

5-15-2012

## The Gray Zone in the Power of Local Municipalities: Where Zoning Authority Clashes with State Law

Skye L. Daley

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/jbel>

 Part of the [Constitutional Law Commons](#), [Food and Drug Law Commons](#), [Land Use Planning Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Daley, Skye L. (2012) "The Gray Zone in the Power of Local Municipalities: Where Zoning Authority Clashes with State Law," *The Journal of Business, Entrepreneurship & the Law*: Vol. 5: Iss. 2, Article 1.  
Available at: <http://digitalcommons.pepperdine.edu/jbel/vol5/iss2/1>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in The Journal of Business, Entrepreneurship & the Law by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

---

# THE GRAY ZONE IN THE POWER OF LOCAL MUNICIPALITIES: WHERE ZONING AUTHORITY CLASHES WITH STATE LAW

*Skye L. Daley\**

Abstract .....	215
I. Introduction .....	216
II. Local Police Powers .....	218
A. Zoning Ordinances .....	218
B. Nuisance Laws .....	220
C. Moratoriums .....	221
III. The Doctrine of Preemption .....	222
A. Express Preemption vs. Implied Preemption.....	223
B. The Right to Abate Nuisance.....	226
IV. Legal Background of Marijuana Dispensaries.....	227
V. When Zoning Authority Clashes with State & Federal Law.....	230
A. Preemption by State Statute .....	231
B. Preemption by Referendum.....	232
C. Preemption by Federal Law.....	234
D. Criminalization.....	235
VI. Impact .....	236
A. Impact on Dispensaries .....	236
B. Impact on Other Businesses .....	239
VII. Conclusion.....	240

## ABSTRACT

This article will explore the oft-overlooked area of police powers granted to local municipalities by the California Constitution through the lens of marijuana dispensaries. These dispensaries, and the obstacles they face, provide the perfect vantage point from which to survey the current status of zoning power in California. This article will consider the extent and limits of what is known as the “police powers” of local municipalities: the power of cities, towns and counties to regulate, restrict, and proscribe the way in which land can be utilized within its borders. If local municipalities are the creation of the state—indeed, an extension of the state government’s power, subject to its whims—then can a city, town, or county simply defy the expressed will of the state legislature? Or, in a parallel real example, how can a fast-food restaurant hoping to open a new location in Los Angeles be banned outright from an entire community, even though such restaurants are sanctioned by the legislature in Sacramento?

## I. INTRODUCTION

*“I’ve often thought that if our zoning boards could be put in charge of botanists, of zoologists and geologists, and people who know about the earth, we would have much more wisdom in such planning than we have when we leave it to the engineers . . . .”*

*-Justice William Orville Douglas*

If local municipalities are a creation of the state—indeed, an extension of the state government’s power, subject to its whims—then can a city, town, or county simply defy the expressed will of the state legislature?<sup>1</sup> Can a city planning commission, acting within the confines of the power granted to it by the state, flout state law in order to effectuate their own ends? Or in real terms, how can a fast-food restaurant hoping to open up a new location in Los Angeles be banned outright from an entire community, even though such restaurants are sanctioned by the legislature in Sacramento?<sup>2</sup>

This article is designed to explore the oft-overlooked area of police powers granted to local municipalities by the California Constitution. The power of cities, towns, and counties to regulate, restrict, and proscribe the way in which land can be utilized within its borders is often taken for granted by those with the authority to do so. Zoning rules and regulations are so common place that they are easily ignored.<sup>3</sup>

On occasion, however, a request for a business permit crosses the desk of a local city planner that drags the zoning process to a standstill.<sup>4</sup> Although it is counter-intuitive, just because a business is legal under state or federal law, does not mean that it can simply open anywhere; in some cases a business can be

---

\* Pepperdine University School of Law, *Juris Doctor* candidate, 2012; BA Northeastern University.

<sup>1</sup> This premise was established in California shortly after the state’s admission to the Union in 1850. *See Webb v. Cal. Fish Co.*, 138 P. 79, 92 (Cal. 1913) (quoting *Payne v. Treadwell*, 16 Cal. 220, 233 (1860)) (“A municipal corporation is a public institution, created for public purposes; the municipality is a political subdivision or department of the state, governed, and regulated, and constituted by public law . . . the original power to control, as well as to create them, therefore, is in the Legislature.”); *see also San Francisco v. Canavan*, 42 Cal. 541, 557 (1872) (“[M]unicipal corporations are but subordinate subdivisions of the State Government, which may be created, altered, or abolished, at the will of the legislature . . .”).

<sup>2</sup> Jennifer Medina, *In South Los Angeles, New Fast-Food Spots Get a ‘No, Thanks.’* N.Y. TIMES (Jan. 15, 2011), <http://www.nytimes.com/2011/01/16/us/16fastfood.html>.

<sup>3</sup> Consider all the aspects of a town or city that zoning affects: where schools can be located, what businesses are allowed to open and where. Homes are not often found in the middle of an industrial complex, and the reasoning for that is zoning.

<sup>4</sup> When faced with an increase in unwanted zoning applications, some cities have held special meetings in order to create moratoriums. *See City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1, 4 (Ct. App. 2008) (noting that following Naulls’ application to open a marijuana dispensary, the city of Corona held an emergency “special meeting” in order to create a moratorium on all future dispensaries). In some unfortunate situations, cities have spent years grappling with how to handle a new business. For an example look to the fast-food debate taking place in South Los Angeles for over two years: following a one year moratorium passed in 2008, the Los Angeles City Council extended the moratorium twice, while it debated the merits of an outright fast-food ban. *See supra* note 2. The moratorium was made permanent, and now, no new fast-food restaurants are allowed to open. *Id.*

banned outright from an entire jurisdiction.<sup>5</sup> When this happens, litigation is almost certain to ensue and the question of whether or not a local municipality possesses the constitutional authority to ban said business—or in some extremes to criminalize it—once again rises from legal obscurity.

This paper will consider the extent and limits of what is known as the “police powers” of local municipalities through the lens of the state-sanctioned marijuana dispensaries that have recently exploded into existence across the state.<sup>6</sup> These dispensaries, though legal under state law, have been criminalized or banned permanently or temporarily in multiple jurisdictions throughout California, prompting a string of lawsuits that have left the state with a patchwork of legal guidelines.

This is not a narrow question addressing only dispensaries. The issues surrounding local police powers affects any entrepreneur hoping to start a business in any given location, or in fact, any business already in existence. Single individuals hoping to start a closely-held corporation are subject to the same zoning powers as publicly-traded mega companies.<sup>7</sup> These dispensaries, however, and the obstacles they face, provide the perfect vantage point from which to survey the current status of zoning power in California.

Part II of this article will provide the legal framework within which zoning authority exists, considering where local municipalities derive their power, the evolution of zoning law, and the deference the courts pay to the local authorities. Part III of this article will expand to consider the limits of zoning authority, the most important of which, for this analysis, is the preemption of state law. If California law says that “big-box retailers” like Wal-Mart or timber mills operating within statutory limits are legal, how can a city ban them? Can a city criminalize them? Part IV will provide a very brief history of the legalization of medicinal marijuana in California and the current legal battles being fought over a dispensary’s right to exist in the face of local ordinances banning or criminalizing them. Part V will analyze how zoning laws and the doctrine of preemption affects businesses of all types. Part VI will apply the analysis to the real world. Finally, this article will conclude by suggesting that the doctrine of preemption has been applied too weakly, and the current litigation over marijuana dispensaries provides the ideal opportunity for the courts to give the doctrine enough bite to protect legal businesses from the political whims of local governance.

---

<sup>5</sup> See generally *Wal-Mart Stores Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420 (Ct. App. 2006) (finding that a zoning regulation banning all “big box” retailers from the city was within the police powers of the jurisdiction).

<sup>6</sup> “Before a 2007 moratorium, the city of Los Angeles had issued 186 medical marijuana dispensary licenses. Since the moratorium, nearly 800 applications for hardship exemptions have been filed.” *Where’s The Weed?* L.A. TIMES, <http://www.latimes.com/news/local/la-me-dispensaries-i,0,5658093.htmlstory> (last visited Feb. 10, 2012).

<sup>7</sup> Compare *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 421 (dealing with a claim brought by publicly-traded Wal-Mart), with *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 (Ct. App. 2009) (dealing with a claim brought against an individual hoping to start his own business).

## II. LOCAL POLICE POWERS

*“Our community is like many around the country that have . . . sophisticated planning and zoning regulations. These are elements that are developed as a result of local community pressure to balance interests.”*

*-United States Representative Earl Blumenauer*

## A. Zoning Ordinances

“Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put . . . .”<sup>8</sup> In its purest form, zoning ordinances manifest themselves as the division of a municipality into districts, with each district having a unique set of regulations.<sup>9</sup> These regulations most commonly foist restrictions upon property owners regarding the extent to which their property may be used, and more often than not, concern the type of structures that can be built and the types of businesses that can operate out of them.<sup>10</sup>

The overarching theory behind zoning power is that property-owners—or more specifically, the land that they own—may be regulated for the good of the community as a whole.<sup>11</sup> These regulations are most often created by a city planning agency or other governmental body in order to create a “general plan” for the city as required under California law.<sup>12</sup> Although zoning decisions affect specified, individual neighborhoods, and the property owners within them, they are firmly legislative decisions as they ultimately affect the community at large.<sup>13</sup> These decisions require the analysis of aesthetic, environmental, and economic

---

<sup>8</sup> *Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 850 (Cal. 1936).

<sup>9</sup> *See Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1009 (Cal. 1976); *see also* *Consol. Rock Prods. Co. v. City of L.A.*, 370 P.2d 342, 345–46 (Cal. 1962).

<sup>10</sup> *See Birkenfeld*, 550 P.2d at 1009; *see also Consol. Rock Prods. Co.*, 370 P.2d at 345–46.

<sup>11</sup> *Korean Am. Legal Advocacy Found. v. City of L.A.*, 28 Cal. Rptr. 2d 530, 536–40 (Ct. App. 1994) (referencing *Floresta, Inc. v. City Council*, 12 Cal. Rptr. 182 (Ct. App. 1961)). In *Floresta*, Justice Tobriner provides a succinct overview of zoning power and its origins:

The concept of zoning reaches back historically to the Renaissance plans of public planning that started in Italy and spread to France; it is symbolized by the famous plan of Sir Christopher Wren for London after the fire of 1666 and in the United States by the L’Enfant’s planned cities of Washington and Indianapolis; indeed, before its first significant development in the city planning of New York in this country, such planning had been widely accepted in Sweden and Germany. As is stated in *Recent Social Trends in the U.S.* by the Research Committee on Social Trends (1934, McGraw Hill Book Co., Inc.), “The zoning movement . . . began over 30 years ago and today every state and the District of Columbia has adopted some form of zoning legislation or regulation. Since 1916 when New York City adopted a comprehensive zoning ordinance, the decided trend has been to integrate zoning with city planning. Today all but two states have comprehensive zoning legislation.”

*Floresta*, 12 Cal. Rptr. at 185.

<sup>12</sup> CAL GOV’T. CODE § 65350 (West 2011).

<sup>13</sup> *Metro. Baptist Church v. D.C. Dep’t. of Consumer & Regulatory Affairs—Historic Pres. Review Bd.*, 718 A.2d 119 (D.C. 1998).

considerations.<sup>14</sup>

The initial impetus of zoning laws in California comes from article XI, section 7 of the state Constitution, which states in its entirety: “A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.”<sup>15</sup> Subsequent government codes have further identified the powers of local authorities to adopt ordinances in furtherance of the above-enumerated powers in order to promote the general welfare of society.<sup>16</sup> This authority has come to be known as the “police powers,” at the state and local level.<sup>17</sup> Zoning ordinances, therefore, subject to a few exceptions discussed *infra*, embody a constitutionally legitimate exercise of a municipality’s police power.<sup>18</sup>

The California Government Code not only provides specified authority for local municipalities to regulate the use of their land, but also provides the general framework for the creation and execution of zoning ordinances.<sup>19</sup> This framework involves a variety of topics from notice requirements to standards delineating the applicability of zoning powers.<sup>20</sup> It is analytically important to note that local zoning boards and municipalities do not have an inherent authority to regulate the usage of land.<sup>21</sup> This authority is delegated to the cities and counties from the state legislature—which follows, given that cities and counties are the creation of the state.<sup>22</sup>

Despite a seemingly broad grant of power to the towns and cities, subsequent decisions have limited the scope of the police powers. These limits are based on common law interpretations of article XI, section 7 of the state Constitution and the California Government Code.<sup>23</sup> The court’s understanding of what constitutes a legitimate use of police power has evolved little over time, but centers on the idea that a zoning ordinance is valid if it has a “real or substantial relationship to the public health, safety, morals or general welfare” of the municipality.<sup>24</sup> This understanding of the law was first applied in 1925 by the California Supreme

---

<sup>14</sup> *Id.*

<sup>15</sup> CAL. CONST. art. XI, § 7.

<sup>16</sup> CAL. GOV’T. CODE §§ 65000 et seq. (West 2011), also known as The Planning and Zoning Law section of the Government Code. More specifically, § 65850 states in relevant part: “The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following: (a) regulate the use of buildings, structures, and land as between industry, business, residences, open spaces . . .” *Id.* at § 65850.

<sup>17</sup> The term “police power” is commonly used to describe the inherent governmental power to enact laws that promote the general welfare of society—within constitutional limits. In its purest form, it is the power to govern. *See generally* *Graham v. Kingwell*, 24 P.2d 488, 489 (Cal. 1933).

<sup>18</sup> *Lockard v. City of L.A.*, 202 P.2d 38 (Cal. 1949).

<sup>19</sup> CAL. GOV’T. CODE §§ 65000 et seq. (West 2011).

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*; *see also* CAL. CONST. art. XI, § 7.

<sup>22</sup> *See supra* note 1; *see also* *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 103 (2010). As the saying goes, or at least should go—the legislature giveth, and the legislature taketh away.

<sup>23</sup> *Supra* note 1; CAL. CONST. art. XI, § 7.

<sup>24</sup> *Wal-Mart Stores Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 439 (Ct. App. 2006) (quoting *Assoc’d. Home Builders v. City of Livermore*, 557 P.2d 473 (Cal. 1976)).

Court,<sup>25</sup> but was adopted shortly after by the United States Supreme Court.<sup>26</sup> Courts maintain severe deference to the local legislatures when determining the constitutionality of an ordinance; even going so far as to *presume* constitutionality.<sup>27</sup>

In California, courts have adhered to a path that is so deferential that if there is a possibility that reasonable minds could differ on the propriety of an ordinance, there will be no judicial interference.<sup>28</sup> Nevertheless, a land use ordinance *will* be held invalid if it is found to be arbitrary or unreasonable, possessing no real relationship to the public health, safety, morals or general welfare of the community.<sup>29</sup> Moreover, a zoning ordinance is only entitled to regulate economic competition when its aim is to advance a legitimate public purpose.<sup>30</sup>

It is also important to consider the area that may be affected by a zoning ordinance.<sup>31</sup> If the ordinance will affect not just those in a given jurisdiction, but perhaps an entire region comprised of multiple jurisdictions, then the court must consider the welfare of that entire region.<sup>32</sup>

### B. Nuisance Laws

A “nuisance” is defined as “[a]nything injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property . . . .”<sup>33</sup> However, “[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance.”<sup>34</sup> There are two overarching types of nuisances: those that are public and those that are private. For the purposes of this analysis, the most relevant is that of a public nuisance, namely, “one which affects at the same time an entire community or neighborhood, or any considerable number of persons . . . .”<sup>35</sup> Nuisance laws and zoning regulations often overlap, making it necessary to discuss them at least to the extent required to understand how they

---

<sup>25</sup> See *Miller v. Bd. of Pub. Works*, 234 P. 381 (Cal. 1925).

<sup>26</sup> See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>27</sup> *Lockard v. City of L.A.*, 202 P.2d 38, 38 (Cal. 1949).

<sup>28</sup> *Clemons v. City of L.A.*, 222 P.2d 439 (Cal. 1950). Again, the United States Supreme Court has promulgated a nearly identical test: “If the validity . . . [is] fairly debatable, the legislative judgment must be allowed to control.” *Euclid*, 272 U.S. at 388.

<sup>29</sup> *Home Builders*, 557 P.2d at 473. It is a rare day when a court overturns a local ordinance on the grounds that it is unreasonable or arbitrary. See *Desert Turf Club v. Bd. of Supervisors*, 296 P.2d 882 (Cal. Ct. App. 1956) (finding an ordinance banning horse racing in San Bernardino County to be arbitrary).

<sup>30</sup> *Hernandez v. City of Hartford*, 159 P.3d 33, 40–46 (2007). This is a particularly fragile and contentious issue, which could be the subject of an entire article—but for our purposes, the rule as laid out by the court in *Hernandez* is sufficient.

<sup>31</sup> *Home Builders*, 557 P.2d at 487.

<sup>32</sup> *Id.* Stating, “the proper constitutional test [of the validity of an ordinance] is one which inquires whether the ordinance reasonably relates to those whom it significantly affects.” *Id.*

<sup>33</sup> CAL. CIV. CODE § 3479 (West 2011).

<sup>34</sup> CAL. CIV. CODE § 3482 (West 2011).

<sup>35</sup> CAL. CIV. CODE § 3480 (West 2011).

affect budding businesses targeted by zoning boards.<sup>36</sup>

Simply put, there is an immediate relationship between zoning laws and prohibiting nuisances.<sup>37</sup> However, they are not mutually dependent: the existence of a nuisance is no longer necessary for the operation of a zoning ordinance.<sup>38</sup> If, however, an activity, object, or circumstance is declared to be a nuisance by statute or zoning ordinance, then the very existence of that activity, object, or circumstance makes it a “nuisance per se,” and thus subject to the applicable nuisance laws.<sup>39</sup> This information will prove itself relevant when taking a look at the steps zoning boards, and in fact the courts themselves, have taken to block the establishment of certain businesses within their jurisdictions.

### C. Moratoriums

In the event that the zoning board deems it necessary, an interim ordinance may be adopted in order to temporarily halt the creation of new businesses or structures.<sup>40</sup> This is considered an emergency measure that is also known as a moratorium.<sup>41</sup> A moratorium creates a temporary ban on the issuance of a certain type of permit while the zoning board determines what steps it will take to regulate the requested construction or business.<sup>42</sup> Generally speaking, a moratorium is used when a novel type of business or construction—not foreseen in the city’s “general plan”—arrives in the jurisdiction.<sup>43</sup>

The ability of a zoning board to implement a moratorium is not universal however, and is subject to its own set of limitations.<sup>44</sup> Most importantly, an interim ordinance is only a temporary solution. The moratorium is statutorily limited to forty-five days, with the option to extend it two more times, up to two years.<sup>45</sup> The moratorium is used to “protect the public safety, health, and welfare” by “prohibiting any uses [of land] that may be in conflict with a contemplated general plan” while the legislative body studies the topic.<sup>46</sup> Again, courts have taken a very deferential approach to challenged moratoriums.<sup>47</sup>

---

<sup>36</sup> A comprehensive overview of nuisance laws would be too expansive for this article.

<sup>37</sup> See generally *Mid-West Emery Freight Sys. v. City of Chi.*, 257 N.E.2d 127 (Ill. 1970) (holding plaintiff failed to overcome the zoning ordinance’s presumption of validity).

<sup>38</sup> *Beverly Oil Co. v. City of L.A.*, 254 P.2d 865, 554 (Cal. 1953). “However, the existence of a nuisance is not necessarily the basis on which a zoning ordinance may operate against a particular industry.” *Id.*

<sup>39</sup> *Claremont v. Kruse*, 100 Cal. Rptr. 3d 1, 10 (Ct. App. 2009).

<sup>40</sup> CAL. GOV’T. CODE § 65858 (West 2002).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See generally *Martin v. Superior Court*, 286 Cal. Rptr. 513 (Ct. App. 1991) (a moratorium freezing construction on a hillside property was found to exceed the bounds of § 65858).

<sup>44</sup> CAL. GOV’T. CODE § 65858(b) (West 2002).

<sup>45</sup> *Id.*

<sup>46</sup> CAL. GOV’T. CODE § 65858(a) (West 2002).

<sup>47</sup> See generally *Assoc’d. Home Builders v. City of Livermore*, 557 P.2d 473, 486 (Cal. 1976) (stating that a challenged zoning decision is presumed to be legitimate); see also *Lockard v. City of L.A.*, 202 P.2d 38, 42 (Cal. 1949) (stating that “every intendment is in favor of the validity of such an ordinances”).

## III. THE DOCTRINE OF PREEMPTION

*“What can a provincial legislature do when [central government] possess the exclusive regulation of external and internal commerce?”*

*-Anonymous Author of Anti-Federalist Number 9*

As expressed in part II, article XI, section 7 of the California State Constitution, the Government Code and the common law all give local authorities an often-surprising amount of leeway in matters of local concern.<sup>48</sup> The power, however, is not unlimited.<sup>49</sup> As previously discussed, any ordinance must be reasonable and rational.<sup>50</sup> Yet, that is not the end of an ordinance’s limitations. Arguably the most powerful form of protection a business owner has against a zoning regulation comes from the doctrine of preemption. Although the zoning board is given a wide berth in the regulation of local matters, the power is curbed by the concept of state sovereignty, which could limit the applicability of ordinances in conflict with state law.<sup>51</sup>

The over-simplified definition of the doctrine of preemption is that “local legislation in conflict with general law is void.”<sup>52</sup> This derives directly from the very text of article XI, section 7, which again reads: “A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations *not in conflict with general laws.*”<sup>53</sup> Nevertheless, this does not truly engage the whole picture. In fact, a conflict arises if the local ordinance “duplicates, contradicts, or enters an area fully occupied by general law.”<sup>54</sup>

Because traditionally local governments have always maintained control over land-use regulations, the courts will presume that the regulation is *not* preempted by the state legislature.<sup>55</sup> The only possibility of overcoming this presumption is by showing a clear indication of preemptive intent made by the state, or in the alternative, by showing that the legislated material regards only a municipal affair.<sup>56</sup>

---

<sup>48</sup> See *supra* notes 21–28 and accompanying text.

<sup>49</sup> *Id.*

<sup>50</sup> See *supra* note 28.

<sup>51</sup> Korean Am. Legal Advocacy Found. v. City of L.A., 28 Cal. Rptr. 2d 530, 536 (Ct. App. 1994).

<sup>52</sup> Deukmejian v. County of Mendocino, 683 P.2d 1150, 1155 (Cal. 1984).

<sup>53</sup> CAL. CONST. art. XI, § 7 (emphasis added).

<sup>54</sup> Sherwin-Williams Co. v. City of L.A., 844 P.2d 534, 536 (Cal. 1993).

<sup>55</sup> Compare O’Connell v. City of Stockton, 162 P.3d 583 (Cal. 2007) (ordinance requiring the seizing of a vehicle used in the solicitation of prostitution was preempted by state law), with Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821 (Cal. 2006) (ordinance limiting locations of timber operations not preempted by state law).

<sup>56</sup> Compare Am. Fin. Servs. Ass’n v. City of Oakland, 104 P.3d 813 (Cal. 2005) (determining whether or not the state legislature indicated preemptive intent), with Yost v. Thomas, 685 P.2d 1152 (Cal. 1984) (stating it is “undisputed that in matters of general statewide concern the state may preempt local regulation”).

*A. Express Preemption vs. Implied Preemption*

In determining whether or not state law preempts an ordinance, the courts apply a three-pronged test.<sup>57</sup> First, the court must determine whether or not the ordinance duplicates, contradicts, or enters an area fully occupied by general law.<sup>58</sup> Assuming it does, the court then considers whether the ordinance addresses a municipal issue or a statewide concern.<sup>59</sup> In the event that the ordinance addresses a statewide matter, then the court must next consider whether or not the state legislature expressly or implicitly indicated preemptive intent in enacting the statute with which it conflicts.<sup>60</sup> Alternatively, if the question addressed by the ordinance is found to be one of local concern, then the court, bound by article XI, section 5 of the California State Constitution, will find the ordinance supersedes state law.<sup>61</sup>

Determining if the local ordinance is in conflict with state law is the first step.<sup>62</sup> Duplication of state law occurs when an ordinance is “coextensive,” or purports to impose the same prohibition that the general law imposes.<sup>63</sup> Next, an ordinance contradicts state law when it cannot be reconciled with state law.<sup>64</sup> Finally, a local ordinance can come into conflict with state law when it enters a field fully occupied by state law either through the expressed intent of the legislature to fully occupy the legal area, or through implicit intent.<sup>65</sup> Broken down, a local ordinance is in conflict with the general laws when it duplicates, is irreconcilable with, or enters a field fully occupied by, state law.<sup>66</sup>

In the event that a conflict is found to exist, article XI, section 5 of the state constitution vests local municipalities with the authority to supersede all other inconsistent laws respecting municipal affairs.<sup>67</sup> Put differently, if the matter in question is merely a local issue—and not one of statewide concern—then the local

---

<sup>57</sup> See *O’Connell*, 162 P.3d at 586–88; see also *Am. Fin. Servs.*, 104 P.3d at 820–21.

<sup>58</sup> *O’Connell*, 162 P.3d at 587.

<sup>59</sup> *Supra* notes 52–52 and accompanying text.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Article XI, section 5(a) states:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and *with respect to municipal affairs shall supersede all laws inconsistent therewith.*

*Id.* (emphasis added).

<sup>62</sup> *O’Connell*, 162 P.3d at 587

<sup>63</sup> *Id.* (quoting *Sherwin-Williams Co. v. City of L.A.*, 844 P.2d 534, 536 (Cal. 1993)).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Duplication of state law is the easiest to identify, as it is essentially self-explanatory. If a local ordinance prohibits or requires what state law already prohibits or requires, then it is duplicative. Irreconcilable is the opposite of duplication: namely, that a local ordinance cannot require an action which state law prohibits, or visa-versa. Finally, and most complex, a local ordinance cannot enter a field fully occupied by state law. See *id.* This last factor is explored *infra*.

<sup>67</sup> CAL. CONST. art. XI, § 5.

ordinance concerning such a question controls, even over state law.<sup>68</sup> This has come to be known as the “Home Rule.”<sup>69</sup> The court’s interpretation of this rule has changed drastically over time.<sup>70</sup> Although the original understanding of a “municipal affair” was expansive, the California Supreme Court has slowly chipped away at what a local legislature can call sovereign legal territory.<sup>71</sup> This has not occurred without dissent among the courts.<sup>72</sup>

Having determined that the ordinance touches upon issues of statewide concern, and is not simply addressing a municipal affair, the court will then move on to the third part of the preemption test: whether the state legislature had intended for the statute to preempt local ordinances.<sup>73</sup> The courts recognize both expressed and implicit intent.<sup>74</sup> Expressed intent is the most efficient method for any party hoping to prove that a local ordinance is invalid under the doctrine of preemption.<sup>75</sup> The most common form of expressed intent is a direct contradiction between the local ordinance and the statute because it is clear that if the state legislature said something that specifically conflicts with the ordinance, then it expressly dominates that point of law.<sup>76</sup> Consider the ruling in *Piploy v. Benson*, where the court suggested that “[w]here a statute and an ordinance are identical it is obvious that the field sought to be covered by the ordinance has already been occupied by state legislation.”<sup>77</sup>

Nevertheless, expressed intent is difficult to establish given the state legislature’s “intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning

---

<sup>68</sup> See *Johnson v. Bradley*, 841 P.2d 990, 994 (Cal. 1992).

<sup>69</sup> *Id.* at 993–95.

<sup>70</sup> For a more detailed analysis of this evolution, Chief Justice Lucas provides a brief overview of the history of the Home Rule in California in *Johnson*. *Id.* at 993–95. Although the courts had found that the legislature intended to vest local government with police power over local affairs at the outset of the California Constitution, the only way to guarantee that power was through an amendment to the constitution. *Id.* As a result, from 1896 to 1968, multiple amendments were made to the Constitution in an effort to clarify and solidify the Home Rule, resulting in article XI, section 5. *Id.* at 994–95.

<sup>71</sup> Compare *Bishop v. City of San Jose*, 460 P.2d 137, 144 (Cal. 1969) (“The fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs.”), with *O’Connell*, 162 P.3d at 587 (finding that although a matter may be a municipal concern, state Legislature involvement in the matter makes it a statewide concern). Further, the court has said, “[t]he common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.” *Gluck v. County of L.A.*, 155 Cal. Rptr. 435, 441 (Ct. App. 1979).

<sup>72</sup> See *O’Connell*, 162 P.3d at 593–96 (Corrigan, J., dissenting).

<sup>73</sup> *Id.* at 587–88. An analogous test is well founded in federal law: “When Congress legislates in a field traditionally occupied by the States, ‘we 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.’” *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 429 (Cal. 2004) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)).

<sup>74</sup> See *Big Creek Lumber Co. v. County of Santa Cruz*, 136 P.3d 821, 828–33 (Cal. 2006) (analyzing both expressed and implicit intent).

<sup>75</sup> See generally *id.*

<sup>76</sup> Contradiction, as discussed above, occurs when an ordinance cannot be reconciled with state law. *Supra* note 61.

<sup>77</sup> *Piploy v. Benson*, 125 P.2d 482, 485 (Cal. 1942).

matters.”<sup>78</sup> It is therefore rare, but not unheard of, for civil legislation to specify its intention to dominate the legal landscape.<sup>79</sup>

Otherwise, the courts can look to the implied intent of the legislature.<sup>80</sup> There are three indicia of the intent to fully occupy the area of law that the courts have consistently recognized.<sup>81</sup> First, “the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern.”<sup>82</sup> Second, “the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate future or additional legal action.”<sup>83</sup> Finally, “the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefits to the locality.”<sup>84</sup>

In determining implied preemption, the court is not to look merely at the words, but at the totality of circumstances surrounding the statute.<sup>85</sup> This includes, but is not limited to, the history behind the law in conjunction with its language and scope, as well as the history behind that form of regulation.<sup>86</sup>

In *O’Connell*, the court recognized a split among the appellate districts in determining what does and does not constitute a municipal affair.<sup>87</sup> There, an ordinance was passed in Stockton, which provided for the forfeiture of “any vehicle used to solicit an act of prostitution, or to acquire or attempt to acquire any controlled substance” in the city.<sup>88</sup> *O’Connell* challenged the law, seeking an injunction, claiming, in part, that the law was preempted by state laws governing vehicle forfeitures.<sup>89</sup> The court agreed.<sup>90</sup> Applying the three-pronged analysis, the

---

<sup>78</sup> CAL. GOV’T. CODE § 65800 (West 2008).

<sup>79</sup> See *Cal. Grocers Ass’n v. City of L.A.*, 98 Cal. Rptr. 3d 34, 38, 43–45 (Ct. App. 2009) (finding that by including the phrase “it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities” the legislature created an expressed intent to fully occupy the field). See also *Big Creek Lumber*, 136 P.3d at 827–32. It is much more common in criminal law to find a contradiction (and therefore expressed intent), given that any local ordinance that seeks to establish a punishment inimical to one prescribed by state law will be found to conflict with it. Compare *In re Portnoy*, 131 P.2d 1, 3 (Cal. 1942) (local legislation imposed the same criminal prohibition as the general law—therefore conflicts), with *Ex Parte Daniels*, 192 P. 442 (Cal. 1920) (finding a contradiction in laws when a local ordinance set the speed limit below that set by the state).

<sup>80</sup> *Big Creek Lumber*, 136 P.3d at 832.

<sup>81</sup> *Am. Fin. Servs. Ass’n v. City of Oakland*, 104 P.3d 813, 820 (Cal. 2005).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* “The denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent dual regulations that could result in uncertainty and confusion.” *Abbott v. City of L.A.* 349 P.2d 974, 979 (Cal. 1960).

<sup>85</sup> *Am. Fin. Servs.*, 104 P.3d at 820–21

<sup>86</sup> *Id.* “Where the legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme.” *Tolman v. Underhill*, 249 P.2d 280, 283 (Cal. 1952).

<sup>87</sup> *O’Connell v. City of Stockton*, 162 P.3d 583, 586 (Cal. 2007).

<sup>88</sup> *Id.* at 588.

<sup>89</sup> *Id.* at 585.

<sup>90</sup> *Id.* at 593.

court determined that the state had addressed questions of vehicular forfeiture through multiple provisions of the state's Penal and Vehicle Codes, "leaving no room for further regulation at the local level."<sup>91</sup> This meant that (1) the ordinance was in conflict with general law because it had entered a field fully occupied by the state; (2) the law was *made* a statewide concern via the state legislature's involvement; and (3) that the legislature had implicitly preempted local ordinances concerning the same topic.<sup>92</sup>

Analogously, in *American Financial Services*, the court was asked to determine if an Oakland ordinance regulating predatory lending practices in the local home mortgage market was preempted by a state law enacted to achieve the same thing.<sup>93</sup> The court applied the same three-pronged analysis: determining first and foremost that the ordinance was in conflict with general law by entering an area occupied by the state.<sup>94</sup> Next, the court questioned whether or not predatory lending practices were a statewide concern or a municipal affair. The court found that the "regulation of predatory practices in mortgage lending is one of statewide concern."<sup>95</sup> Therefore, the court examined the circumstances surrounding the statute, as well as the language of the statute itself to determine if the legislature had intended for the statute to preempt local ordinances.<sup>96</sup> In doing so, the court found that the state law was comprehensive and detailed in its scope, and that historically, the area of regulating home mortgages was dominated by the state.<sup>97</sup> These factors led the court to the conclusion that the California legislature had intended for the state law to supersede local ordinances.<sup>98</sup>

#### B. *The Right to Abate Nuisance*

Local municipalities maintain the authority to abate nuisances, and can do so through its police powers.<sup>99</sup> As a result, no business has a vested right to conduct itself in a manner that the city constitutes a nuisance.<sup>100</sup> Like every other power discussed thus far, the ability to regulate, as a nuisance, any activity or business is limited: zoning regulations cannot prohibit what the state has expressly authorized.<sup>101</sup> This, again, is an over simplification. A board of supervisors may exclude, on certain grounds, a business from parts of their jurisdiction, or even from the entire jurisdiction given the right circumstances.<sup>102</sup> However, the "certain

---

<sup>91</sup> *Id.* at 592.

<sup>92</sup> *Id.*

<sup>93</sup> *Am. Fin. Servs. Ass'n. v. City of Oakland*, 104 P.3d 813, 815 (Cal. 2005).

<sup>94</sup> *Id.* at 820–23.

<sup>95</sup> *Id.* at 820.

<sup>96</sup> *Id.* at 820–23.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 823.

<sup>99</sup> *City of Oakland v. Superior Court*, 53 Cal. Rptr. 2d 120, 131 (Ct. App. 1996).

<sup>100</sup> *Id.*

<sup>101</sup> *See Desert Turf Club v. Board of Supervisors*, 296 P.2d 882 (Cal. Ct. App. 1956).

<sup>102</sup> *Compare Desert Turf Club*, 296 P.2d at 886 (finding the outright ban of horse racing tracks an overextension of zoning powers), *with Wal-Mart Stores Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 421–22 (Ct. App. 2006) (finding an outright ban of "big-box retailers" constitutionally acceptable).

grounds” requirement is a reference to the necessity that the outright ban be based on some reasonable zoning concern, in the same manner utilized in restricting manufacturing establishments in residential zones.<sup>103</sup> What a board of supervisors *cannot* do is effectuate a ban of a business on strictly moral or personal grounds.<sup>104</sup>

In practice, what this means is that through zoning, a municipality cannot ban outright an industry because the zoning commission finds the industry offensive, or because members of the board have a financial stake in disallowing it.<sup>105</sup> Yet, a business *can* be banned from an entire jurisdiction if there are legitimate grounds that satisfy the requirements discussed earlier; namely, that the ordinance is reasonable and not arbitrary, furthering the health and welfare of the community at large.<sup>106</sup> Consider two cases. In the first, *Desert Turf Club*, the board of supervisors in Riverside County passed an ordinance banning from the county all horse racing tracks, even though through referendum the people had given the power of regulating horse racing to the state legislature.<sup>107</sup> In the other, *Wal-Mart Stores*, the board of supervisors for the City of Turlock banned all “big-box retailers” from the jurisdiction, even though under state law, “big-box retailers” were legal.<sup>108</sup> The two courts came to two very different conclusions regarding whether or not the local ordinances overstepped their bounds. In *Desert Turf Club*, the court found the ordinance violated the preemption doctrine,<sup>109</sup> while in *Wal-Mart Stores* the court found that state law did not preempt the ordinance.<sup>110</sup>

In the first case, the court determined that the people, through referendum and in conjunction with the state legislature, had clearly intended to “fully occupy” the legal field of horse racing.<sup>111</sup> As a result, the ordinance was preempted.<sup>112</sup> Conversely, in *Wal-Mart Stores*, the court found that there was no sign, implicit or expressed, that the ordinance overstepped its bounds.<sup>113</sup>

#### IV. LEGAL BACKGROUND OF MARIJUANA DISPENSARIES

*“That is not a drug. It’s a leaf.”*

*-Governor Arnold Schwarzenegger*

California became the first state to legalize the use of marijuana for

---

<sup>103</sup> See *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 440–41.

<sup>104</sup> See *Desert Turf Club*, 296 P.2d at 886.

<sup>105</sup> *Id.*

<sup>106</sup> *Supra* notes 22–30.

<sup>107</sup> *Desert Turf Club*, 296 P.2d at 883–84.

<sup>108</sup> *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 421–22.

<sup>109</sup> *Desert Turf Club*, 296 P.2d at 888 (“As it appears to us that the Board of Supervisors based its actions on an erroneous conclusion as to its legal rights and duties, and that upon the record legitimately before it the Board acted in abuse of its discretion, a writ of mandate should issue.”).

<sup>110</sup> *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 438.

<sup>111</sup> *Desert Turf Club*, 296 P.2d at 450–51.

<sup>112</sup> *Id.*

<sup>113</sup> *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 438–39.

medicinal purposes in 1996.<sup>114</sup> This was accomplished through Proposition 215, also known as the Compassionate Use Act (CUA), which won a majority of the public vote,<sup>115</sup> and paved the way for thirteen other states to enact similar laws.<sup>116</sup> The CUA was codified as Health and Safety Code section 11362.5 and was created to, among other things, “ensure that seriously ill Californians have the right to obtain and use marijuana for medicinal purposes,” and “to ensure that patients and their primary caregivers who obtain and use marijuana . . . are not subject to criminal prosecution or sanction.”<sup>117</sup>

Early critics of the proposition claimed that the language contained within the four corners of the law was too vague.<sup>118</sup> The subsequent data may now prove that prediction accurate, as there are an estimated 200,000 Californians who have received a prescription for marijuana.<sup>119</sup> But the largest problems did not come from some sudden influx of marijuana; instead, the largest hurdles created by Proposition 215 came from its implementation.<sup>120</sup> There were no clear guidelines explaining how patients could receive the drug, nor was there guidance to law enforcement regarding how to tell the difference between a legitimate user and someone using the drug illegally.<sup>121</sup> This vagueness resulted in multiple cases arriving at the appellate level, as citizens and law enforcement grappled with what to make of the new legal landscape.<sup>122</sup>

Realizing these issues, the California legislature introduced and enacted Senate Bill 420 in an effort to solve the many problems created by Proposition 215 (later codified in the California Health and Safety Code).<sup>123</sup> The bill, titled the

---

<sup>114</sup> Patrick Stack, *A Brief History of Medical Marijuana*, TIME MAGAZINE (Oct. 21, 2009), <http://www.time.com/time/health/article/0,8599,1931247,00.html>.

<sup>115</sup> Bill Jones, Cal. Sec’y of State, Supplement Statement of Vote 102 (Nov. 5, 1996), available at <http://www.sos.ca.gov/elections/sov/1996-general/1996-general-ssov.pdf>. The CUA was passed with approximately 55% of the vote. *Id.*

<sup>116</sup> Patricia Salkin, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLAN. & ENVTL. L. No. 8, 3 (2010). These states are: Alaska, Colorado, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont and Washington. *Id.*

<sup>117</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

<sup>118</sup> Scott Imler & Stephen Gutwillig, *Medical Marijuana in California: A History*, L.A. TIMES (Mar. 6, 2009), <http://www.latimes.com/features/health/la-oe-w-gutwillig-imler6-2009mar06,0,2951626.story>. In fact, Senator Diane Feinstein reportedly said that Proposition 215 was so poorly written, “you’ll be able to drive a truckload of marijuana through the holes in it.” *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Tammy McCabe, *It’s High Time: California Attempts to Clear the Smoke Surrounding The Compassionate Use Act*, 35 MCGEORGE L. REV. 545, 549 (2004) (there was no guidance within the new law providing for the structure of dispensaries or co-ops).

<sup>121</sup> CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996). See also McCabe, *supra* note 120, at 549.

<sup>122</sup> See *People v. Urziceanu*, 33 Cal. Rptr. 3d 859, 873 (Ct. App. 2005) (explaining, “the Compassionate Use Act is a narrowly drafted statement designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient’s personal use despite penal laws that outlaw these two acts for all others”); *People v. Mower*, 49 P.3d 1067 (2002) (holding that the medical-marijuana defense offers only limited immunity, rather than complete immunity from criminal prosecution); *People v. Rigo*, 81 Cal. Rptr. 2d 624 (Ct. App. 1999) (stating, “the acts of selling, giving away, transporting, and growing large quantities of marijuana remain criminal”).

<sup>123</sup> CAL. HEALTH & SAFETY CODE § 11362.7 (West 2004). The Statutory Notes state that following the implementation of the CUA, “reports from across the state have revealed problems and

Medical Marijuana Protection Act (MMPA), had the expressed intention of solving the problems created by the CUA,<sup>124</sup> and in some respects succeeded.<sup>125</sup> First, the bill defined key terms, which had become controversial following the passage of the CUA.<sup>126</sup> This included defining what constituted an illness justifying the prescription of marijuana, and who could be considered a patient.<sup>127</sup> Next, the MMPA tackled criminal liability by limiting the criminal liability of a qualified patient.<sup>128</sup>

Most importantly, however, the MMPA laid the foundation for storefront dispensaries.<sup>129</sup> Although initially vague, section 11362.81, subdivision (d), of the MMPA provides that, “the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act.”<sup>130</sup> This instruction led to the “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use,” released on August 25, 2008 (herein Guidelines).<sup>131</sup> The Guidelines are not legally binding, but the document does hold considerable legal weight.<sup>132</sup>

The Guidelines explain that the only legally permissible business models entitled to engage in the distribution of marijuana are *cooperatives* and *collectives*.<sup>133</sup> All *cooperatives* must be properly organized and registered as a corporation under the Corporations or Food and Agricultural Codes, and file articles of incorporation with the state.<sup>134</sup> The attorney general later defines a cooperative corporation as “democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons.”<sup>135</sup> Although California law does not recognize *collectives* as an independent business entity, the Guidelines explain, “a collective should be an organization that merely facilitates the collaborative efforts of patient

---

uncertainties in the Act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended.” *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Scott Imler, *supra* note 118 (“I would consider SB420 a qualified success”).

<sup>126</sup> CAL. HEALTH & SAFETY CODE § 11362.7(h) (West 2004).

<sup>127</sup> CAL. HEALTH & SAFETY CODE §§ 11362.7(a), (h) (West 2004).

<sup>128</sup> *Id.* (specifically, individuals “shall not be subject, on that sole basis” to liability under Health and Safety Code section 11357 (possession), section 11358 (cultivation), section 11359 (possession for sale), section 11360 (transportation, sale, distribution), section 11366 (opening or maintaining an unlawful place), section 11366.5 (providing a place for unlawful acts involving controlled substances), and section 11570 (nuisance)). See McCabe, *supra* note 120 n.43.

<sup>129</sup> CAL. HEALTH & SAFETY CODE § 11362.81(d) (West 2004).

<sup>130</sup> *Id.*

<sup>131</sup> Edmund G. Brown, Cal. State Att’y General, *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, (Aug. 2008), available at [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1601\\_medicalmarijuanaguidelines.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf).

<sup>132</sup> *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 98 (Ct. App. 2010) (quoting *Freedom Newspapers, Inc. v. Employees Retirement System*, 863 P.2d 218, 223 (Cal. 1993)).

<sup>133</sup> Brown, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (quoting CAL. CORP. CODE § 12201 (West 2011)).

and caregiver members – including the allocation of costs and revenues.”<sup>136</sup>

Following the publication of the attorney general’s guidelines, it became clear that, under state law, marijuana dispensaries would be permissible so long as they operated on a not-for-profit basis and that the dispensaries operated on a closed loop system.<sup>137</sup> In other words, the marijuana had to come from the members of the group, and could only be sold to the members of the group.<sup>138</sup> Outsiders would not be allowed into the closed system, unless eligible under the MMPA.<sup>139</sup>

It matters not, then, if the cooperative corporation or the collective has a storefront.<sup>140</sup> In fact, to clarify the issue further, the attorney general points out that while, “dispensaries, as such, are not recognized under the law . . . a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful . . . .”<sup>141</sup> This is an important revelation for the owners of the approximately 966 store front dispensaries scattered throughout Los Angeles.<sup>142</sup>

#### V. WHEN ZONING AUTHORITY CLASHES WITH STATE & FEDERAL LAW

*“There seems to be no public policy purpose for [that] zoning. This whole thing just smacks of special interest politics.”*

*-Ken Thompson, Co-Creator of Google’s Programming Language*

Whenever a new and perhaps contentious land use request is filed with a local zoning authority, it is common for planning commissions to enact a moratorium in an effort to buy some time in order to determine how to handle the permitting.<sup>143</sup> Because these moratoria are temporary solutions, it is only a matter of time before a final zoning decision is handed down.<sup>144</sup> Although the power of local municipalities to regulate land usage within their jurisdiction seems to be expansive, it does have its limits. Those limits have scarcely ever been tested as consistently (and with as much aggression) as they have in the face of the

---

<sup>136</sup> *Id.* The attorney general further relies on the dictionary to define a collective, stating, “the dictionary defines them as ‘a business, farm, etc. jointly owned and operated by the members of a group.’” *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See generally id.*

<sup>141</sup> *Id.* The attorney general provides an example of a dispensary acting unlawfully: “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.” *Id.*

<sup>142</sup> Doug Smith & Thomas Suh Lauder, *Where’s the Weed? Mapping LA’s Marijuana Dispensaries*, L.A. TIMES (Sept. 10, 2009), <http://latimesblogs.latimes.com/lanow/2009/09/medical-marijuana-in-los-angeles.html>.

<sup>143</sup> *See City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1 (Ct. App. 2008).

<sup>144</sup> CAL. GOV’T CODE § 65858 (West 2002).

explosion of storefront dispensaries.<sup>145</sup> This section will examine the ways business owners have attempted to circumvent local planning commissions in an effort to start a business, and how, on occasion, they have succeeded.

#### A. Preemption by State Statute

The driving force behind preemption is the concept of state sovereignty, but as discussed *supra* in Part II, the implied power of preemption is not without its limits.<sup>146</sup> The court has set up factors to consider in determining whether or not an ordinance is preempted,<sup>147</sup> and has applied them in multiple recent decisions regarding a myriad of regulations discussed below.

In *Big Creek Lumber*, the County of Santa Cruz passed zoning ordinances restricting permissible locations of timber operations to specified zones within the county.<sup>148</sup> A lumber company subsequently challenged the ordinances, claiming the ordinances were preempted by the Z'berg-Nejedly Forest Practice Act of 1973 (a state law).<sup>149</sup> The court determined that, within the Act, the state legislature had expressed its intention to preempt local regulations regarding the conduct of timber harvesting, but not the location.<sup>150</sup> Further, the court said, “by expressly preempting local regulations targeting the conduct of timber operations . . . [the Forest Practice Act] implicitly permits local regulations addressed to other aspects of timber operations.”<sup>151</sup> Essentially, the court found that the Forest Practice Act only regulated the “how” and not the “where,” and in doing so, implied that local municipalities had the authority to regulate the “where.”<sup>152</sup>

Conversely, in *California Grocers*, the court determined that state Health and Safety Codes preempted a Los Angeles ordinance.<sup>153</sup> The ordinance in question required purchasers of large grocery stores to employ the pre-existing staff for at least 90 days following the acquisition.<sup>154</sup> The court found, however, that the ordinance was being used to maintain health and safety standards, which was expressly preempted by the California Retail Food Code (CRFC).<sup>155</sup> When

---

<sup>145</sup> “Explosion” is used to describe the rapid increase of dispensaries in Los Angeles over the past four years—leveling off at approximately 1,000 dispensaries (outnumbering Starbucks in some neighborhoods). Madalite Del Barco, *In California, Marijuana Dispensaries Outnumber Starbucks*, NATIONAL PUBLIC RADIO (Oct. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=113822156>.

<sup>146</sup> See *supra* notes 21–30.

<sup>147</sup> See *supra* notes 56–92.

<sup>148</sup> *Big Creek Lumber Co. v. County of Santa Cruz*, 136 P.3d 821, 824 (Cal. 2006); see also CAL. PUB. RES. CODE § 4511 (West 2011).

<sup>149</sup> *Big Creek Lumber*, 136 P.3d at 824.

<sup>150</sup> *Id.* at 828–31.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Cal. Grocers Ass’n. v. City of L.A.*, 98 Cal. Rptr. 3d 34, 37–38 (Ct. App. 2009), *rev’d* 254 P.3d 1019 (Cal. 2011).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* In order to make this determination, the court examined the legislative history of the ordinance, the comments made by legislators during debate, as well as the language of the ordinance itself. *Id.*

enacting the CRFC, the legislature expressly declared that, “it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities.”<sup>156</sup> Given this expressed preemptive intent, the court determined that the Los Angeles ordinance was preempted by state law.<sup>157</sup>

In both of these situations, the courts have turned to the content of the statute and the intentions of the legislature.<sup>158</sup> When there is not direct language indicating preemptive intent, as there was in *California Grocers*, the courts must rely on what the legislators intended when enacting the law.<sup>159</sup> The MMPA does not speak to the topic of preemption.<sup>160</sup> Nevertheless the fact that the stated purpose of the Act was to “promote uniform and consistent application of the act among the counties within the state,” must be taken into consideration by the courts when deciding what the legislature intended.<sup>161</sup> Here, the legislature clearly intended to create a uniform, statewide, set of guidelines for the implementation of the CUA.

### *B. Preemption by Referendum*

The California Constitution provides for the creation of initiative statutes or referendums through popular vote.<sup>162</sup> This process requires that proponents of a proposed ordinance submit an initiative petition signed by the requisite number of voters, at which time the proposed ordinance can be placed to a public vote.<sup>163</sup> The initiative process can be utilized for those seeking to change state, county, or city laws.<sup>164</sup> Because it is one of the few examples of the people voting directly for a law—instead of electing representatives who vote for laws on the people’s behalf—it is perhaps one of the only vestiges of a direct democracy in the federal system.

In determining whether a state law preempts a local ordinance, courts have paid an increased amount of deference towards those laws, which have been enacted directly by the people.<sup>165</sup> In *Desert Turf Club*, discussed supra, the court

---

<sup>156</sup> *Id.* at 38.

<sup>157</sup> *Id.* at 45.

<sup>158</sup> *Id.* at 38, 44–45.

<sup>159</sup> *Supra* notes 73–79.

<sup>160</sup> *See* CAL. HEALTH & SAFETY CODE § 11362.7 (West 2004).

<sup>161</sup> *Id.* The legislative notes states in relevant part:

It is the intent of the Legislature, therefore, to do all of the following: (1) Clarify the scope of the application of the act and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2) *Promote uniform and consistent application of the act among the counties within the state.*

*Id.* (emphasis added).

<sup>162</sup> CAL. CONST. art. IV, § 1. “The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.” *Id.*

<sup>163</sup> CAL. ELEC. CODE § 9101 (West 2003).

<sup>164</sup> CAL. CONST. art. II, § 2.

<sup>165</sup> *See Desert Turf Club v. Board of Supervisors*, 296 P.2d 882, 884 (Cal. Ct. App. 1956).

recognized the added legal weight of a law passed by popular vote and questioned whether, “a board of supervisors [can] overrule the act of the people of the state in adopting a constitutional amendment and the legislature of the state in passing a full and comprehensive plan for the licensing and control by forbidding on moral grounds what the state expressly permits?”<sup>166</sup> The court found the answer to quite simply be “no.”<sup>167</sup>

The similarities between marijuana dispensaries and horse racing tracks are fairly numerous. First, medicinal marijuana was decriminalized in 1996 by initiative,<sup>168</sup> just as horse racing was legalized in 1933 by amendment.<sup>169</sup> Second, in both cases following legalization, the legislature instituted a more comprehensive plan to carry out the will of the people.<sup>170</sup> Third, following implementation of both the initiative and the subsequent legislative plan, individual counties and cities attempted to ban outright, through zoning, both marijuana dispensaries and horse racing.<sup>171</sup>

In *Desert Turf Club*, the court managed to walk a thin line. The court determined that a local municipality could ban horseracing tracks—even after a statewide initiative passed, permitting them—but could only do so while acting in good faith, and not arbitrarily or unreasonably.<sup>172</sup> In other words, the zoning board must simply work within the confines of the authority granted to it, and thus avoid banning something based only on personal beliefs or moral opposition.<sup>173</sup> Yet, if a zoning board found legitimate zoning concerns, it would be justified in banning a certain business or activity *even after* a public referendum condoned that very activity or business.<sup>174</sup>

For marijuana dispensaries this is an ominous realization. Although the courts have made it clear that every business is safe from zoning boards that function with an ulterior, moral agenda that does not mean that such zoning boards are powerless.<sup>175</sup> Based solely on the reasonableness standard, a city planning commission need only provide a *plausible* reason for banning a business.<sup>176</sup> Given the current nature of the medical marijuana industry, the “reasonableness” standard is not a particularly difficult standard to meet.<sup>177</sup>

---

<sup>166</sup> *Id.* at 885.

<sup>167</sup> *Id.* (“There is no escape, in our opinion, from a negative answer.”).

<sup>168</sup> Stack, *supra* note 114.

<sup>169</sup> CAL. CONST. art. IV, § 25.5 (repealed 1966).

<sup>170</sup> CAL. HEALTH & SAFETY CODE § 11362.7 (West 2004) created the MMPA, while CAL. BUS. & PROF. CODE §§ 19400–19663 (West 2008) created what was known as the “Horse Racing Law.”

<sup>171</sup> *Desert Turf Club*, 296 P.2d at 882–85 (banning horseracing tracks in Riverside County); see Memorandum from Richard Doyle, City Attorney, and Robert L. Davies, Chief of Police to Honorable Mayor and City Council Members (Mar. 16, 2010), available at <http://tiny.cc/joek1> (stating, “[c]ommercial dispensaries that sell marijuana to qualified medical patients or their primary caregivers for medicinal purposes would not comport with either state or federal laws and, so, would constitute a public nuisance and not be allowed anywhere in the City”).

<sup>172</sup> *Desert Turf Club*, 296 P.2d at 885–86.

<sup>173</sup> See generally *id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *Wal-Mart Stores Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 438–39 (Ct. App. 2006).

<sup>177</sup> Consider the Los Angeles Department of City Planning’s Recommendation Report concerning

### C. Preemption by Federal Law

Multiple attempts have been made by opponents of medical marijuana dispensaries to argue that the city must act in compliance with federal law—as opposed to state law—because federal law preempts state law.<sup>178</sup> This argument was actually not addressed until very recently in *Qualified Patients Association*, when the court answered the question directly.<sup>179</sup> It serves an important purpose, however, to first understand the nature of the claim.

City councils have claimed that because the federal Controlled Substance Act criminalized marijuana, it is a violation of federal law for a local government to authorize the existence of medical marijuana dispensaries.<sup>180</sup> Fearing prosecution, cities have opted to side with the federal government as opposed to complying with state law.<sup>181</sup> This logic was dismissed first in *City of Garden Grove*, and then later in *Qualified Patients Association*.<sup>182</sup> In this area the appellate courts have made two significant findings. First, the courts found that federal law did not preempt California’s marijuana laws.<sup>183</sup> The court determined that “no conflict arises based on the fact that Congress has chosen to prohibit the possession of medical marijuana while California has chosen not to.”<sup>184</sup> This means that the MMPA does not require anything that the Controlled Substances Act forbids.<sup>185</sup> The court went further, pointing out that the federal Controlled Substances Act does not direct local governments regarding zoning power in any way, and consequently, a local government’s compliance with state law does not violate federal law.<sup>186</sup> What this means is the fact that an individual or collective corporation chooses to act in a way that violates federal but not state law, does not alone relay liability unto the municipality.<sup>187</sup> As a result, federal law does not

---

a moratorium on dispensaries. L.A. DEP’T OF CITY PLANNING, RECOMMENDATION REPORT, CPC 2007-0280-ICO, at 1 (Mar. 22, 2007), available at [http://cityplanning.lacity.org/Code\\_Studies/Misc/Marijuana.pdf](http://cityplanning.lacity.org/Code_Studies/Misc/Marijuana.pdf). The report recommended the implementation of a moratorium in order to study the effects of dispensaries on the city. *Id.* The recommendation was based, in part, upon a police report, which stated, “the proliferation of medical marijuana dispensaries has led to increased crime and violence.” *Id.* at 6. The police report, however, is not the final say on the relationship between dispensaries and crime. A recent study by the Rand Corporation showed that the existence of a medical marijuana dispensary did *not* increase crime, and in some cases even *reduced* crime. John Hoeffel, *Study On Pot Shops Has A Twist*, L.A. TIMES (Sept. 21, 2011), <http://www.latimes.com/news/local/la-me-0928-marijuana-dispensaries-20110921,0,7776989.story>.

<sup>178</sup> See generally *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 105 (2010); *Claremont v. Kruse*, 100 Cal. Rptr. 3d 1, 9 (Ct. App. 2009); *Garden Grove v. Superior Court*, 68 Cal. Rptr. 3d 656, 673–74 (Ct. App. 2007).

<sup>179</sup> *Qualified Patients Ass’n*, 115 Cal. Rptr. 3d at 105.

<sup>180</sup> *Supra* note 178.

<sup>181</sup> *Id.*

<sup>182</sup> See *Qualified Patients Ass’n*, 115 Cal. Rptr. 3d at 105–10; *Garden Grove*, 68 Cal. Rptr. 3d at 673–78.

<sup>183</sup> *Qualified Patients Ass’n*, 115 Cal. Rptr. 3d at 105–10.

<sup>184</sup> *Id.* at 107 (quoting *Garden Grove*, 68 Cal. Rptr. 3d at 677).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* “Governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state marijuana laws.” *Id.*

<sup>187</sup> *Id.*

preempt California's medical marijuana laws.<sup>188</sup>

#### D. Criminalization

In some situations, local municipalities have gone so far as to criminalize certain businesses or groups, even while under state law the business or activity is valid.<sup>189</sup> In *Qualified Patients Association*, the City of Anaheim enacted an ordinance that made it a misdemeanor to own, operate, or be employed by a medical marijuana dispensary.<sup>190</sup> The ordinance was contrary to the MMPA, enacted by the state legislature as Senate Bill No. 420, and the CUA, which had decriminalized medicinal marijuana, cooperative corporations, and collectives.<sup>191</sup> Anaheim argued that California's dispensary laws were preempted by the federal Controlled Substances Act, and therefore, was inapplicable to local municipalities.<sup>192</sup> Qualified Patients Association, a medicinal marijuana dispensary operating within Anaheim, sought a declaratory judgment that the state's marijuana laws preempted Anaheim's ordinance.<sup>193</sup> The trial court granted Anaheim's demurrer, but an appellate court reversed the demurrer and remanded the case back to the trial courts, putting off the discussion of state preemption until adequately adjudicated.<sup>194</sup>

Because of this ruling there remains the question of state preemption—specifically, can Anaheim criminalize dispensaries without regard for state law? The appellate court had hinted at the answer before overturning the lower court's demurrer and remanding for further proceedings. The appellate court said, “it seems odd the [state] Legislature would disagree with federal policymakers . . . but intend that local legislatures could side with their federal—instead of state—counterparts in prohibiting and criminalizing . . . medical marijuana activities. After all, local entities are creatures of the state, not the federal government.”<sup>195</sup>

Picking up on this “hint,” Judge Caffee of the Superior Court of Orange County ruled that state law preempted the portion of Anaheim's ordinance that criminalized medical marijuana dispensaries.<sup>196</sup> The Superior Court found that the goal of the CUA to protect qualified patients from criminal liability was in direct conflict of Anaheim's ordinance.<sup>197</sup> However, the Superior Court also found that

---

<sup>188</sup> *Id.* at 105–10.

<sup>189</sup> *See id.* at 92 (criminalizing storefront dispensaries); *see also* *Lancaster v. Municipal Court*, 494 P.2d 681 *passim* (Cal. 1972) (finding that an ordinance making it a misdemeanor for physical therapists, masseuses, etc. to massage members of the opposite sex improperly expanded upon state law and was therefore preempted).

<sup>190</sup> *Qualified Patients Ass'n*, 115 Cal. Rptr. 3d at 93 (quoting ANAHEIM, CAL., ORDINANCE ch. 4.20, § 4.20.030 (2007)).

<sup>191</sup> *See supra* notes 114–39.

<sup>192</sup> *Qualified Patients Ass'n*, 115 Cal. Rptr. 3d at 105.

<sup>193</sup> *Id.* at 92.

<sup>194</sup> *Id.* At the time of this writing, the case is currently pending before a trial court.

<sup>195</sup> *Id.*

<sup>196</sup> Minute Order at 1, *Qualified Patients Ass'n v. Anaheim*, 115 Cal. Rptr. 3d at 89, No. 07CC09524 (Aug. 15, 2011), *available at* [http://americansforsafeaccess.org/downloads/Anaheim\\_Superior\\_Court\\_Trial\\_Ruling.pdf](http://americansforsafeaccess.org/downloads/Anaheim_Superior_Court_Trial_Ruling.pdf) [hereinafter Minute Order]

<sup>197</sup> *Id.*

the CUA and MMPA do not fully occupy the field of law surrounding marijuana dispensaries, and that the state legislature intended to allow local governments to address the issue more fully.<sup>198</sup> The ability to regulate dispensaries into oblivion is within the powers of local governments.<sup>199</sup> As a result, Judge Caffee severed the criminal portion of the ordinance, but ruled that the remaining portions were valid.<sup>200</sup> What this means in a real world context is that dispensaries are still not allowed in Anaheim, but opening one or working in one is not grounds for criminal liability—the city will simply shut it down, or not issue a business permit to begin with.

## VI. IMPACT

*“The Chief Business of the American People is Business”*

*-President Calvin Coolidge*

The current legal issues facing medicinal marijuana dispensaries may seem like a distant plight to most businesses, but that understanding of the issue could be dangerously short-sighted. Instead, the power of local governments to ban outright entire business models that are otherwise legal should be a very real concern. The Home Rule was designed to decentralize power away from Sacramento and into the hands of local legislatures,<sup>201</sup> but courts have failed to delineate clearly where one authority ends and the other begins. As a result, zoning commissions often find themselves in legal battles to determine whether or not they have overstepped their authority.

### *A. Impact on Dispensaries*

At the most basic level, criminalization by local governments of an expressly sanctioned business goes too far. It seems clear that the appellate court and the superior court’s observation in *Qualified Patients Association* was keen: it is categorically illogical for the state legislature to expressly decriminalize a business, with the intention that local governments be allowed to disregard the law.<sup>202</sup> Local governments are nothing but an extension of the state legislature; they were created at Sacramento’s whim and therefore dictated by the laws of the land.<sup>203</sup>

---

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* This view was recently echoed by Governor Jerry Brown who vetoed a statewide bill that would have banned marijuana dispensaries from being established within 600 feet of a school. In explaining his choice to veto, Governor Brown stated, “[d]ecisions of this kind are best made in cities and counties, not the state capitol.” Patrick McGreevy, *Brown Vetoes Pot Shop Bill*, L.A. TIMES (Sept. 22, 2011), available at <http://www.latimes.com/la-me-brown-marijuana-20110922,0,1067869.story>.

<sup>200</sup> See Minute Order, *supra* note 196.

<sup>201</sup> See *supra* notes 67–72.

<sup>202</sup> *Qualified Patients Ass’n v. City of Anaheim*, 115 Cal. Rptr. 3d 89, 103 (2010).

<sup>203</sup> See *supra* note 1. See *Webb v. Cal. Fish Co.*, 138 P. 79, 92 (Cal. 1913) (quoting *Payne v. Treadwell*, 16 Cal. 220, 233 (1860)) (“A municipal corporation is a public institution, created for public

Criminalization moves beyond an act of mere zoning. It is clear that a local municipality is authorized to zone in a manner dictated by statute and common law—namely in a way that is neither unreasonable nor arbitrary;<sup>204</sup> however the act of criminalizing dispensaries steps far beyond these confines. In *Qualified Patients Association*, the City of Anaheim argued that they were complying with federal law by criminalizing medical marijuana dispensaries.<sup>205</sup> This, however, is not an accurate depiction of the function of local government. Local government is designed to carry out the will of the state legislature.<sup>206</sup> It could be argued that local governments are also designed to give a voice to the individual communities who may wish to fashion their community as they see fit. Proponents of this view point would likely argue that it should therefore be left up to the local governing agencies to determine the layout and content of the community. This argument, however, ignores the realities of our federalist system. Decentralized power within the state—as within the country—is not the equivalent of a freestanding government. As each locality is the creation of the state, each is therefore beholden to the state so as to create a uniform set of rules and regulations.<sup>207</sup> Local criminalization of marijuana dispensaries in defiance of a state law that expressly legalized the same is therefore overreaching and unjustified. The court in *Qualified Patients Association* ruled accordingly.

Most localities, however, have relied not on criminalization, but on moratoria and zoning. When enacted correctly, zoning regulations and moratoria affecting dispensaries have been upheld in multiple instances throughout the state.<sup>208</sup> Distance restrictions, moratoria, and express limits on the number of dispensaries are all legitimate uses of a local government's police powers.<sup>209</sup> The process goes awry, however, if local officials attempt to ban the businesses outright based solely upon personal feelings harbored towards dispensaries.<sup>210</sup> In these situations, courts must not be timid in the protection of these dispensaries by

---

purposes; the municipality is a political subdivision or department of the state, governed, and regulated, and constituted by public law . . . the original power to control, as well as to create them, therefore, is in the Legislature.”).

<sup>204</sup> See *supra* note 29.

<sup>205</sup> *Qualified Patients Ass'n*, 115 Cal. Rptr. 3d at 105.

<sup>206</sup> See *supra* note 1.

<sup>207</sup> *Id.*

<sup>208</sup> See *Claremont v. Kruse*, 100 Cal. Rptr. 3d 1 *passim* (Ct. App. 2009) (upholding moratorium and ordinance); *City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1, *passim* (Ct. App. 2008) (upholding moratorium and ordinance). In contrast, consider the current status of Los Angeles' moratorium on dispensaries — which has endured years of legal battles and has on multiple occasions been struck down due to the failure of the city council to follow state law in renewing the moratorium. See John Hoeffel, *229 medical marijuana dispensaries make deadline for L.A.'s lottery to see which can stay open legally*, L.A. TIMES NOW BLOG (Feb. 24, 2011), <http://latimesblogs.latimes.com/lanow/2011/02/medical-marijuana-los-angeles-lottery.html>. Today, the city has instituted a lottery in order to randomly choose those dispensaries, which may continue to operate within city borders. *Id.*

<sup>209</sup> See J.M. Brown, *County Panel OK's Medical Marijuana Rules*, SANTA CRUZ SENTINEL (Feb. 10, 2011), [http://www.santacruzsentinel.com/ci\\_17346990](http://www.santacruzsentinel.com/ci_17346990); John Hoeffel, *Los Angeles City Council Passes Medical Marijuana Dispensary Ordinance*, L.A. TIMES (Jan. 19, 2010), <http://articles.latimes.com/2010/jan/19/local/la-me-medical-marijuana20-2010jan20>.

<sup>210</sup> *Desert Turf Club v. Bd. of Supervisors*, 296 P.2d 882, 885 (Cal. Ct. App. 1956).

applying the precedent set forth in *Desert Turf Club*,<sup>211</sup> as zoning commissions are simply not entitled to act arbitrarily.

Nevertheless, through preemption, dispensaries may be able to escape the powerful zoning commissions. Although the Home Rule places authority in the hands of zoning boards to handle municipal affairs, this power does not give local municipalities the ability to regulate anything that occurs within their jurisdiction without regard for what occurs outside of it. Instead, the courts evolving understanding of the Home Rule reveals a weaker delineation of power than originally defined.<sup>212</sup> In *Polis v. City of La Palma*, the court ruled that state preemption of a local ordinance is likely to exist where there was not “a significant local interest to be served that may differ from one locality to another.”<sup>213</sup> In other words, if the ordinance in question regards an issue occupied by state law, and that issue is essentially static from one municipality to the next, then the state law regarding that issue would sufficiently occupy that field of law, leaving no room for further regulation at the municipal level.

If this proposition is correct, then the threat stemming from the subject of the ordinance is no more severe from one municipality to the next, and the city cannot justify an expansion or restriction of the state law.<sup>214</sup> Assume *arguendo* that dispensaries operating within the confines of the law are no less and no more dangerous in Anaheim than they are in Los Angeles, San Francisco, Humboldt County, or Fresno. It follows then, that there is no justification for the limitation of the applicability of state law from city to city. Under this understanding, dispensaries sanctioned by state law should not be subjected to unnecessarily restrictive local ordinances that differ from locality to locality.

Further, when looking to determine whether the MMPA or the CUA expressly or implicitly preempts a local ordinance, the courts should consider the legislative notes following the text of the MMPA itself. Although there is no expressed preemptive intent within the MMPA, the legislative notes clearly state that the goal of the legislature was to create a uniform set of guidelines.<sup>215</sup> This is a straightforward, unambiguous expression of preemptive intent. The legislature has made it clear that the rules and guidelines set forth in the MMPA are designed for statewide application. The goal was to avoid the very patchwork of regulation that local ordinances have since created.

Alternatively, note that nothing within the CUA or the MMPA *compels* cities and counties to accommodate dispensaries.<sup>216</sup> If the courts chose not to adhere to the legislative notes, the strongest argument available to dispensary owners hoping to overturn an unduly burdensome zoning restriction still lies within the court’s existing preemption test. In determining preemption, courts consider the three

---

<sup>211</sup> See *supra* notes 165–74; *Desert Turf Club*, 296 P.2d *passim*.

<sup>212</sup> See *supra* notes 68–70.

<sup>213</sup> *Polis v. City of La Palma*, 12 Cal. Rptr. 2d 322, 325 (Ct. App. 1992) (finding that a local ordinance creating term limits was preempted by state law).

<sup>214</sup> See *id.*

<sup>215</sup> See *supra* note 161.

<sup>216</sup> *City of Claremont v. Kruse*, 100 Cal. Rptr. 3d 1, 20 (Ct. App. 2009).

distinct indicia of implied preemption discussed above.<sup>217</sup> The third indicium states, “the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefits to the locality.”<sup>218</sup> This is a dispensary owner’s most cogent argument. Because cooperative corporations and collectives exist for the sole purpose of providing a state recognized medication to legitimate patients, an ordinance which forbids the sale of this medication would invariably affect transient patients.

Taking the court’s third indicium in pieces, it is clear that the subject matter has been partially covered by state law: the MMPA and the CUA both pertain to medical marijuana, and the MMPA deals directly with patients and their caregivers.<sup>219</sup> The second clause requires that harm to transient citizens caused by the ordinance outweigh the benefits to the locality.<sup>220</sup> The harm to legitimate patients who use marijuana to treat their symptoms appears to be severe.<sup>221</sup> In real terms, this is tantamount to a municipality banning pain medication to injured athletes, and appetite inducing medication for chemotherapy patients. The ability of a sick patient to receive medication should not be subject to the whims of the zoning commission. Patients should not be restricted in their travels to those places that allow for their medication.<sup>222</sup>

### *B. Impact on Other Businesses*

Recently, the Los Angeles City Council banned new fast food restaurants from opening in South Los Angeles—a move that angered many residents.<sup>223</sup> The ban came following the expiration of a moratorium enacted in 2008.<sup>224</sup> The ability of the city council to ban new fast food restaurants from opening is rooted firmly in the same power that allows the city council to ban medical marijuana dispensaries.<sup>225</sup> The city council has acted well within its authority in doing so; they have argued that the ban is directly related to the health and welfare of the city.<sup>226</sup> Given the deference that the courts pay to the local legislatures, this claim

---

<sup>217</sup> See *supra* note 82–84.

<sup>218</sup> *Am. Fin. Servs. Ass’n v. City of Oakland*, 104 P.3d 813, 820 (Cal. 2005).

<sup>219</sup> See *supra* notes 114–39.

<sup>220</sup> *Am. Fin. Servs. Ass’n*, 104 P.3d at 820.

<sup>221</sup> See e.g., *Cannabis and Cannabinoids: General Information*, The National Cancer Institute at the NAT’L INSTS. OF HEALTH, [http://www.cancer.gov/cancertopics/pdq/cam/cannabis/health\\_professional/page2](http://www.cancer.gov/cancertopics/pdq/cam/cannabis/health_professional/page2) (last visited Feb. 23, 2012).

<sup>222</sup> This is a very real debate occurring in Laguna Beach, California: “[F]or communities to not step up and take some responsibility for how their folks can have access [to medicinal marijuana], and to push it off onto other communities brings to us a consistency issue that is legitimate for us to look at . . . .” Commissioner Mark Stone of the California Coastal Commission, referring to Laguna Beach’s decision to ban dispensaries outright. Claudia Koerner, *Marijuana Dispensary Ban Finds Disfavor in Laguna*, ORANGE CNTY. REGISTER (Jan. 19, 2011), <http://www.ocregister.com/news/coastal-284721-ban-commission.html>.

<sup>223</sup> Medina, *supra* note 2.

<sup>224</sup> *Id.*

<sup>225</sup> See e.g., Medina, *supra* note 2..

<sup>226</sup> *Id.* This is further bolstered by the realization that since the moratorium, although not a single

is unlikely to be disputed.<sup>227</sup>

This is the type of action that business owners must be wary of, and it is what marijuana dispensaries have in common with owners of fast-food restaurants, bankers, and retailers: all are subject to the zoning commissions' decisions to allow, or not to allow, a business. In *Wal-Mart*, a city ordinance banning "big-box" retailers was upheld as a valid use of a local government's police power.<sup>228</sup> The court determined that the increase in pollution, coupled with the fear of "urban decay," was sufficient reason for the city council to pass the ordinance.<sup>229</sup> The court also found that the unintended consequence of limiting economic competition was of no concern.<sup>230</sup>

It seems then, virtually impossible for a business to overcome a zoning ordinance that places restrictions upon it in excess of state law. The complaining business must show one of two things: either state law preempts the ordinance, or the ordinance is unreasonable or arbitrary.<sup>231</sup> The latter, as discussed, is very difficult to prove—so preemption is often the only argument to make.<sup>232</sup>

## VII. CONCLUSION

The Home Rule has many valuable qualities—the most important of which may be the ability of communities to handle municipal affairs without interference from Sacramento. Local governments are more amenable to the needs of their constituents, and are capable of tailoring rules and regulations to fit the needs of the community better than the state legislature, which must legislate for a larger, more diverse group.

Nevertheless, when state law expressly authorizes the existence of a business, product, or group, it seems extremely illogical that local municipalities should be allowed to reject the law and ban what the state has expressly authorized. This argument is founded in the understanding that local governments are not autonomous islands. As the court stated in *Abbott v. City of Los Angeles*, "[t]he denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent dual regulations which could result in uncertainty or

---

fast food restaurant has opened, the first grocery store in approximately ten years opened in the area.  
*Id.*

<sup>227</sup> "[S]o long as [there is] a 'question upon which reasonable minds may differ,' there will be no judicial interference with [a] municipality's determination of policy." *Clemons v. City of L.A.*, 222 P.2d 439, 448 (Cal. 1950).

<sup>228</sup> *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 438, discussed in detail *supra* notes 108–13.

<sup>229</sup> *Id.* at 439.

<sup>230</sup> *Id.* at 439–441.

<sup>231</sup> See generally *Cal. Grocers Ass'n v. City of L.A.*, 98 Cal. Rptr. 3d 34 *passim* (Ct. App. 2009) (finding that by including the phrase "it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities" the legislature created an expressed intent to fully occupy the field); *Desert Turf Club v. Bd. of Supervisors*, 296 P.2d 882 *passim* (Cal. Ct. App. 1956) (finding an ordinance banning horse racing in San Bernardino County to be arbitrary).

<sup>232</sup> See *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 438 (finding that the County's regulation was not arbitrary and capricious, even if it had other illegitimate results).

confusion.”<sup>233</sup> Further, local municipalities are an extension of the state government and should function as such.

Zoning authority is one of many police powers granted to local municipalities through the Home Rule. This power serves an important function in the planning and execution of a city, and when used properly, zoning ordinances truly do promote public health, safety, and the general welfare. But, as Article XI, section 7 of the California State Constitution explains, municipal ordinances and regulations may not conflict with the general laws.<sup>234</sup> It is from this rule that the doctrine of state preemption is drawn.

Understanding the principles of preemption and the rules governing zoning authority, business owners can be armed with the information necessary to try and protect themselves from ordinances that may limit a businesses’ growth or its very existence. Nowhere is this more prevalent than in the current debate over medical marijuana dispensaries. As *Qualified Patients Association* makes its way through the appellate process, the unjustifiable claims posed by the City of Anaheim should be disregarded, and the ordinance criminalizing what the state has expressly sanctioned should be struck down as preempted. As local governments attempt to grapple with the sudden influx of cooperative corporations and collectives, the courts must continue to uphold the principles of preemption, and be wary of unreasonable and arbitrary zoning regulations.

---

<sup>233</sup> *Abbott v. City of L.A.*, 349 P.2d 974, 979 (Cal. 1960).

<sup>234</sup> CAL. CONST. art. XI, § 7.