the exact same enumerated uses that are allowed prior to the adoption of the proposed ordinance would be permitted after the adoption of the proposed ordinance. There may be an immediate and temporary change from baseline due to closure of medical marijuana businesses; however no significant change is anticipated because other uses allowed by right or allowed with further discretionary action and CEQA analysis will be eligible to operate in the same space. The ultimate result is that the exact same enumerated uses that are allowed prior to the adoption of the proposed ordinance would be permitted after the adoption of the proposed ordinance. Therefore, the baseline of existing conditions will have a net result of being the same after the proposed ordinance is adopted.

D. State CEQA Guidelines Section 15308 consists of "*actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption*"; and

City of Los Angeles Environmental Quality Act Guidelines, Article III, Class 8 consists of "*actions taken by regulatory agencies as authorized by State or local ordinance to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities are not included in this exemption.*"

By banning medical marijuana businesses, the proposed ordinance assures the maintenance, enhancement and protection of the environment in the following ways:

- It enhances the environment by prohibiting rather than authorizing medical marijuana businesses as required by the ruling in *Pack*. The *Pack* court held that significant provisions of the medical marijuana ordinance of the City of Long Beach, which was modeled after Article 5.1, Chapter IV of the LAMC, are preempted by the federal CSA. The *Pack* court ruled that cities may enact prohibitions that restrict and limit medical marijuana businesses but may not enact affirmative regulations that permit or authorize such businesses. The proposed ordinance is in conformity with public necessity and protection of the environment where the regulatory process involves procedures for protection of the environment in that it maintains conformity with the *Pack* rulings;

- It protects the environment by banning an activity that is associated with criminal activity. Commencing in 2007, more than 850 medical marijuana businesses opened storefront shops and commercial growing operations in violation of the City's Zoning Code. Since that time, an unknown number of these businesses, estimated to exceed 500, continue to open and operate in Los Angeles, each in violation of the Zoning Code. The Los Angeles Police Department has reported that, as the number of marijuana businesses have proliferated, the City and its neighborhoods have experienced an increase in crime and the negative secondary harms associated with unregulated marijuana businesses, including but not limited to, murders, robberies, the distribution of tainted marijuana, and the diversion of marijuana for non-medical and recreational uses. Neighborhoods and businesses complain about the disruption and public safety issues presented by medical marijuana businesses in the City. By banning medical marijuana businesses, the proposed ordinance maintains the health and safety of the environment which therefore protects the environment;

- It protects and maintains the environment of the city by minimizing the continuing drain of litigation and police services against the City which impacts the City's financial health in its entirety. The City's prior comprehensive regulatory framework, enacted in January 2010 as the Medical Marijuana Ordinance 181069, amended several times, with the final substantive amendments adopted by the City Council in January 2011 by Temporary Urgency Ordinance No. 181530, became the subject of nearly two years of intensive and voluminous litigation. The protracted litigation was a substantial drain of City resources and personnel. The proposed ordinance promotes protection of the environment because it prevents the continuing drain of litigation and police services; and

- It assures the maintenance and protection of the environment by not changing access to medical marijuana by qualified patients, persons with an identification card, or primary caregivers, consistent with State law. Under the proposed ordinance, qualified patients, persons with an identification card, or primary caregivers will continue to have access to medical marijuana consistent with State law as codified in the CUA and MMPA. The CUA, adopted by the voters in 1996, and MMPA, enacted by the State Legislature in 2003,

provide California's qualified patients with serious medical conditions, persons with an identification card, and their primary caregivers, with limited immunities to specified criminal prosecutions under State law for the purpose of enabling access to marijuana for medical purposes. The proposed ordinance excludes from the definition of medical marijuana business locations and vehicles used in strict conformity with State law.

E. State CEQA Guidelines Section 15321 consists of *"Actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency. Such actions include, but are not limited to, the following: (1) The direct referral of a violation of lease, permit, license, certificate, or entitlement for use or of a general rule, standard, or objective to the Attorney General, District Attorney, or City Attorney as appropriate, for judicial enforcement; (2) The adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective"*; and

City of Los Angeles Environmental Quality Act Guidelines, Article III, Class 21 consists of *"actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate or other entitlement for use which is issued, adopted or prescribed by the regulatory agency or a law, general rule, standard or objective which is administered or adopted by the regulatory agency. Such actions include, but are not limited to, the following: 1) The direct referral of a violation of a lease, permit, license, certificate or other entitlement for use or of a general rule, standard of objective to the Attorney General, District Attorney or City Attorney, as appropriate for judicial enforcement. 2) The adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate or other entitlement for use or enforcing the general rule, standard or objective."*

The proposed ordinance would be the adoption of an order enforcing a law, general rule, standard and objective administered and/or adopted by the City because it confirms and restores the rule of law, expressed by the City's Zoning Code and the *Pack* court, in Los Angeles. Further, the proposed ordinance exempts from the definition of medical marijuana business, locations and vehicles used in strict conformity with State law. The proposed ordinance is in conformity with State law because it does not change access by qualified patients, persons with an identification card, or primary caregivers to medical marijuana consistent with the CUA and MMPA.

Furthermore, operation of existing medical marijuana businesses is not an authorized land use as it is not an enumerated use in the Zoning Code. Therefore, the adoption of the proposed ordinance would indirectly revoke leases to businesses not allowed under the Zoning Code.

IV. EXCEPTIONS TO THE USE OF CATEGORICAL EXEMPTIONS

Planning staff evaluated all the potential exceptions to the use of Categorical Exemptions for the proposed ordinance and determined that none of these exceptions apply as explained below:

A. *Cumulative Impact:* *The exception applies when, although a particular project may not have a significant impact, the impact of successive projects, of the same type, in the same place, over time is significant.*

There are no successive projects of the same type planned for the City of Los Angeles. Furthermore, as set forth below in the Additional Factual Support section, any impact from the proposed ordinance is negligible or close to *de minimis*, so that any incremental effect from the proposed ordinance would not be cumulatively considerable. Finally, it should be noted that existing conditions do not include the enumeration of medical marijuana businesses in the Zoning Code. Any existing medical marijuana business is not an authorized land use. As a result, the proposed ordinance does not result in additional uses after its adoption. Therefore, there would not be any direct incremental effects from the proposed ordinance.

B. *Significant Effect Due to Unusual Circumstances:* *This exception applies when, although the project may otherwise be exempt, there is a reasonable possibility that the project will have a significant effect due to unusual circumstances. Examples include projects which may affect scenic or historical resources.*

There is no reasonable possibility that the proposed ordinance will have a significant effect due to unusual circumstances. There is no unusual concentration of existing medical marijuana businesses; they occur throughout the City. Therefore, the prohibition of such activity will not cause an impact due to unusual circumstances when an entire city is impacted en masse by this proposed ordinance.

Additionally, as set forth in the Additional Factual Support section, any impact from the proposed ordinance is less than significant.

Finally, the proposed ordinance will not have a significant effect on medical marijuana businesses that cease to operate as qualified patients, persons with an identification card, and primary caregivers will continue to access medical marijuana at locations throughout the City consistent with the CUA and MMPA.

C. *Scenic Highway:* *Projects that may result in damage to scenic resources within a duly designated scenic highway.*

The proposed ordinance does not affect what type of buildings can or cannot be built and will therefore not damage scenic resources within a duly designated scenic highway. The proposed ordinance merely affects operation within existing structures that are already built out. Without existing medical marijuana businesses, the proposed ordinance would have a positive potential impact on the structures and any potential surrounding scenic highway as medical marijuana facilities are often painted with window coverings that obstruct view within buildings contrary to the Commercial Corner Ordinance as well as Design Guidelines associated with many Specific Plans and Supplemental Use Districts.

D. *Hazardous Waste Site:* *Projects located on a site or facility listed pursuant to California Government Code 65962.5.*

The proposed ordinance does not supersede any existing regulation on hazardous material site because the proposed ordinance merely affects land use operations within existing structures that are already built out. Without existing medical marijuana businesses, the relation of these structures to hazardous waste sites would not change. New structures are subject to project-specific environmental analysis and mitigated accordingly.

E. *Historical Resources: Projects that may cause a substantial adverse change in the significance of an historical resource.*

The proposed ordinance would not cause an adverse change in the significance of a historical resource as defined in State CEQA 15064.5. This is because the proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, the relation of these structures as a historic resource would not change. New structures are subject to project-specific environmental analysis and mitigated accordingly.

V. ADDITIONAL FACTUAL SUPPORT

Below is a consideration of all categories on the Initial Study Checklist to demonstrate further that the proposed ordinance qualifies for the listed categorical exemptions:

A. *Aesthetics*

This proposed ordinance will have zero to minimal aesthetic environmental effects. The prohibition of medical marijuana businesses will not alter any scenic vistas. Scenic vistas are generally defined as panoramic public views to natural features, including views of the ocean, striking or unusual natural terrain, or unique urban or historic features.

The proposed ordinance would not impact these scenic resources because it merely affects activities operating within existing structures that are already built out. The proposed ordinance would have a positive potential impact on the structures themselves and surrounding environment as medical marijuana businesses are often painted with window coverings that obstruct view within buildings contrary to the Commercial Corner Ordinance as well as Design Guidelines associated with many Specific Plans and Supplemental Use Districts.

B. *Agricultural*

The proposed ordinance prohibits medical marijuana businesses, and does not impact agricultural uses because medical marijuana businesses are not an enumerated use in the Zoning Code and therefore are not allowed in any zone, including Agricultural. Therefore, the proposed ordinance will not impact agricultural uses. After adoption of the proposed ordinance, these uses can continue operating in the same fashion as they did prior to adoption.

C. *Air Quality*

The proposed ordinance would not conflict with or obstruct the implementation of the SCAQMD or congestion management plan, violate any air quality standard, or contribute substantially to an existing or projected air quality violation. There would not be cumulatively considerable net increases of any criteria pollutant for which the air basic is in non-attainment. Moreover, the proposed ordinance would not expose any sensitive receptors to substantial pollutant concentrations, nor create any odors.

The proposed ordinance does not result in any significant impacts on traffic (as impacts are close to *de minimis*), as set forth below in the Transportation/Circulation Section below. Therefore, air quality impacts from any increase in traffic would be similarly less than significant. Finally, because air quality impacts would be substantially less than significant, it is expected that any greenhouse gas contribution would also be less than significant.

D. *Biological Resources*

The proposed ordinance will not create changes in conditions that could yield an incremental increase in potential impacts to any species identified as a candidate, sensitive, or special status species. There are no biological resources, including riparian habitat, or other sensitive natural community or federally protected wetlands, native resident or migratory fish/wildlife species that would be impacted. The proposed ordinance would not result in direct removal, filling, or hydrological interruption to any resources. This is because the proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on biological resources. New structures are subject to project-specific environmental analysis and mitigated accordingly.

E. *Cultural Resources*

The proposed ordinance would not cause an adverse change of a historical resource as defined in State CEQA 15064.5. The proposed ordinance will not cause an adverse change in significance of an archaeological resource, paleontological resource, site, or unique geologic feature, or any human remains. This is because the proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on cultural resources. New structures are subject to project-specific environmental analysis and mitigated accordingly.

F. *Geology and Soils*

The proposed ordinance in and of itself will not pose any risks of human injury and property damage due to potential regional earthquakes. As is common in the Southern California region, there will be continued risks of human injury and property damage because of potential regional earthquakes. While generally the potential exists for geologic hazards due to geologic and seismic conditions throughout the City, this specific project proposes no changes that would alter these conditions because the proposed ordinance merely affects land use operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on geology

and soils. New structures are subject to project-specific environmental analysis and mitigated accordingly.

G. *Hazards and Hazardous Materials*

The proposed ordinance would not result in the routine transport, use, production or disposal of hazardous materials. The proposed ordinance would merely prohibit an activity from operation and would not involve the use of potentially hazardous materials that could create a significant public hazard through the accidental release of hazardous materials into the environment. Medical marijuana businesses do not involve the transport or use of hazardous materials. Therefore, the prohibition of this activity would not result in any change from the baseline conditions.

H. *Hydrology and Water Quality*

The proposed ordinance would not violate any water quality standards or waste discharge requirements, nor would it have a substantial impact on groundwater supplies or recharge. The proposed ordinance would not substantially deplete groundwater supplies or interfere with groundwater recharge.

The proposed ordinance would not create or contribute to runoff water or substantially degrade water quality. The proposed ordinance is not near a levee or dam, and thus would not threaten to expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam.

This is because the proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on hydrology and water quality. New structures are subject to project-specific environmental analysis and mitigated accordingly.

I. *Land Use and Planning*

Neighborhoods continue to complain daily of the disruption and general safety issues presented by the operation of medical marijuana businesses. By prohibiting such businesses as enumerated activities, the proposed ordinance has a positive impact on land use and planning in that it furthers the following goals and objectives of the General Plan:

- Housing Element goal 5A to create "a livable City for existing and future residents and one that is attractive to future investment."
- Economic Development goal 7B to create "a City with land appropriately and sufficiently designated to sustain a robust commercial and industrial base."
- Economic Development goal 7.2 to "establish a balance of land uses that provides for commercial and industrial development which meets the needs of local residents, sustains economic growth, and assures maximum feasible environmental quality."
- Economic Development goal 7D to create "a City able to attract and maintain new land uses and businesses."

Additionally, the proposed ordinance upholds the City's right to prohibit medical marijuana businesses due to good zoning practice in that medical marijuana businesses are not an enumerated use in the Zoning Code. The Los Angeles Municipal Code limits uses to those expressly enumerated in the Zoning Code. Medical marijuana businesses are not an allowed, enumerated use of land in any zone in the City. Therefore, the proposed ordinance has a positive impact on land use and planning.

J. *Mineral Resources*

The proposed ordinance would not result in the loss of availability of a known mineral resource or locally-important mineral resource recovery site. This is because the proposed ordinance merely affects land use activities within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on mineral resources. New structures are subject to project-specific environmental analysis and mitigated accordingly.

K. *Noise*

The proposed ordinance would not result in the exposure of persons to or generation of noise in levels in excess of standard levels. Furthermore, the proposed ordinance would not result in the exposure of people to or generation of excessive ground borne vibration or ground borne noise levels or create a substantial periodic or permanent increase in ambient noise levels. In fact, the only potential impact is a reduction of noise. However, this would be very minimal as the noise associated with this type of activity mostly occurs indoors and is not audible outside the structure. The proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on noise. New structures are subject to project-specific environmental analysis and mitigated accordingly.

L. *Population and Housing*

The proposed ordinance would not impact the distribution of population and housing Citywide. The proposed ordinance prohibits medical marijuana businesses as an activity, which does not impact residential uses because medical marijuana businesses are not an enumerated use in the Zoning Code and therefore are not allowed in any zone, including Residential. Therefore, the proposed ordinance will not impact residential uses. After adoption of the proposed ordinance, residential uses can continue operating in the same fashion as they did prior to adoption.

M. *Public Services*

The impact on public services will be positive. Neighborhoods continue to complain daily of the disruption and general safety issues presented by the operation of medical marijuana businesses. As set forth previously, by banning operation of such businesses, the demand on police to respond to such appeals will decrease.

N. *Recreation*

The proposed ordinance would not impact the public recreational facilities throughout the City. The proposed ordinance prohibits medical marijuana businesses as a use, which does not impact recreational uses because medical marijuana businesses are not an enumerated use in the Zoning Code and therefore are not allowed in any zone, including Public Facilities or Open Space, where public recreational facilities typically occur. Therefore, the proposed ordinance will not impact recreational uses. After adoption of the proposed ordinance, public recreational facilities can continue operating in the same fashion as they did prior to adoption.

O. *Transportation/Circulation*

The proposed ordinance would not cause a significant impact on traffic. The proposed ordinance would not exceed a level of service standard established by the county congestion management agency for designated roads or highways. The proposed ordinance would not result in a change in air traffic patterns, nor would it impact street design. The proposed ordinance does not regulate any public thoroughfare and does not include any guidelines that would conflict with adopted policies, plans or programs supporting alternative transportation.

This is because the proposed ordinance prohibits a specific activity. There is no expansion of allowable uses that would promote an increase in traffic. There may be a temporary and immediate time in which there is an increase in vacant storefronts as operations close. This timeframe is seen as temporary because uses that are permitted by right or with discretionary approval with CEQA review will ultimately occupy the space. If the formerly vacant storefronts reopen with uses that are by right or allowed by discretionary approval with CEQA review, traffic may or may not increase, depending on the new use occupying the former medical marijuana facilities. It is difficult to speculate on the impact on traffic due to unknown future variables; however it is expected to be less than significant due to the short time period of expected impacts from vacancies and the fact that any more intense use of the properties that could cause traffic impacts not already allowed by right would be separately addressed by further CEQA review.

Furthermore, while the exact impact on traffic cannot be estimated with certainty, it is anticipated to be less than significant considering that 1) traffic generated by the access to existing medical marijuana businesses is believed to be spread throughout the day and are thus not concentrated during peak traffic hours; 2) the ordinance does not result in additional uses after its adoption that would promote an increase in traffic; (3) existing marijuana business are disbursed throughout the City; and (4) the ordinance excludes from its definition of medical marijuana business, the following, with the result that the ordinance does not change access by qualified patients, persons with an identification card, and primary caregivers to medical marijuana at "[a]ny location" or in "[a]ny vehicle" in the City, so long as that access remains consistent with the CUA and MMPA:

> (a) Any location when in use by a primary caregiver to deliver or give away marijuana to a qualified patient or person with an identification card who has designated the

individual as a primary caregiver, for the personal medical use of the qualified patient or person with an identification card, in accordance with California Health and Safety Code Section 11362.5 and 11362.7 *et seq*.

(b) The location of any clinic licensed pursuant to Chapter 1 (commencing with Section 1200), a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250), a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01), a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569), a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725), all of Division 2 of the California Health and Safety Code where: (i) a qualified patient or person with an identification card receives medical care or supportive services, or both, from the clinic, facility, hospice, or home health agency, and (ii) the owner or operator, or one of not more than three employees designated by the owner or operator, of the clinic, facility, hospice, or home health agency has been designated as a primary caregiver pursuant to California Health and Safety Code Section 11362.7(d) by that qualified patient or person with an identification card.

(c) Any vehicle when in use by: (i) a qualified patient or person with an identification card to transport marijuana for his or her personal medical use, or (ii) a primary caregiver to transport, deliver, or give away marijuana to a qualified patient or person with an identification card who has designated the individual as a primary caregiver, for the personal medical use of the qualified patient or person with an identification card, in accordance with California Health and Safety Code Section 11362.765. (§ 45.19.6.1 Definitions.)

The net result of traffic conditions is minimal or non-existent as qualified patients, persons with an identification card, and primary caregivers spread to locations throughout the City to access medical marijuana, consistent with the CUA and MMPA.

Finally, there is a possibility that traffic may be displaced to other areas as qualified patients, persons with an identification card, or primary caregivers travel to obtain medical marijuana. This will not result in an increase in traffic, but rather a change in traffic patterns. Any such displacement effect is expected to be negligible, as the locations of previous medical marijuana businesses were spread throughout the City, and the qualified patients, persons with an identification card, and primary caregivers will spread to locations throughout the City to access medical marijuana, consistent with the CUA and MMPA. Likewise, qualified patients and primary caregivers are inherently spread throughout the City, as there is no evidence of any specific concentrations in a part of the City.

P. ***Utilities***

The proposed ordinance would not encourage nor limit construction, but rather prohibit activity that would otherwise not be allowed. The proposed ordinance would not exceed wastewater treatment requirements of the applicable regional water quality control board, nor require the construction of new water or wastewater treatment facilities. The proposed ordinance would not require the construction of new storm water drainage facilities or expansion of existing facilities. The proposed ordinance would not

have an effect on water supplies, nor affect wastewater treatment. Moreover, the proposed ordinance would not have any solid waste disposal needs or generate any solid waste disposal itself.

This is because proposed ordinance merely affects land use operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new significant impact on utilities. New structures are subject to project-specific environmental analysis and mitigated accordingly. The only potential impact would be a temporary reduction in demand of the utilities as some operations close. However, this change is seen as temporary as uses which are allowed by-right or with discretionary review and CEQA review would eventually occupy these spaces and have a comparable demand on utilities.

Q. *Mandatory Findings of Significance*

The proposed ordinance would not substantially degrade environmental quality, substantially reduce fish or wildlife habitat, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plan or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory. This is because the proposed ordinance merely affects operations within existing structures that are already built out. Without existing medical marijuana businesses, these structures would have no new impact on the aforementioned topics. New structures are subject to project-specific environmental analysis and mitigated accordingly.

As noted previously in the Exceptions to the Use of Categorical Exemptions section, the proposed ordinance would not have a cumulatively considerable impact.

PREPARED BY:
CITY OF LOS ANGELES, DEPARTMENT OF CITY PLANNING
CHARLES J. RAUSCH, JR., SENIOR CITY PLANNER : DK : TB

1/6/2012
DATE

BY: CHARLES J. RAUSCH, JR.
SENIOR CITY PLANNER
OFFICE OF ZONING ADMINISTRATION
Telephone: (213) 978-1306

Attachment 7

COUNTY CLERK'S USE

CITY OF LOS ANGELES
OFFICE OF THE CITY CLERK
200 NORTH SPRING STREET, ROOM 360
LOS ANGELES, CALIFORNIA 90012

CITY CLERK'S USE

CALIFORNIA ENVIRONMENTAL QUALITY ACT

NOTICE OF EXEMPTION

(California Environmental Quality Act Section 15062)

Filing of this form is optional. If filed, the form shall be filed with the County Clerk, 12400 E. Imperial Highway, Norwalk, CA 90650, pursuant to Public Resources Code Section 21152 (b). Pursuant to Public Resources Code Section 21167 (d), the filing of this notice starts a 35-day statute of limitations on court challenges to the approval of the project. Failure to file this notice with the County Clerk results in the statute of limitations being extended to 180 days.

LEAD CITY AGENCY	COUNCIL DISTRICT
City of Los Angeles Department of City Planning	ALL

PROJECT TITLE	LOG REFERENCE
Proposed Ordinance Concerning Regulation of Medical Marijuana	ENV 2011-3306-CE

PROJECT LOCATION
Citywide

DESCRIPTION OF NATURE, PURPOSE, AND BENEFICIARIES OF PROJECT:
A proposed ordinance amending Article 5.1 of Chapter IV of the Los Angeles Municipal Code in order to implement recent appellate court decisions concerning regulation of medical marijuana.

NAME OF PERSON OR AGENCY CARRYING OUT PROJECT, IF OTHER THAN LEAD CITY AGENCY:

CONTACT PERSON	AREA CODE	TELEPHONE NUMBER	EXT.
Tanner Blackman	213	978-1195	

EXEMPT STATUS: (Check One)

		STATE CEQA GUIDELINES	CITY CEQA GUIDELINES
☐	MINISTERIAL	Sec. 15268	Art. II, Sec. 2b
☐	DECLARED EMERGENCY	Sec. 15269	Art. II, Sec. 2a (1)
☐	EMERGENCY PROJECT	Sec. 15269 (b) & (c)	Art. II, Sec. 2a (2) & (3)
☑	CATEGORICAL EXEMPTION	Sec. 15300 *et seq.*	Art. III, Sec. 1

Class 1,5,8,21 Category 15301,15305,15308,15321 (State CEQA Guidelines)

☑ OTHER (See Public Resources Code Sec. 21080 (b) and set forth state and City guideline provision.
State CEQA Guidelines Sec. 15061(c)(2) and City CEQA Guidelines Art. II, Section 2m.

JUSTIFICATION FOR PROJECT EXEMPTION:
The proposed ordinance would have no direct or reasonably foreseeable indirect physical impact upon the environment. Also, the proposed ordinance solely impacts the operation of existing private structures involving negligible or no expansion of use; is a minor alteration in land use limitations; is an action to assure the maintenance, enhancement, or protection of the environment; and is an action to enforce a law, general rule, standard, and objective. See CEQA Narrative found in the above-noted file.

IF FILED BY APPLICANT, ATTACH CERTIFIED DOCUMENT ISSUED BY THE CITY PLANNING DEPARTMENT STATING THAT THE DEPARTMENT HAS FOUND THE PROJECT TO BE EXEMPT.

SIGNATURE	TITLE	DATE

FEE:	RECEIPT NO.	REC'D. BY	DATE

DISTRIBUTION: (1) County Clerk, (2) City Clerk, (3) Agency Record

Rev. 11-1-03

IF FILED BY THE APPLICANT:

NAME (PRINTED)

SIGNATURE

DATE