Medical Marijuana – Revisited After New State Laws

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I. INTRODUCTION

Since the passage of Proposition 215 in 1996, medical marijuana has presented perplexing and challenging land use issues for city attorneys. Proposition 215, known as the Compassionate Use Act ("CUA"), and Senate Bill 420, known as the Medical Marijuana Program Act ("MMP"), offered cities little guidance on how to address medical marijuana land uses, resulting in a patchwork regulatory approach across the state and costly litigation.

On October 9, 2015, Governor Brown signed Assembly Bills 243 and 266 and Senate Bill 643 (collectively, the "Medical Marijuana Regulation and Safety Act" or "MMRSA"), which together create a state regulatory and licensing system governing the cultivation, testing, and distribution of medical marijuana, the manufacturing of medical marijuana products, and physician recommendations for medical marijuana. MMRSA recognizes a range of medical marijuana businesses referred to as "commercial cannabis activities," including cultivation businesses, marijuana product manufacturers, marijuana distributors and transporters, marijuana testing laboratories, and dispensaries, and provides immunity to marijuana businesses operating with both a state license and a local permit.

MMRSA, combined with several important court victories, will help cities tremendously in dealing with medical marijuana land uses. It is now clear under both statutory and case law that cities can ban medical marijuana activities completely or choose to allow them subject to local permitting requirements. Despite this regulatory flexibility, there are still difficult and uncertain issues that remain. The goal of this paper is to provide an overview of the state's medical marijuana laws and address the special issues that will likely pose continuing challenges for local jurisdictions. This paper will also briefly summarize the Control, Regulate and Tax Adult Use of Marijuana Act, which will likely appear on the November 2016 general election ballot.

II. OVERVIEW OF FEDERAL AND STATE MARIJUANA LAWS

In order to understand what MMRSA accomplishes and how it works, it is important to place it in the context of existing federal and state marijuana laws. All marijuana activities remain illegal under federal law, which classifies marijuana as a Schedule I controlled substance with no medical value. In general, state law prohibits marijuana activities, but the CUA and MMP provide limited exceptions from these prohibitions for qualified patients and primary caregivers to engage in specified marijuana activities for medical use only. MMRSA supplements the CUA and MMP by providing a regulatory framework for the cultivation, manufacturing, and distribution of medical marijuana and medical marijuana products.

A. Federal Controlled Substances Act

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act. Title II of that Act, the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., imposes a "comprehensive regime to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." To effectuate these goals, Congress devised a regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled

substance except in a manner authorized by the CSA. (*Gonzales v. Raich* (2005) 545 U.S. 1; 21 U.S.C. §§ 841(a)(1), 844(a).) The CSA created five categories, or schedules, of controlled substances, each with its own set of restrictions and requirements. (21 U.S.C. § 812) From its inception, the CSA has classified marijuana as a Schedule I drug. (21 U.S.C. § 812(c).) A Schedule I controlled substance is one that has a "high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." (*Gonzales v. Raich*, *supra*, 545 U.S. at p. 14; 21 U.S.C. § 812(b)(1).) It is illegal, therefore, to import, manufacture, distribute, possess or use marijuana in the United States. (21 U.S.C. §§ 823(f), 841(a)(1), 844(a). There is no medical necessity defense to the CSA's prohibitions. (*United States v. Oakland Cannabis Buyers' Coop*. (2001) 532 U.S. 483, 491.) Accordingly, the operation of any marijuana facility violates federal law.

B. California Uniform Controlled Substances Act

California first made marijuana illegal in 1913. (1913 Cal.Stats. ch. 342, § 8a.) In 1972, the Legislature consolidated the state's narcotics laws under the California Uniform Controlled Substances Act ("UCSA"), commencing at Health and Safety Code section 11000. Chapter 6 of the UCSA, entitled "Offenses and Penalties" and commencing at Health and Safety Code section 11350, established the state's prohibition, penalties, and punishments for controlled substances. (Health & Safety Code §§ 11350 et seq.) Within Chapter 6, Article 2 is entitled "Marijuana" and sets forth general prohibitions and punishments for the possession, cultivation, transportation, and distribution of marijuana. (Health & Safety Code §§ 11357 et seq.)

C. Compassionate Use Act

Against this backdrop of longstanding federal and state prohibitions and punishments for marijuana, California voters approved the CUA in 1996. The primary purpose of the CUA, which was codified at Health and Safety Code section 11362.5, was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." The scope of the CUA, however, was very limited. Health and Safety Code section 11362.5(d) provides that: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Section 11362.5(c) protected physicians from punishment for recommending marijuana to a patient for medical purposes.

Following the CUA, many medical marijuana dispensaries opened throughout the state. However, contrary to what many marijuana advocates believed at the time, the CUA did not "legalize" medical marijuana or authorize the establishment of dispensaries. (*Ross v. Raging Wire Telecommunications* (2008) 42 Cal.4th 920, 926.) California courts held consistently that the Act only created a limited exception from criminal liability under the state UCSA for seriously ill persons who are in need of medical marijuana for specified medical purposes and who obtain and use medical marijuana under limited, specified circumstances. (*People v. Mower* (2002) 28 Cal.4th 457, 480; *People v. Kelly* (2010) 47 Cal.4th 1008, 1014.)

D. Medical Marijuana Program Act

In 2003 the Legislature enacted the MMP, adding sections 11362.7 through 11362.83 to the Health & Safety Code. (*People v. Wright* (2006) 40 Cal.4th 81, 93.) The purpose of the MMP was to clarify the scope of the CUA. The MMP established a voluntary program for identification cards issued by counties for qualified patients and primary caregivers, and provided criminal immunity to qualified patients and primary caregivers for certain activities involving medical marijuana. Of particular importance and concern to cities, Health and Safety Code section 11362.775 created immunities for the collective or cooperative cultivation of medical marijuana:

> "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance created by premises used for manufacture, storage or distribution of controlled substance]."

Many marijuana advocates argued that this immunity from state criminal sanctions also preempted local zoning prohibitions against medical marijuana establishments. This resulted in numerous court battles between local agencies and medical marijuana dispensaries, as well as a split among the courts of appeal on this issue. On May 6, 2013, the California Supreme Court resolved the issue, ruling unanimously in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 ("*Inland Empire*"), that the CUA and the MMP did not preempt local ordinances that completely and permanently banned medical marijuana facilities

In reaching this conclusion, the Supreme Court recognized that a city's "inherent local police power includes broad authority to determine, for purposes of public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed." (*Inland Empire*, *supra*, 56 Cal.App.4th at p. 738.) After examining state medical marijuana laws, the Court concluded that "[n]othing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders." (*Ibid*.) The Court reasoned that Health and Safety Code section 11362.775 only immunized "the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby *mandate* that local governments authorize, allow, or accommodate the existence of such facilities." (*Id*. at p. 759 [emphasis in original].)

The Court summarized its analysis of the CUA and MMP as follows:

> "As we have noted, the CUA and MMP are careful and limited forays into the subject of medical marijuana, aimed at striking a delicate balance in an area that remains controversial, and involves sensitivity in federal-state relations. We must take these laws as we find them, and their purposes and provisions are modest. They remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a 'right' of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries."
> (Id. at pp. 762-763.)

Inland Empire's broad holding in favor of local control not only resolved issues related to medical marijuana dispensaries, cooperatives, and collectives, but also applied to other medical marijuana activities, such as cultivation. In *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984, the Third District Court of Appeal held, based on *Inland Empire*, that there was no right to cultivate medical marijuana and that a city could implement and enforce a complete ban on this activity, including a ban on cultivation by individual qualified patients for their own personal medical use. More recent appellate decisions reached the same conclusion regarding local control over medical marijuana cultivation and affirmed local agencies' ability to ban such activities completely. (See *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940, 969-970 [holding that the CUA and MMP did not preempt a local ban on all cultivation activities]; *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1032 [affirming that "there is no constitutional or statutory right to possess, cultivate, distribute, or transport marijuana for medical purposes."].)

Inland Empire and *Maral* were important decisions for local control and provided long-awaited clarification on the meaning of the CUA and MMP. *Inland Empire* recognized, however, that "nothing prevents future efforts by the Legislature, or by the People, to adopt a different approach." (*Inland Empire*, *supra*, 56 Cal.4th at p. 763.) Not surprisingly, medical marijuana proponents soon shifted their focus to the state legislature in an attempt to amend the MMP. In 2013 alone, there were four medical marijuana bills introduced in the legislature that would have weakened local control over and undermined the victories in *Inland Empire* and related cases. In September 2013, AB 604, which would have preempted local prohibitions of medical marijuana establishments, was defeated on State Senate Floor by only two votes.

Based on these near misses, and faced with the prospect of additional legislative amendments sponsored by medical marijuana advocates that could preempt local control, the League of California Cities and California Police Chiefs Association decided in 2014 to take a proactive approach to medical marijuana and put together their own medical marijuana regulatory proposal. Senate Bill 1162 was designed to create a state regulatory framework for medical marijuana while expressly preserving *Inland Empire* and the ability of local agencies to ban medical marijuana completely. While SB 1262 was unsuccessful, it laid the groundwork for future legislative efforts by bringing together a powerful coalition consisting of local governments, law enforcement agencies, and labor organizations, who all recognized that the public supported broadening medical marijuana access and that it was important to provide a workable regulatory framework for the industry. In 2015, the League and Police Chiefs

Association continued to work together on medical marijuana legislation and found multiple legislators who were eager to sponsor a new proposal. This renewed lobbying effort culminated in the emergence of three bills – Assembly Bills 243 and 266 and Senate Bill 643.

III. THE 2015 LEGISLATION – AB 243, AB 266, AND SB 643

Taken together, AB 243, AB 266, and SB 643 create a comprehensive state regulatory and licensing system governing the cultivation, testing, and distribution of medical marijuana, as well as physician recommendations for medical marijuana. There are three major components to the legislation:

- MMRSA. Each bill contains various provisions of MMRSA, which commences at Business and Professions Code section 19300. MMRSA is intended to govern all commercial cannabis activities, which are defined as "cultivation, possession, manufacture, processing, storing, laboratory testing, labeling, transporting, distribution, or sale of medical cannabis or a medical cannabis product." Under Business and Professsions Code section 19320(a), "no person shall engage in commercial cannabis activity without possessing both a state license and a local permit, license, or other authorization."

- AB 243 and AB 266 amend the MMP by (1) deleting Health and Safety Code section 11362.775(a), which provided state criminal law immunity for the collective and cooperative cultivation of medical marijuana, and (2) adding Health and Safety Code section 11362.777, which regulates medical marijuana cultivation.

- SB 643 (1) directs the California Medical Board to prioritize the investigation of clearly excessive medical marijuana recommendations by physicians or repeated acts of recommending medical marijuana without a good faith prior examination and a medical reason for the recommendation; (2) imposes fines against doctors who make recommendations to licensed dispensaries in which they have a financial interest; (3) categorizes medical marijuana recommendations without an appropriate prior examination and a medical indication as unprofessional conduct; and (4) imposes restrictions on advertising for physician recommendations for medical marijuana.

A. MMRSA - Overview

Under MMRSA, California will have, for the first time, a comprehensive state regulatory system for medical marijuana that governs the industry from "seed to sale." This is a significant leap forward from the CUA and MMP, which merely provided state law immunity to qualified patients and primary caregivers, but did not regulate the mechanics of medical marijuana cultivation, processing, and distribution. (See *City of Monterrey v. Caarnshimba* (2013) 215 Cal.App.4th 1068, 1092 [analyzing the CUA and MMP and observing that "the precise parameters of a Dispensary operating lawfully under California law remain undefined by case law or statute"].) The newly-created Bureau of Medical Marijuana Regulation, which is within the Department of Consumer Affairs, will have primary responsibility for administering and

enforcing MMRSA. MMRSA divides state licensing and enforcement responsibilities among three agencies:

- The Department of Food and Agriculture will issue medical marijuana cultivation licenses.

- The Department of Consumer Affairs will issue licenses for medical marijuana dispensaries, distributors, and transporters.

- The Department of Public Health will issue licenses for medical marijuana manufacturers and testing laboratories.

A state cannabis license will be valid for only one year. (Bus. & Prof. Code § 19321(b).) A separate state license is required for each commercial cannabis business location. (Bus. & Prof. Code § 19320(c).) Each of these state licensing authorities is responsible for creating regulations governing their respective areas of responsibility. (Bus. & Prof. Code § 19321(a).)

Once MMRSA's regulatory scheme is in operation, which the state anticipates will be January 2018, the medical marijuana industry will operate in the following way:

- Step One: Medical marijuana cultivators cultivate marijuana and medical marijuana manufacturers produce medical marijuana products in accordance with state and local regulations.

- Step Two: Medical marijuana cultivators and manufacturers deliver their products to a medical marijuana distributor.

- Step Three: The distributor confirms the identity and quality of the products and sends them to a medical marijuana testing laboratory.

- Step Four: The testing laboratory performs batch testing on a random sample of the product. If the product meets the safety standards to be established by the state, the testing laboratory issues a certificate of analysis and returns the product to the distributor.

- Step Five: The distributor performs a final quality assurance review and then delivers the product to a medical marijuana dispensary.

- Step Six: The dispensary distributes the medical marijuana to qualified patients and primary caregivers.

(Bus. & Prof. Code § 19326.)

As noted above, all medical marijuana businesses, or commercial cannabis activities, must have both a state license and local permit in order to operate lawfully within California. (Bus. & Prof. Code § 19320(a).) A person cannot commence any commercial cannabis activity under a state license until the "applicant" has obtained a "local permit, license or other

authorization." (Bus. & Prof. Code § 19320(a).) In fact, a person or entity cannot even apply for a state license "unless that person or entity has received a license, permit, or authorization by a local jurisdiction." (Bus. & Prof. Code § 19322(a).) With regard to medical marijuana cultivation, newly-added Health and Safety Code section 11362.777(b)(2) is equally explicit: a cultivator cannot apply for a state cultivation license unless the applicant "has received a license, permit, or other entitlement, specifically permitting cultivation pursuant to these provisions, from" the local jurisdiction. In addition, Health and Safety Code section 11362.777(b)(3) states that a cultivator cannot apply for a state cultivation license if the proposed cultivation will violate any local ordinance or regulation, or if medical marijuana is prohibited by the local jurisdiction, either expressly or through permissive zoning.

This dual licensing scheme is the basis for a new state law immunity for medical marijuana establishments. Under Business and Professions Code section 19317, any person operating a commercial cannabis business under both a state license and a local permit is immune from arrest, prosecution, or other sanction under state law, and cannot be subject to a civil fine or seizure or forfeiture of assets. This new dual licensing immunity represents a much more objective standard than the existing immunity for collective and cooperative cultivation under Health and Safety Code section 11362.775 and should make it easier for both local authorities and law enforcement to determine which medical marijuana establishments are operating lawfully. Rather than have to determine whether an establishment is a bona fide collective or cooperative, which can be difficult to do when dealing with all-cash businesses that often do not maintain accurate records, local officials will only need to confirm that the establishment has a state license and local permit. The immunity for collective and cooperative cultivation under Health and Safety Code section 11362.775 will remain in effect only until one year after the Bureau posts a notice on its website that the state licensing authorities have commenced issuing licenses under MMRSA and will be repealed upon issuance of licenses.

The new state licensing requirements for commercial cannabis activities do not apply to qualified patients and primary caregivers provided that they meet certain requirements and remain within certain specified limits.

● Qualified Patients

- Business and Professions Code section 19319(a) – no state license is required for a qualified patient who cultivates, possesses, stores, manufactures, or transports cannabis exclusively for his or her personal medical use and does not distribute to anyone else.

- Health and Safety Code section 11362.777(g) – no state cultivation license is required for a qualified patient if the cultivation area is 100 square feet or less, the cultivation is for the patient's personal medical use only, and the patient does not distribute the marijuana to any other person.

●Primary Caregivers

- Business and Professions Code section 19319(b) – no state license is required for a primary caregiver who cultivates, possesses, stores, manufactures, transports, donates, or provides cannabis for no more than five qualified patients and who does not receive payment except for reimbursement of actual costs.

- Health and Safety Code section 11362.777(g) – no state cultivation license is required for a primary caregiver if his or her cultivation area is 500 square feet or less, the cultivation is for no more than five qualified patients, and the caregiver does not receive payment except for reimbursement of actual costs

In addition to these licensing exceptions under MMRSA, existing criminal law immunities under the CUA and MMP for qualified patients and primary caregivers, with the exception of those set forth in Health and Safety Code section 11362.775, will remain in effect:

● Health and Safety Code § 11362.5(d): "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

● Health and Safety Code § 11362.765(a): A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use or designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver, shall not be subject, on that sole basis, to criminal liability under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

Health and Safety Code section 11362.77(a) provides a safe harbor for qualified patients and primary caregivers "as to the amount of marijuana they may possess and the number of plants they may maintain." (*Kirby v. County of Fresno*, *supra*, 242 Cal.App.4th at p. 953.) Under this provision, qualified patients and primary caregivers may possess up to eight ounces of dried marijuana per qualified patient and maintain up to six mature or 12 immature marijuana plants per qualified patient. Upon a doctor's recommendation, a qualified patient or primary caregiver may possess a greater amount consistent with a patient's medical needs. (Health & Safety Code § 11362(b).)

Please note that the licensing exceptions and state criminal law immunities for qualified patients and primary caregivers do not preempt local land use ordinances which prohibit medical marijuana activities completely. (*Maral v. City of Live Oak*, *supra*, 221 Cal.App.4th at p. 984; *Kirby v. County of Fresno*, *supra*, 242 Cal.App.4th at pp. 969-970.)

B. Local Regulatory Options

The League's and Police Chiefs Association's primary objective in pushing for new medical marijuana regulations was to preserve broad local control over medical marijuana land uses against repeated legislative attacks by marijuana advocates. *Inland Empire* emphatically affirmed local government's "inherent, constitutionally recognized power to determine the appropriate use of land within its borders." *Inland Empire* also recognized "that neither the CUA nor the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana." (*Inland Empire*, *supra*, 56 Cal.4th at p. 762.) In order to ensure that cities and counties would continue to have this full range of regulatory options available, MMRSA included three separate provisions that protect local police power authority over medical marijuana establishments:

● Business and Professions Code § 19315(a): "Nothing in this chapter shall be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local permit or licensing requirements."

● Business and Professions Code § 19316(a): "Pursuant to Section 7 of Article XI of the California Constitution, a city, county, or city and county may adopt ordinances that establish additional standards, requirements, and regulations for local licenses and permits for commercial cannabis activity. Any standards, requirements, and regulations regarding health and safety, testing, security, and worker protections established by the state shall be the minimum standards for all licensees statewide."

● Business and Professions Code § 19316(c): "Nothing in this chapter, or any regulations promulgated thereunder, shall be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution."

These local control provisions demonstrate that MMRSA does not preempt local medical marijuana ordinances. Cities, therefore, have a wide range of regulatory options to deal with medical marijuana land uses:

● Express bans. The great majority of California cities have prohibited medical marijuana dispensaries and related activities. Under *Inland Empire*, *Maral*, *Kirby*, and *Safe Life Carevigers*, as well as the local control provisions in MMRSA, such bans will be enforceable absent a drastic change in state law. In adopting prohibitions on medical marijuana, or reviewing existing bans, cities must decide how extensive the ban should be. In the past, most medical marijuana ordinances focused on dispensaries, collectives, and cooperatives. MMRSA recognizes a range of new businesses, including cultivators, medical marijuana manufacturers, distributors, transporters, and testing laboratories. Cities may opt to ban each of these activities under MMRSA.

● Regulatory schemes. Now that MMRSA establishes a state framework for regulating all aspects of the medical marijuana industry, more cities are exploring the option of allowing such businesses through some form of a local regulatory permit system. The

only minimum requirement for those local agencies that want to allow commercial cannabis activities is that they issue a "local permit, license, or other authorization." (Bus. & Prof. Code § 19320(a).) For cultivation businesses, the language is slightly different: in order to obtain a state license, the cultivator must receive a "license, permit, or other entitlement" from the local jurisdiction. (Health & Safety Code § 11362.777(b)(1)(A).)

Typically, medical marijuana ordinances involve locational restrictions, the issuance of a regulatory permit that is subject to annual renewal, and the imposition of various safety-related operating requirements. Locational restrictions may include the designation of certain zoning districts as permissible locations and separation requirements to avoid clustering of medical marijuana land uses. Some cities have limited the number of medical marijuana establishment permits that they are willing to issue. Operating requirements can be extensive and include the following: the use of licensed security guards, designated hours of operation, prohibition against sales of alcohol and/or tobacco and on-site alcohol and/or tobacco consumption, installation of adequate odor control devices and ventilation systems, and limitations on access to minors.

Cities that issue permits for medical marijuana businesses should expect to be inundated with permit inquiries and/or applications. With the amount of money that is at stake, unsuccessful applicants will likely look for potential ways to attack the city's selection and evaluation process. Those cities, therefore, should give careful consideration to how they are going to process applications for medical marijuana businesses. Local ordinances should provide clear guidelines as to what information is required in the application, what grounds constitute a basis for denial of a permit, the type of permit to be issued (CUP or renewable regulatory permit), and who is responsible for making the decision on issuing the permit. Some cities vest the decision making authority in the city manager, police chief, or other staff member. Others leave the ultimate decision to the city council.

With regard to processing applications and issuing permits, there are a number of possible approaches:

- First come, first serve. A city can accept and review applications in the order they are received, subject to applicable zoning requirements and separation restrictions. The reviewer will ensure that the applicant meets the applicable standards for a medical marijuana business and on that basis either grant or deny the permit.

- Lottery. Cities that expect to receive a large number of applications may want to consider a lottery system for issuing permits. The advantage of the lottery system is that it provides a degree of neutrality in the selection process. The disadvantage, of course, is that a lottery can deprive a city of control over who gets a permit, which can be a significant problem given the number of suspicious actors and former felons who are involved in the medical marijuana industry. Many medical marijuana lotteries, therefore, are combined with staff-level

screening of applicants either before or after the lottery, or both. For example, in Santa Ana, which conducted a lottery in 2015, medical marijuana dispensary applicants had to first register with the director of planning and building. The director then reviewed the registration application to determine if the applicant complied with the city's medical marijuana regulations. Applicants who made it on to the qualified registration list were then entered into a lottery, which was administered by an independent accounting firm. The lottery was used to select 20 applicants who could then apply to the city for a regulatory safety permit from the police department, which required another level of staff review.

- Scoring system. As an alternative to a lottery system, a city could implement a subjective evaluation process to review medical marijuana applicants. Applicants would receive a score based on a review of their applications and, in some instances, an interview. Those applicants who receive the highest scores would then be recommended for approval to the decision making authority. If this selection method is used, it may be preferable to use a neutral outside consultant to review the applications, conduct interviews, and make recommendations.

● Permissive zoning. Most, if not all, zoning codes in California are permissive in nature. Under permissive zoning principles, the omission of any particular land use from local zoning regulations is the equivalent of an express ban unless the planning director or other designated official finds that the proposed use is substantially the same in character and intensity as those land uses listed in the code. (See *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433-436.) If the city can make this finding, such a use is subject to the permit process and zoning requirements which govern the land use category in which it falls.

Permissive zoning provides cities with some flexibility in dealing with medical marijuana activities. Cities can rely on permissive zoning to prohibit medical marijuana uses if they so choose. The new legislation, in fact, recognizes that such an approach is permissible. Newly-enacted Health and Safety Code section 11362.777(b)(3), which addresses medical marijuana cultivation, states that a "person or entity shall not submit an application for a state license . . . if the proposed cultivation of marijuana will violate the provisions of any local ordinance or regulation, or if medical marijuana is prohibited by the city, county, or city and county in which the cultivation is proposed to occur, either expressly or otherwise under principles of permissive zoning."

In the past, medical marijuana establishments have argued that they fall within various land use categories and descriptions, such as pharmacies, retail sales, nurseries, and agriculture. Based on the unique nature of most medical marijuana activities and the potential for negative secondary effects, cities have generally been successful in defeating such similar use arguments. For example, in *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, the court held that "medical marijuana dispensaries and pharmacies are not 'similarly situated' for public health and safety purposes and therefore need not be treated equally." (*Id*. at p. 871.) In reaching this conclusion, the court observed that the presence of large amounts of cash and marijuana at medical marijuana dispensaries

makes them attractive targets for crime. (*Ibid*.) In *County of Tulare v. Nunes* (2013) 215 Cal.App.4th 1188, the court concluded that a medical marijuana collective did not qualify as an "agricultural" land use because "marijuana is a controlled substance and is not treated as a mere crop or horticultural product under the law." (*Id*. at p. 1205.) In *City of Monterey v. Carrnshimba*, *supra*, 215 Cal.App.4th 1068, the court rejected a similar argument that a medical marijuana dispensary was substantially similar to the listed commercial use classifications for personal services, retail sales, pharmacies and medical supplies. (*Id*. at p. 1091.) The court concluded that a medical marijuana dispensary did not fit within the definition of these land use classifications and observed that the city had consistently interpreted its zoning code as prohibiting medical marijuana dispensaries. (*Ibid*.)

Cities, however, should be cautious in relying on permissive zoning to prohibit any medical marijuana land use. As more people try to enter the lucrative medical marijuana industry, cities relying on the permissive zoning approach could see repeated requests for similar use determinations. These case-by-case requests could result in time-consuming administrative hearings and costly and uncertain litigation. There is potential for marijuana advocates to challenge similar use determinations depending on the wording of individual municipal codes. For these reasons, cities that want to ban all or some medical marijuana activities may want to consider adopting express prohibitions.

Cities that want to permit medical marijuana businesses under permissive zoning principles should also be cautious. By allowing a medical marijuana business to proceed under permissive zoning principles, a city is setting a precedent for future land use interpretations. (See *City of Monterrey v. Carrnshimba*, *supra*, 215 Cal.App.4th at p. 1091.) In addition, a city should evaluate whether the applicable land use regulations are sufficient to address the potentially negative secondary effects that are commonly associated with medical marijuana land uses, such as unsafe construction and electrical wiring, noxious fumes and odors, and increased crime in and around marijuana establishments. The potential loss of local control over marijuana cultivation land uses could hinder the city's ability to protect the public health, safety, and welfare.

C. Local Enforcement Against Commercial Cannabis Activities

MMRSA established a dual enforcement scheme for commercial cannabis activities that violate either state or local laws. The state licensing authorities will enforce state statutes and regulations. State authorities can suspend or revoke state licenses (Bus. & Prof. Code § 19320(c)), pursue civil penalties against violating businesses in an amount equal to two times the applicable licensing fee per violation (Bus. & Prof. Code § 19318(a)), or may prosecute violators criminally (Bus. & Prof. Code § 19318(c)). Local authorities will be responsible for enforcing local ordinances and regulations. For state-licensed facilities operating within a city, a city may have authority to enforce state law and regulations "if delegated by the state." (Bus. & Prof. Code § 19316(b).)

Under their constitutional police power and statutory authority, cities will continue to have the full range of enforcement remedies. As *Inland Empire* explained, the CUA and MMP

"remove *state-level* criminal and civil sanctions from specified medical marijuana activities, but they do not . . . override the zoning, licensing, and police powers of local jurisdictions." (*Inland Empire, supra*, 56 Cal.App.4th at pp. 762-763 [emphasis added].) Furthermore, as noted above, Business and Professions Code section 19316(c) provides that nothing in MMRSA or its implementing regulations "shall be deemed to limit the authority or *remedies* of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution." (Emphasis added.) Similarly, Business and Professions Code section 19315(a) states that nothing in MMRSA "shall be interpreted to supersede or limit *existing* local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local permit or licensing requirements." (Emphasis added.) The police power of local jurisdictions authorizes the following remedies:

● Civil action for injunctive relief. (*Inland Empire, supra*, 56 Cal.4th at p. 762 [finding that neither the CUA nor the MMP preempts the authority of California cities and counties "to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions"]; *City & County of San Francisco v. City Inv. Corp*. (1971) 15 Cal.App.3d 1031, 1041 [holding that a city can abate a violation of a local ordinance through an injunction].)

● Administrative abatement proceedings. (Govt. Code §§ 36901, 38771, 38773.5.)

● Administrative citations. (Govt. Code § 53069.4.)

● License revocation. Business and Professions Code section 19320(b) states, "Revocation of a local license, permit, or other authorization shall terminate the ability of a medical cannabis business to operate within that local jurisdiction until the local jurisdiction reinstates or reissues the local license, permit, or other required authorization." In order to utilize this valuable enforcement tool, cities should review their permit revocation procedures to ensure that they comply with due process requirements.

● Criminal enforcement. In general, cities can criminally prosecute those who engage in unpermitted medical marijuana activities. The constitutional police power referenced in *Inland Empire* includes the authority to initiate criminal prosecutions against those who violate local ordinances. (Govt. Code § 36900(a).) Furthermore, Health and Safety Code section 11362.83, which is part of the MMP, expressly recognizes this authority to criminally prosecute unpermitted medical marijuana cooperatives and collectives.

While the police power confers broad authority on cities to enforce local ordinances, the recent court of appeal decision in *Kirby, supra*, 242 Cal.App.4th 940, casts uncertainty over a city's ability to criminally prosecute certain medical marijuana-related offenses. *Kirby* dealt with a county medical marijuana ordinance that, among other restrictions, prohibited cultivation in all zones of the city, including cultivation by individual qualified patients for their own personal medical use. The medical marijuana ordinance also contained a provision that made marijuana cultivation in violation of the ordinance a

misdemeanor. The plaintiff challenged the ordinance provisions relating to cultivation and criminal prosecution. The trial court sustained the county's demurrer.

As noted above, the court of appeal upheld the county's complete prohibition on medical marijuana cultivation, concluding that the CUA and MMP did not preempt the county's zoning authority in this area. The court of appeal, however, concluded that Health and Safety Code section 11362.71(e) preempted a local ordinance that *directly* criminalized marijuana cultivation. (*Id*. at p. 961.) Section 11362.71(e) provides:

> "No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article."

According to *Kirby*, this provision does not merely protect individuals from arrest under state law, but also precludes criminal arrest under local ordinances. The court contrasted this provision with sections 11362.765 and 11362.775, which listed specific state laws for which immunity applied. (*Id*. at p. 960.) Since the immunity from arrest in section 11362.71 was not expressly limited to state laws, the court concluded that this section necessarily protected individuals from arrest and prosecution under local zoning ordinances. The court found additional support for its conclusion in the UCSA, which is a comprehensive scheme for defining drug crimes and penalties. In the court's view, both "the USCA and MMP's prohibition of arrests manifest the Legislature's intent to fully occupy the area of criminalization and decriminalization of activity directly related to marijuana." (*Id*. at pp. 960-961.)

Kirby, however, added a significant caveat to its ruling. The court noted that, while a local jurisdiction could not impose a direct criminal sanction on cultivation, it could impose an "*indirect* criminal sanction . . . because the failure to abate a public nuisance after notice is recognized as a separate crime by the Legislature." (*Id*. at p. 961 [citing Pen. Code § 373a and Health & Safety Code § 11362.83(b)] [emphasis added].) Therefore, a local agency could still prosecute someone for cultivating marijuana in violation of a local zoning ordinance under a general penalty provision that designates any code violation as a public nuisance and a misdemeanor.

There may be additional cases in the near future that address the issue of criminal prosecution under local medical marijuana regulations. Until the issue gets fully resolved, most likely by the Supreme Court, cities may want to review the enforcement provisions in their local ordinances. Under *Kirby*, local ordinances that specifically make the "possession, transportation, delivery, or cultivation of medical marijuana" a crime may be subject to challenge.

III. SPECIAL ISSUES

A. Cultivation

Marijuana cultivation has long been a topic of concern for local agencies and law enforcement. It is well documented that marijuana cultivation is often associated with significant negative secondary effects such as hazardous electrical wiring, diversion of public waters, water pollution, noxious odors and fumes, and violent crime. Under MMRSA, the CUA, the MMP, and existing case law, local agencies can ban marijuana cultivation completely.

As noted above, *Maral* and *Kirby* both held that neither the CUA nor the MMP preempted local bans on medical marijuana cultivation, including cultivation by a qualified patient for his or her personal medical use. (*Maral v. City of Live Oak, supra,* 221 Cal.App.4th at p. 984; *Kirby v. County of Fresno, supra*, 242 Cal.App.4th at pp. 969-970.) The local control provisions in MMRSA reaffirmed this police power authority. (Bus. & Prof. Code §§ 19315(a), 19316(a), and 19316(c).)

While these decisions and statutory provisions should support local cultivation bans, the fallout from a drafting error in AB 243 may encourage marijuana advocates to challenge such ordinances. Health and Safety Code section 11362.777(c)(4), which was part of AB 243, provided that if a city or county did not have a land use ordinance or regulation prohibiting medical marijuana cultivation, either expressly or otherwise under principles of permissive zoning, or chose not to implement a regulatory scheme, then commencing March 1, 2016, the state Department of Food and Agriculture would become the sole licensing authority for cultivation applicants in that jurisdiction. As a result of this deadline, which was left in AB 243 inadvertently, cities and counties scrambled to adopt medical marijuana cultivation ordinances. Assembly Bill 21, signed by Governor Brown on February 3, 2016, deleted the March 1st deadline. However, as part of a legislative compromise, AB 21 also deleted a sentence from Health and Safety Code section 11362.777(g) that expressly stated that cities and counties could ban cultivation by qualified patients and primary caregivers and replaced it with the following:

> "Exemption from the requirements of this section [the dual licensing requirements for medical marijuana cultivation facilities] does not limit or prevent a city, county, or city and county from exercising its police authority under Section 7 of Article XI of the California Constitution."

There has been concern that deleting a provision that expressly recognized the ability of cities and counties to ban private medical marijuana cultivation could be interpreted as a concession that no such right existed and would undermine *Maral* and *Kirby*. However, in light of the new language which preserves the existing police power authority of cities and counties, such an interpretation is unlikely. Rather, the better interpretation is that the revised Health and Safety Code section 11362.777(g) preserves the status quo for cities and counties with regard to local control over all marijuana cultivation activities and that, based on *Inland Empire*, *Maral*, and *Kirby*, cities and counties can still prohibit marijuana cultivation completely.

B. Deliveries

Based on a quick review of Weedmaps.com, it is safe to conclude that medical marijuana delivery services are likely operating in every California city. Most delivery services, however, do not advertise the location at which they either store or obtain their medical marijuana, which presents challenges for law enforcement in cities that prohibit such activities. As a result of MMRSA, this clandestine business model will change drastically.

Business and Professions Code section 19340(a) provides that medical marijuana deliveries can *only* be made by a state-licensed dispensary in a city, county, or city and county that does not *explicitly* prohibit it by local ordinance. Therefore, in order for a city or county to prohibit medical marijuana delivery services by a state-licensed dispensary, it will need to enact an express ban. Business and Professions Code section 19300.5(m) defines "delivery" as follows"

> "[T]he commercial transfer of medical cannabis or medical cannabis products from a dispensary, up to an amount to be determined by the bureau to a primary caregiver or qualified patient as defined in Section 11362.7 of the Health and Safety Code, or a testing laboratory. 'Delivery' also means the use by a dispensary of any technology platform owned and controlled by the dispensary, or independently licensed under this chapter, that enables qualified patients or primary caregivers to arrange for or facilitate the commercial transfer by a licensed dispensary of medical cannabis or medical cannabis products."

For those cities that choose to ban medical marijuana deliveries, there is one exception: a local jurisdiction cannot prevent a delivery service from using public roads to simply pass through its jurisdiction from a licensed dispensary to a delivery location outside of its boundaries. (Bus. & Prof. Code § 19340(f).)

Cities can also choose to allow and regulate medical marijuana deliveries by licensed dispensaries. Business and Professions Code section 19316(a) provides that a local agency "may adopt ordinances that establish additional standards, requirements, and regulations for local licenses and permits for commercial cannabis activity." This would include deliveries by a licensed dispensary. MMRSA currently imposes very basic requirements on delivery services. Under MMRSA, a delivery person must carry a copy of the dispensary's state-issued license, a government ID, and a copy of the delivery request. The patient or caregiver requesting a delivery must also maintain a copy of the delivery request (which suggests that each delivery request must generate a written record of some type). MMRSA does not require that the delivery person be a primary caregiver. Dispensaries and delivery people who comply with MMRSA will be immune from prosecution for marijuana transportation. (Bus. & Prof. Code § 19317(f).)

Keep in mind, however, that the state is working on the implementing regulations, which may further explain how medical marijuana deliveries can occur. For instance, it will be up to the Department of Consumer Affairs to determine how much marijuana can be transported during the delivery process. This is an important question because a small amount of marijuana can have a significant street value, making it an attractive criminal target. Any health and safety regulations developed by the state for medical marijuana deliveries will represent the minimum state-wide standards.

The Department of Consumer Affairs does not anticipate issuing any state dispensary licenses until January 2018. Until 2018, local agencies can continue to rely on their constitutional police powers to regulate and/or prohibit medical marijuana delivery services.

C. Federal Preemption

In *Inland Empire*, the Court stated that "localities in California are left free to accommodate such conduct, if they choose, free of state interference." (*Inland Empire*, *supra*, 56 Cal.4th at p. 762.) The Court, however, did not address the extent to which local regulatory and permitting schemes would conflict with federal law.

In *City of Palm Springs v. Luna Crest, Inc.* (Cal. Ct. App. March 17, 2016) 2016 WL 1056700, the court of appeal concluded the CSA did not preempt a local ordinance that allowed a certain number of dispensaries to operate subject to a local permit. Luna Crest opened a medical marijuana dispensary in Palm Springs without a permit, contending that the CSA preempted Palm Springs' regulatory permitting scheme. First, the court concluded that there was no conflict between the CSA and Palm Springs' ordinance. The court observed that the CSA did "'not direct local governments to exercise their regulatory, licensing, zoning, or other power in any particular way,' so exercise of those powers 'with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law." (*Id*. at *3[quoting *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 759.) Second, the court held that the ordinance was not an obstacle to enforcement of the CSA because a strong local regulatory program for medical marijuana "would tend to prevent" medical marijuana from contributing to recreational drug abuse and drug trafficking. (*Id*. at *4.)

For now, *Luna Crest* should shield cities that allow medical marijuana land uses from federal preemption arguments. It is unlikely that a sensible marijuana advocate would want to make the federal preemption argument since the likely outcome of winning that argument is a complete ban on medical marijuana facilities.

IV. The Control, Regulate and Tax Adult Use of Marijuana Act

It is widely anticipated that one or more recreational marijuana ballot measures will appear on the ballot in the November 2016 general election. There have been approximately 20 proposed recreational marijuana ballot measures circulated for signatures. Of these proposed initiatives, the most likely initiative to make it on the ballot is the Control, Regulate and Tax Adult Use of Marijuana Act. Some have referred to this as the Parker Initiative, because Sean Parker of Facebook has put his vast financial resources behind it. So far, it has garnered some high profile endorsements, including one from Lieutenant Governor Gavin Newsome. It is probable that marijuana advocates will consolidate their support behind this particular initiative rather than risk splitting the vote among competing measures.

In summary, the Adult Use of Marijuana Act would legalize and regulate recreational marijuana in California. Under the Act, individuals could possess up to one ounce of dried marijuana or grow up to six plants. The Act recognizes similar categories of marijuana

businesses as MMRSA and requires these businesses to obtain a state license in a manner very similar to MMRSA. The Act does not contain a dual licensing requirement; marijuana businesses can apply for a state license without having to show proof of compliance with local regulations. However, the Act contains an express provision preserving local control and states that nothing in the Act shall limit or supersede the authority of local jurisdictions "to completely prohibit the establishment or operation of one or more types of businesses licensed under" the Act. With regard to personal cultivation, the Act provides that local agencies can completely prohibit outdoor grows at private residences and can reasonably regulate indoor grows at private residences.

Cities and counties will need to keep a close eye on this initiative, as well as others that may qualify for the November election. The Act would clearly diminish local control, but not as much as some had feared from a ballot initiative sponsored by marijuana advocates.

IV. CONCLUSION

Court victories such as *Inland Empire* and the explicit local control language in MMRSA and the revised MMP provide local governments with a strong hand to deal with medical marijuana. This is a significant and positive development. If there is one certainty on the issue of medical marijuana, it is that marijuana advocates will continue to develop creative arguments to expand access and limit local control.

APPENDIX – SAMPLE ORDINANCE

9-6.186 Medical Marijuana Facilities.

(a) Purpose. The purpose and intent of this section is to prohibit medical marijuana dispensaries, marijuana cultivation facilities, commercial cannabis activities, and medical marijuana deliveries, as defined below, within the city limits. It is recognized that it is a Federal violation under the Controlled Substances Act to possess or distribute marijuana even if for medical purposes. Additionally, there is evidence of an increased incidence of crime-related secondary impacts in locations associated with marijuana cultivation facilities and medical marijuana dispensaries and in connection with medical marijuana deliveries, which is contrary to policies that are intended to promote and maintain the public's health, safety, and welfare.

(b) Definitions.

(1) "Commercial cannabis activity" shall have the meaning set forth in Business and Professions Code section 19300.5(k).

(2) "Cultivation" means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of marijuana.

(3) "Marijuana" means all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture,

salt, derivative, mixture, or preparation of the plant, its seeds or resin. It includes marijuana infused in foodstuff, and concentrated cannabis and the separated resin, whether crude or petrified, obtained from marijuana. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except resin extracted therefrom), fiber, oil, or cake, or the sterilized seeds of the plant that are incapable of germination.

(4) "Medical marijuana" is marijuana used for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of acquired immune deficiency syndrome ("AIDS"), anorexia, arthritis, cancer, chronic pain, glaucoma, migraine, spasticity, or any other serious medical condition for which marijuana is deemed to provide relief as defined in subsection (h) of Health and Safety Code § 11362.7.

(6) “Marijuana cultivation facility” means any business, facility, use, establishment, property, or location where the cultivation of marijuana occurs.

(7) "Medical marijuana dispensary" means any business, facility, use, establishment, property, or location, whether fixed or mobile, where medical marijuana is sold, made available to, delivered to and/or distributed by or to three or more people. A "medical marijuana dispensary" does not include the following uses, as long as the location of such uses are otherwise regulated by this Code or applicable law: a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code, a health care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code, a residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code, as long as any such use complies strictly with applicable law including, but not limited to, Health and Safety Code § 11362.5 and following.

(c) Medical marijuana dispensaries, marijuana cultivation facilities, commercial cannabis activities, and medical marijuana deliveries prohibited.

(1) Medical marijuana dispensaries are prohibited in all zones in the city and shall not be established or operated anywhere in the city.

(2) Marijuana cultivation facilities are prohibited in all zones in the city and shall not be established or operated anywhere in the city. This prohibition shall not apply to a qualified patient, as defined by Health and Safety Code section 11362.7(f), who cultivates medical marijuana, either by himself or herself or with assistance from his or her primary caregiver, as defined by Health and Safety Code sections 11362.5(e) and 11362.7(d), provided that the qualified patient maintains no more than six mature or 12 immature marijuana plants and does not sell, distribute, donate, or provide marijuana to

any other person or entity, and the property on which the qualified patient is cultivating marijuana/cannabis has no more than 100 square feet devoted to the cultivation of marijuana /cannabis by any qualified patient or combination of qualified patients (the area used to cultivate marijuana/cannabis shall be measured by the aggregate area of vegetative growth of live marijuana plants on the premises)

(3) Commercial cannabis activities are prohibited in all zones in the city and shall not be established or operated anywhere in the city.

(4) No person may own, establish, open, operate, conduct, or manage a medical marijuana dispensary, marijuana cultivation facility, or commercial cannabis activity in the city, or be the lessor of property where a medical marijuana dispensary, marijuana cultivation facility, or commercial cannabis activity is located. No person may participate as an employee, contractor, agent, volunteer, or in any manner or capacity in any medical marijuana dispensary, marijuana cultivation facility, or commercial cannabis activity in the city.

(5) No person and/or entity may deliver or transport medical marijuana from any fixed or mobile location, either inside or outside the city, to any person in the city, except that a person may deliver or transport medical marijuana to a qualified patient or person with an identification card, as those terms are defined in Health and Safety Code section 11362.7, for whom he or she is the primary caregiver within the meaning of Health and Safety Code sections 11362.5 and 11362.7(d).

(6) Nothing contained in this section shall be deemed to permit or authorize any use or activity which is otherwise prohibited by any state or federal law.

(d) Enforcement. The city may enforce this section in any manner permitted by law. The violation of this section shall be and is hereby declared to be a public nuisance and contrary to the public interest and shall, at the discretion of the city, create a cause of action for injunctive relief.