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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF LAKE FOREST, Plaintiff and Respondent, v. LAKE FOREST WELLNESS CENTER AND COLLECTIVE et al., Defendants and Appellants.	G043817 (consol. with G043867) (Super. Ct. No. 30-2009-00298887) O P I N I O N

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

Howard|Nassiri, Vincent D. Howard, Damian J. Nassiri, Naveen Madala; and Donna Bader for Defendants and Appellants.

Best Best & Krieger, Jeffrey V. Dunn and Lee Ann Meyer for Plaintiff and Respondent.

* * *

Lake Forest Wellness Center and Collective and the Independent Collective of Orange County (the dispensaries) appeal from the trial court's order granting a preliminary injunction enjoining their medical marijuana activities in this nuisance abatement proceeding. They contend medical marijuana dispensaries are authorized by Health and Safety Code section 11362.775's endorsement of "collective[]" and "cooperative[]" activities, and, therefore, what the Legislature has authorized, the City of Lake Forest (the City) may not ban. As explained in *City of Lake Forest v. Evergreen Holistic Collective* (February 29, 2012, G043909) __ Cal.App.4th __ (*Evergreen*), we agree with the dispensaries' basic contention, albeit with the caveat that the Legislature only authorized dispensaries at sites where medical marijuana is "collectively or cooperatively . . . cultivate[d]" (Health & Saf. Code, § 11362.775). Consequently, the City's asserted blanket, per se ban on medical marijuana dispensaries contradicts state law and furnishes no valid basis to obtain a preliminary injunction. Rather, the City must show a dispensary did not grow its marijuana on-site or otherwise failed to comply with applicable state medical marijuana law or permissible local regulations. Because the trial court granted the City's injunction request solely on the basis of the City's total ban, we must reverse the preliminary injunction and remand the matter for further proceedings.

I

FACTUAL AND PROCEDURAL BACKGROUND

The City filed its nuisance complaint against the dispensaries under the general nuisance statute (Civ. Code, § 3479) alleging a public nuisance (Civ. Code, § 3480). The City pleaded two nuisance causes of action against the dispensaries. First, the City alleged their dispensary activities constituted a per se nuisance because City ordinances effectively banned medical marijuana dispensaries and, therefore, operating a

dispensary constituted a categorical nuisance under its municipal law. The City's second cause of action alleged that operation of the dispensary created an actual nuisance "injurious to health, . . . indecent and offensive to the senses, and an obstruction to the free use of property, so as to interfere with the comfortable use and enjoyment of property, which affects an entire community and, as such, is a public nuisance." The trial court eventually granted the City's request for a preliminary injunction on the first ground only.

Specifically, the City asserted its zoning code established medical marijuana dispensaries constituted a per se public nuisance by omitting dispensaries as an authorized property use in the "Commercial Community" zoning district. Indeed, as the City's complaint put it, the City effectively had banned dispensaries because "marijuana dispensaries are neither enumerated as a permitted use, nor as any other type of conditional or temporary use *in any zoning district in the City*." (Italics added.) For example, the relevant zoning provisions governing the commercial community district identified permitted uses, uses permitted with a permit, temporary permitted uses, accessory uses, and prohibited uses, and none included marijuana dispensaries.[1] (Lake Forest Municipal Code (LFMC), §§ 9.88.020-9.88.060; all further undesignated section references are to the LFMC.)

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[1] We grant the City's request to take judicial notice of the relevant portions of its zoning code, also judicially noticed by the trial court. (Evid. Code, §§ 452, subd. (b), 459.) We similarly grant all but one of the parties' numerous other requests for judicial notice or to augment the record, including requests concerning general provisions of the City's municipal code, various motions or other matters filed in the trial court, and the legislative history of Health and Safety Code sections 11362.768 and 11362.83. We deny as irrelevant, however, the dispensaries' July 2011 request for judicial notice of appellate stays initially granted by Division Two of the Court of Appeal, Fourth Appellate District, to stay enforcement of preliminary injunctions obtained against dispensaries in that jurisdiction.

In particular, section 9.88.030 identified certain "principal" property uses as permitted uses in the commercial community zoning district, including for example, "Administrative and professional offices," "Animal Clinics," "Automobile repair specialty shops," "Cinemas and theaters," "Civic and government uses," "Day (care) nurseries," "Instructional studios," "Restaurants," "Retail businesses," "Service businesses," "Wholesale businesses without warehousing," and "Adult Businesses." Of these, only adult businesses required City preapproval.

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

In section 9.88.060, the zoning code identified the following uses as "specifically prohibited" in the commercial community district where the dispensaries were located: "Automobile wrecking, junk and salvage yards," "Bottling plants," "Cleaning, dyeing and laundry plants," "Contractors' storage and equipment yards, work and fabricating areas," "Rental and sales agencies for agricultural, industrial and construction equipment," "Vehicle engine/transmission rebuilding, tire retreading, fender and body repair and paint shops," and "Welding shops and metal plating." The code also prohibited uses not enumerated in the foregoing sections. (§ 9.88.030 [prohibiting the above-listed uses and "Uses not permitted by Sections 9.88.020 through 9.88.050"].)

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

The dispensaries opposed the City's request for a preliminary injunction on grounds the City failed to establish its activities constituted a public nuisance, either in the ordinary sense or as a per se public nuisance. On the per se issue, the dispensaries pointed out that the City Council's express moratorium on medical marijuana dispensaries had lapsed four years earlier. The dispensaries suggested the City's assertion of an implied ban — based on the omission in the City code of dispensaries as a permitted use — did not rise to the level of an express legislative judgment necessary to make a particular use a nuisance per se. Specifically, the dispensaries argued that relying on the City's supposed ban was too vague to support a preliminary injunction, and violated due process by failing to notify the public what activities were prohibited. One

of the dispensaries asserted its activities fell within the "Service businesses" category authorized as a permitted use in the commercial community zoning district. Alternatively, the dispensaries argued they had not violated the City's municipal code because the City did not require a business license before a new enterprise opened its doors. The dispensaries also argued state medical marijuana law, including the Legislature's endorsement of "cooperative and collective" (Health & Saf. Code, § 11362.775) distribution endeavors, prevented the City from banning dispensary activities as a public nuisance.

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

The trial court did not determine the dispensaries failed to qualify as a cooperative or collective (Health & Saf. Code, § 11362.775) or otherwise failed to comply with California medical marijuana law. The City's complaint and motion for a preliminary injunction included no such allegations. Instead, the court's ruling was based solely on the dispensaries' per se nuisance violation of City ordinances, which did not permit medical marijuana dispensaries. The trial court found unpersuasive the dispensaries' argument that because the City did not require a business license, they violated no municipal law. The court explained that the City's "zoning scheme

effectively regulates what is and is not allowed in the City of Lake Forest, thereby obviating the need for a business license requirement."[2]

II

DISCUSSION

The dispensaries contend the trial court erred by granting the City's preliminary injunction shutting them down as a per se nuisance. As explained at length in *Evergreen, supra,* __ Cal.App.4th __, we agree that California medical marijuana law preempts a total local ban against dispensaries. Therefore, as in *Evergreen*, we must reverse the preliminary injunction issued below solely on the basis of the City's asserted per se ban.

We also briefly address here a contention that did not arise in *Evergreen*. Specifically, the dispensaries assert the City's nuisance complaint was void at the outset because the City failed to adhere to its own municipal code. The dispensaries claim the City's code required it to hold an administrative hearing *before* resorting to a civil action in the superior court. But the dispensaries' reliance on section 6.14.005 of the City code does not support their claim.

Section 6.14.005 is entitled, "Involuntary Abatement," and provides that when the City attempts to abate a public nuisance by City administrative procedures, "the Director [a City administrator unspecified by the parties] shall cause a hearing to be held

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

to determine whether said building, structure or property is being maintained in such a manner so as to constitute a public nuisance." Nothing in section 6.14.005, however, states or suggests that a City administrative hearing is a mandatory prerequisite that must precede a civil nuisance cause of action. To the contrary, state law provides that criminal, civil, and administrative proceedings are alternative remedies "against a public nuisance." (Civ. Code, § 3491.) "[T]he public entity is free to choose any of the three options." (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244 (*Flahive*).)

Section 1.01.240(A) and (B) of the City's municipal code reflect that this choice rests in the City's discretion. Subsection (A) provides that violations of the City code constitute a public nuisance that "may be summarily abated as such by the City." (§ 1.01.240(A); see *Flahive*, *supra*, 72 Cal.App.4th at p. 245, fn. 5 [classifying "summary abatement" as "administrative abatement"].) Subsection (B) provides as an alternate remedy that public nuisances "may be abated by the City Attorney in a civil judicial action." (§ 1.01.240(B).) Nothing in section 1.01.240 (A) or (B) suggests the City first must pursue administrative abatement proceedings before filing a civil action. Similarly, the parties provide us only snippets of the municipal code's nuisance chapter (§ 6.14), but nothing therein suggests an administrative prehearing requirement before the City may file a nuisance complaint. The dispensaries' claim is therefore without merit. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [burden rests on appellant to demonstrate error].)

Nevertheless, as in *Evergreen*, the City obtained the preliminary injunction here based solely on a total ban against dispensaries rendering them a per se nuisance, contrary to state law determining dispensary activities are not necessarily a nuisance. As

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

IV

DISPOSITION

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

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.