

# PLANNING COMMISSION AGENDA

## ***REGULAR MEETING***

**Date: August 11, 2011**

**Time: 6:30 P.M.**

### COMMISSION MEMBERS

Chris Elvert, Chair

William A. Muller, Vice Chair

Bill Jensen, Commissioner

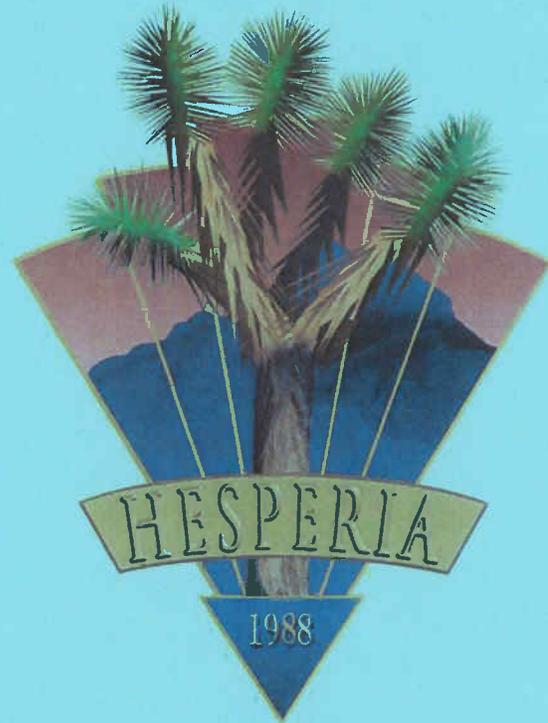
Julie Jensen, Commissioner

Paul Russ, Commissioner

\* - \* - \* - \* - \* - \* - \* - \*

Dave Reno, Principal Planner

Jeff M. Malawy, Assistant City Attorney



**CITY OF HESPERIA**  
9700 Seventh Avenue  
Council Chambers  
Hesperia, CA 92345  
City Offices: (760) 947-1000

The Planning Commission, in its deliberation, may recommend actions other than those described in this agenda.

Any person affected by, or concerned regarding these proposals may submit written comments to the Planning Division before the Planning Commission hearing, or appear and be heard in support of, or in opposition to, these proposals at the time of the hearing. Any person interested in the proposal may contact the Planning Division at 9700 Seventh Avenue (City Hall), Hesperia, California, during normal business hours (7:30 a.m. to 5:30 p.m., Monday through Thursday, and 7:30 a.m. to 4:30 p.m. on Fridays) or call (760) 947-1200. The pertinent documents will be available for public inspection at the above address.

If you challenge these proposals, the related Negative Declaration and/or Resolution in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Planning Commission at, or prior to the public hearing.

In compliance with the American with Disabilities Act, if you need special assistance to participate in this meeting, please contact Dave Reno, Principal Planner (760) 947-1200. Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting. [28 CFR 35.10235.104 ADA Title 11]

Documents produced by the City and distributed less than 72 hours prior to the meeting regarding any item on the Agenda will be made available in the Planning Division, located at 9700 Seventh Avenue during normal business hours or on the City's website.

August 11, 2011

**AGENDA  
HESPERIA PLANNING COMMISSION**

*Prior to action of the Planning Commission, any member of the audience will have the opportunity to address the legislative body on any item listed on the agenda, including those on the Consent Calendar. PLEASE SUBMIT A COMMENT CARD TO THE COMMISSION SECRETARY WITH THE AGENDA ITEM NUMBER NOTED.*

**CALL TO ORDER**

**6:30 p.m.**

- A. Pledge of Allegiance to the Flag
- B. Invocation
- C. Roll Call:
  - Chair Chris Elvert
  - Vice Chair William Muller
  - Commissioner Bill Jensen
  - Commissioner Julie Jensen
  - Commissioner Paul Russ

**JOINT PUBLIC COMMENTS**

*Please complete a "Comment Card" and give it to the Commission Secretary. Comments are limited to three (3) minutes per individual. State your name and address for the record before making your presentation. This request is optional, but very helpful for the follow-up process.*

*Under the provisions of the Brown Act, the Commission is prohibited from taking action on oral requests. However, Members may respond briefly or refer the communication to staff. The Commission may also request the Commission Secretary to calendar an item related to your communication at a future meeting.*

**CONSENT CALENDAR**

- D. Approval of Minutes: July 14, 2011 Planning Commission Meeting Draft Minutes.

-1-

**PUBLIC HEARINGS**

- 1. Consideration of revised Site Plan Review SPR11-10182, to expand an existing automotive repair facility and reconfigure the vacuum area; and Variance VAR11-10208, to allow the vacuum area canopy to encroach 10 feet into the minimum 20-foot rear yard setback at 17985 Bear Valley Road. (Applicant: Hesperia Car Wash LLC; APN: 0399-132-31) (Staff Person: Lisette Sanchez-Mendoza)
- 2. Consideration of Conditional Use Permit CUP11-10195 to establish a car sales/auction facility on 6.0 acres zoned I-1 located on the west side of "I" Avenue, 625 feet north of Eucalyptus.
- 3. City-Freeway Pylon Signs Workshop. (Staff Person: Dave Reno)

1-1

2-1

3-1

**PRINCIPAL PLANNER'S REPORT**

*The Principal Planner or staff may make announcements or reports concerning items of interest to the Commission and the public.*

E. DRC Comments

4-1

F. Major Project Update

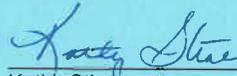
**PLANNING COMMISSION BUSINESS OR REPORTS**

*The Commission Members may make comments of general interest or report on their activities as a representative of the Planning Commission.*

**ADJOURNMENT**

The Chair will close the meeting after all business is conducted.

I, Kathy Stine, Planning Commission Secretary for City of Hesperia, California do hereby certify that I caused to be posted the foregoing agenda on Thursday, August 4, 2011 at 5:30 p.m. pursuant to California Government Code §54954.2.



Kathy Stine  
Planning Commission Secretary

HESPERIA PLANNING COMMISSION MEETING  
REGULAR MEETING  
July 14, 2011  
MINUTES

DRAFT

The Regular Meeting of the Planning Commission was called to order at 6:34 p.m. by Chair Elvert in the Council Chambers, 9700 Seventh Avenue, Hesperia, California.

**CALL TO ORDER** **6:34 p.m.**

A. Pledge of Allegiance to the Flag

B. Invocation

C. Roll Call:

Chair Chris Elvert  
Vice Chair William Muller  
Commissioner Bill Jensen  
Commissioner Julie Jensen  
Commissioner Paul Russ

Present: Chris Elvert  
William Muller  
Bill Jensen  
Julie Jensen  
Paul Russ

**JOINT PUBLIC COMMENTS OPENED AT 6:36 P.M.**

**Al Vogler** spoke during the Public Comment period regarding crime and medical marijuana Dispensaries. He requested that the Commission make decisions that value the Community at large.

**JOINT PUBLIC COMMENTS CLOSED AT 6:38 P.M.**

**CONSENT CALENDAR**

D. Approval of Minutes: June 9, 2011 Planning Commission Meeting Draft Minutes.

**Motion by Paul Russ to approve draft minutes of June 9, 2011 Planning Commission Meeting. Seconded by William Muller and passed with the following roll call vote:**

**AYES:** Chris Elvert, William Muller, Bill Jensen, Julie Jensen and Paul Russ  
**NOES:** None

## PUBLIC HEARING

1. Consideration of Development Code Amendment DCA11-10103 regarding medical marijuana dispensaries (Applicant: West Coast Patients Group; Area affected: Citywide) (Staff Person: Lisette Sanchez-Mendoza)

**Assistant Planner Lisette Sanchez-Mendoza** gave a PowerPoint Presentation on the Medical Marijuana Development Code Amendment proposal.

**Lisette Sanchez-Mendoza** stated that staff's recommendation was to maintain the current ban and deny the ordinance to amend DCA11-10103 and introduced four green sheet items.

Commission asked staff questions and discussion ensued.

***Chair Elvert opened the Public Hearing at 7:41 p.m.***

**Applicant, West Coast Patients Group representative, Scott McMurtrey** stated that they feel there are many legal problems with the ordinance.

**Randy Ponce**, a Pastor in Hesperia, stated he opposed dispensaries.

**Sadie Barajas** spoke in opposition of changing the current ordinance and is in favor of keeping the ban.

**Al Vogler** spoke in opposition to dispense medical marijuana.

**Sharon Green**, a Pastor with Higher Praise Tabernacle, spoke in opposition.

**Chris Green** spoke in opposition to medical marijuana dispensaries in Hesperia.

**David Holman** spoke in opposition of dispensaries in Hesperia and cited State and Federal laws.

**Dave Matteson and Darlene Matteson** spoke in favor of medical marijuana and dispensaries.

**Candis Gutierrez** spoke in favor of dispensaries.

**John McClanahan** spoke in opposition of dispensaries within the City of Hesperia as well as the County.

**Carol Hearn** spoke in opposition of dispensaries in the City and feels the price tag would be too high.

**Mark Skubish and Bruce Mueller** gave their 3 minutes to Laticia Peppers.

**Laticia Peppers**, council for Crusaders for Patients Rights, spoke in favor of dispensaries.

**Emily Hearn** spoke in opposition of dispensaries.

**Jennifer Melvin** from High Desert OG dispensary, spoke in favor of amending the ordinance to allow dispensaries.

**Kevin Sutman** spoke in favor of dispensaries.

**Joseph Kluchin** spoke in favor of dispensaries.

**Vicki Richardson** spoke in favor of dispensaries.

**Eileen Muller** spoke regarding the problems of a current dispensary on Main Street and stated that they should remain banned.

**Daniel Paine** spoke in favor of dispensaries.

**Nicole Skubish** spoke in favor of dispensaries.

**Lou Burgess** spoke in opposition to dispensaries and was concerned on the overall effect on the City.

**Mike Sassenberger** spoke in favor of dispensaries.

**Sonia Marshall** spoke in opposition of medical marijuana and dispensaries.

**Yolanda Ponce** spoke in opposition of dispensaries.

**Laurie Yovanovich** spoke in opposition of dispensaries.

**Chair Elvert closed the Public Hearing at 9:05.**

**Chair Elvert** explained that the Commission was here only to decide the land use issue for the City of Hesperia.

**Motion by William Muller to approve Resolution No. PC-2011-15, recommending that the City Council deny DCA11-10103, regarding medical marijuana dispensaries. Seconded by Paul Russ and discussion ensued.**

**Paul Russ** stated that the Commission was here to decide whether or not to allow dispensaries/collectives under the City's land use development code and they have a right to ban them.

**Bill Jensen** questioned the scientific, legal and financial information regarding the proposed ordinance and motioned to have a scientific workshop and a legal/financial workshop.

**Julie Jensen** stated that citizens with serious medical issues have a right to obtain medical marijuana.

Commission discussion ensued.

**Motion by Bill Jensen to continue the public hearing in order to have (2) workshops to rework the ordinance regarding land use. Seconded by Julie Jensen and passed with the following roll call vote:**

**AYES:** Chris Elvert, Bill Jensen and Julie Jensen  
**NOES:** William Muller and Paul Russ

2. [Consideration of Development Code Amendment DCA11-10191, to amend the Residential Land Use District regulations. \(Applicant: City of Hesperia; Affected area: Citywide\) \(Staff Person: Daniel Alcayaga\)](#)

**Senior Planner Daniel Alcayaga** gave a PowerPoint presentation and stated that the primary purpose of the Development Code Amendment was to make the Development Code consistent with the General Plan.

**Paul Russ** clarified that this amendment was to get to a one map system.

**Bill Jensen** requested that the word "zoning" be placed on the map title.

**Chair Elvert opened Public Comments at 10:09 p.m.**

One comment to consider regarding the combining of three maps.

**Chair Elvert closed Public Comments at 10:11 p.m.**

**Motion by Paul Russ to adopt Resolution No. PC-2011-26, as presented approving DCA11-10191, amending the Residential Land Use District regulations. Seconded by Bill Jensen and passed with the following roll call vote:**

**AYES:** Chris Elvert, William Muller, Bill Jensen, Julie Jensen, and Paul Russ  
**NOES:** None

3. [Consideration of Development Code Amendment DCA11-10167, to reorganize and amend the animal regulations. \(Applicant: City of Hesperia; Affected area: Citywide\) \(Staff Person: Stan Liudahl\)](#)

**Senior Planner Stan Liudahl** gave a PowerPoint presentation and stated that staff was taking the new General Plan Land Use Map and fitting the animal regulations to it.

Commission discussion ensued.

**Chair Elvert opened Public Comment at 10:23 p.m.**

No Comments to consider.

**Chair Elvert closed Public Comment at 10:23 p.m.**

**Motion by Paul Russ to adopt Resolution No. PC-2011-24, approving DCA11-10167, reorganizing and amending the animal regulations. Seconded by Julie Jensen and passed with the following roll call vote:**

**AYES: Chris Elvert, William Muller, Bill Jensen, Julie Jensen, and Paul Russ**  
**NOES: None**

**PRINCIPAL PLANNER'S REPORT**

- E. DRC Comments
- F. Major Project Update

**Principal Planner Dave Reno, AICP**, gave an update on Ranchero Road Underpass and stated that it had gone out to bid.

**Dave Reno** stated that the Wal-Mart groundbreaking will be July 26<sup>th</sup> at 9:00 a.m.

**Chris Elvert** asked if Team Truck Dismantling from DRC will be coming to the Planning Commission and Dave Reno responded that it will be coming as an auto sales yard.

**PLANNING COMMISSION BUSINESS OR REPORTS**

No business or reports to consider.

**Chair Elvert adjourned the meeting until Thursday, August 11, 2011 at 10:30 p.m.**

Chris Elvert,  
Commission Chair

By: Kathy Stine,  
Commission Secretary

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**GRAHAM E. BERRY**  
**ATTORNEY & COUNSELOR AT LAW**  
3384 McLAUGHLIN AVENUE  
LOS ANGELES, CA 90066  
Telephone and Facsimile: (310) 745-3771  
Email: [grahamberry@ca.rr.com](mailto:grahamberry@ca.rr.com)

July 14, 2011

*For Urgent Delivery To Each Commissioner*

The Planning Commissioners  
City of Hesperia Planning Commission  
9700 Seventh Avenue  
Hesperia, CA 92345

Re: Consideration of Development Code Amendment DCA11-10103 regarding Medical Marijuana Dispensaries.

Honorable Commissioners:

I represent High Desert OG which is one of the medical marijuana dispensaries in Hesperia. High Desert is a collective dispensary that complies with the provisions of California law. However, the City is trying to shut High Desert down upon the basis of the City of Hesperia ban on medical marijuana dispensaries. An appeal (if necessary), notice of claim and proceedings against the City will soon be filed. I expect to see other dispensaries facing closure proceedings and arguing, among other things, that the City's current total ban is unconstitutional, violates civil rights, and renders the City liable for substantial damages and associated legal fees and costs.

**1. THE CITY'S TOTAL BAN UPON ANY COLLECTIVE DISPENSARY IS UNLAWFUL**

The City of Hesperia's total ban of any and all medical marijuana collective dispensaries is an issue currently before both the Fourth District Court of Appeal (*City of Colton v. Organic Garden Collective* (E053182 / CIVDS1102363)) and the Second District Court of Appeal (*Americans for Safe Access et. al. v. City of Los Angeles*, B230436 / BC433942).

I am one of the attorneys in the *Safe Access* group of cases pending before Hon. Anthony Mohr of the complex case division of the Los Angeles Superior Court. In the *Safe Access* group of cases we obtained a partial preliminary injunction against portions of the City of Los Angeles medical marijuana ordinance. Among other things, Judge Mohr ruled that a total ban of any and all medical marijuana dispensaries is unconstitutional and can be enjoined (because it is preempted by California state law).

“Section 45.19.6.10 of the Ordinance provides that its provisions shall sunset two years after the effective date and all collectives shall cease operation immediately, unless the City Council adopts an ordinance to extend these provisions.” This section of the Ordinance will prevent collectives even though the MMPA permits their existence (put another way, it will prohibit what the statute commands.’ *Sherwin-Williams, supra*, 4 Cal. 4<sup>th</sup>. At 902) While the Ordinance prohibits all but seventy collectives to continue operating, it still permits collectives to operate. On this point there is no clear contradiction. But a blanket ban on all collectives in the City of Los Angeles, as the sunset provision purports to do, goes too far and contradicts the MMPA.” December 10, 2010 Order, p.10:21-11:9.

Citing *City of Claremont v. Kruse* (2009) 177 Cal. App. 4<sup>th</sup> 1153, 1172-76, the City’s staff report (page 1-1) argues that “[t]he courts have held that a complete local ban on dispensaries is a valid exercise of the city’s police power and is not preempted by the Compassionate Use Act or SB 420.” However, in my opinion *Claremont* is already old law in this rapidly evolving legal landscape. *Claremont* only involved a temporary moratorium which is constitutional because it is merely prospective, temporary and does not close down existing businesses. *Claremont* did not involve a permanent collective dispensary ban such as the one that is currently enforced in Hesperia. Consequently, *Claremont* is not good legal authority in support of the City of Hesperia’s permanent ban upon any medical marijuana dispensary within the City limits.

More recent legal authority comes from the same appellate district in *Qualified Patients v. City of Anaheim* (2010) 187 Cal.App. 4<sup>th</sup> 734. In *Anaheim*, the fourth district court of appeals (which includes Hesperia) ruled that in matters relating to medical marijuana collective dispensaries, federal law did not preempt California state law and that California state law did preempt local laws which must be "consistent" with the provisions of the MMPA.

"Whether the MMPA bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined. ... *City of Claremont v. Kruse* (2009) 177 Cal.App. 4<sup>th</sup> 1153, on which the city relies, did not involve an ordinance like Anaheim's [or Hesperia's], which potentially contradicts [H&S] sections 11362.765 and 11362.775 by making the use of property a crime "solely on the basis" of otherwise lawful marijuana activity. ... [T]he MMPA explicitly touches on land use law by proscribing in sections 11362.765 and 11362.775 the application of sections 11570, 11366, and 11366.5 to uses of property involving medical marijuana. ... it appears incongruous at first glance to conclude a city may criminalize as a misdemeanor a particular use of property the state has expressly exempted from criminal liability in sections 11362.765 and 11362.775." *Anaheim*, pp. 753-754, FN. 4. Emphasis added.

More specifically, the *Anaheim* court wrote:

The city's oft-repeated, pejorative characterization of QPA as a "storefront dispensary," rather than a "cooperative" or "collective," is not persuasive. The city seems to suggest that any medical marijuana outlet it designates as a "dispensary" affronts California medical marijuana law. fn. 2 The city's argument [187 Cal.App.4th 752] fails for two reasons. First, we are here after demurrer, and QPA is identified nowhere in the complaint or any judicially noticeable material as a "storefront dispensary." Second, the "dispensary" label -- even assuming it is apt -- is not dispositive. As the

Attorney General observes in the Guidelines, while "dispensaries, as such, are not recognized under the law, " properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law . . . ." (A.G. Guidelines, *supra*, p. 11.) We perceive no reason at this juncture to disagree with the Attorney General's assessment." *Anaheim, supra*, p. 753.

The recent passage of AB 2650 further distances *Claremont* from the current state of the law. AB 2650 is an "[a]ct to add Section 11362.768 to the Health & Safety Code, relating to medical marijuana. Significantly, H&S §11362.768 expressly provides for medical marijuana cooperatives, collectives and dispensaries.

On June 21, 2011 the Fourth DCA issued another order, this time in *City of Colton v. Organic Garden Collective* [E053182 / CIVDS1102563]. The 4<sup>th</sup> DCA granted a Writ of Supersedeas staying a Superior Court injunction.

"The issue raised in this case, now pending on appeal before this court, is whether a local public entity . . . may effectively prohibit medical marijuana dispensaries within its boundaries when such dispensaries are permitted by state law and have not been shown, as a matter of evidence, to constitute a nuisance in fact. At this time, no published case has dealt with the issue. Having reviewed the petition, opposition, and record, we have concluded that the balance of hardships shown by the evidence favors defendants/appellants, that a substantial issue of law is presented by the appeal, and that we should therefore exercise to preserve the status quo pending the appeal. (Citations omitted.) Accordingly, we GRANT the petition by defendants/appellants for an order in the nature of supersedeas and direct that the preliminary injunction issued by the Superior Court is STAYED pending resolution of the appeal."

Therefore a total ban, as in Hesperia, is preempted by state law and therefore unconstitutional. Indeed, strict enforcement of existing law in relation to existing collective dispensaries would probably produce a reduction of their numbers to an acceptable figure. In some cities this has been one dispensary per 10,000 citizens. In another Inland Empire City where I was involved, the City was considering a Franchise/License agreement providing for one dispensary for every 30,000 citizens and the dispensaries would pay a substantial daily franchise fee (although a local sales tax based system works more fairly and integrates more effectively with state sales tax payments to the State Board of Equalization.

Accordingly, it is submitted that the emerging trend of the applicable law is clear: The City of Hesperia may regulate medical marijuana dispensaries ("consistent" with the MMPA) but it may not totally eliminate them. Furthermore, as set forth in the statute, any local regulation must be "consistent" with the state statute.

## 2. BANKS ATTRACT MORE CRIME THAN COLLECTIVES

The City of Hesperia Staff Report focuses heavily upon alleged negative secondary effects. However, Los Angeles Police Chief Charlie Beck has stated that "Banks are more likely too get robbed than medical marijuana dispensaries. ... Opponents of the [medical marijuana] clinics complain that they attract a host of criminal activity to the neighborhoods including robberies. But a report that Beck recently had the [LAPD] generate looking at citywide robberies in 2009 found that simply was not the case. "I have tried to verify that because that, of course, is the mantra." Said Beck. "It doesn't really bear out." Dailynews.com, Tony Castro, LAPD chief: Pot clinics not plagued by crime. Yet another survey showed higher crime statistics around Los Angeles City Councilman offices than around medical marijuana dispensaries!

## 3. THE HESPERIA BAN VIOLATES PATIENTS MEDICAL RIGHTS

The City's total ban of all and any medical marijuana dispensaries violates the CUA and the MMPA conferred rights of qualified patients to associate for the purpose of

cultivating, transporting and distributing medical marijuana in accordance with state law. These statutory rights involve the rights of a great many 'seriously ill patients' to obtain their medications - often a medicine of last resort after expensive pharmaceutical and synthetic drugs have been ineffective or too toxic.

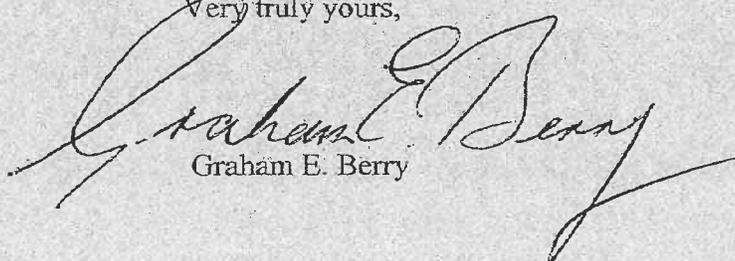
A majority of the state's voters conferred these statutory and patient's rights upon 'seriously ill' Californians. Some of these people are old and immobile. They should not have to try and obtain transportation to other cities or counties to obtain their medication for often crippling and life threatening illnesses.

\* \* \* \*

If the City continues to engage in the increasingly litigious consequences of a total ban on all medical marijuana collectives, the only real winners will be the lawyers and the fees they generate for themselves at the expense of either the local citizens or the dispensaries.

Accordingly, it is submitted that the City of Hesperia should approve DCA10-10103 (or a revised version thereof) regarding medical marijuana dispensary collectives. Enacting appropriate local requirements, and treating the matter as a revenue raising opportunity seems a better use of scarce city resources than mounting an increasingly expensive rear-guard and recalcitrant "Reefer Madness" type resistance to the inevitable.

Very truly yours,



Graham E. Berry

Cc: clients



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DARRELL KRUSE and CLAREMONT ALL NATURAL NUTRITION AIDS BUYERS INFORMATION SERVICE, (a.k.a. "C.A.N.N.A.B.I.S."), Appellants vs. THE CITY OF CLAREMONT, Respondent.

2nd Civil No. B210084

COURT OF APPEAL OF CALIFORNIA, 2ND DISTRICT

2009 CA App. Ct. Briefs 10084; 2009 CA App. Ct. Briefs LEXIS 2296

January 26, 2009

The Honorable Dan T. Oki, Judge. Los Angeles County Superior Court Case Number KC 049836.

Initial Brief: Appellant-Petitioner

COUNSEL: [\*1] Burton Mark Senkfor, Esq., State Bar No. 62723, Law Office of Burton Mark Senkfor, Beverly Hills, California, Allison B. Margolin, Esq., State Bar No. 222370, Beverly Hills, California, Attorneys for Appellants DARRELL KRUSE and CLAREMONT ALL NATURAL NUTRITION AIDS BUYERS INFORMATION SERVICE.

INTERESTS: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one):  INITIAL CERTIFICATE  SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (name): Darrell Kruse and Claremont All Natural, etc.

2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) DARRELL KRUSE	owns 100% of Appellant Claremont All Natural, etc.

- (2)
- (3)
- (4)
- (5)

Continued on attachment 2:

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: January 26, 2008

Burton Mark Senkfor, Esq.  
(TYPE OR PRINT NAME)

/s/ [Signature]  
(SIGNATURE OF PARTY OR ATTORNEY)

**TITLE: APPELLANTS' OPENING BRIEF**

**TEXT: STATEMENT OF THE CASE**

The small picture in this case is whether Respondent City of Claremont (the "City") established its causes of action against Appellants Darrell Kruse ("Kruse") and Claremont All Natural Nutrition AIDS Buyers Information Service ("C.A.N.N.A.B.I.S.") (together, the "Kruse Parties") for nuisance under Civil Code Section 3479 ("§3479").

The big picture includes whether being able to obtain and use medical marijuana is a matter of statewide concern, whether local municipalities can secondguess the State on medical marijuana policy matters, and whether local municipalities can thwart the State's laws intended to facilitate access to medical marijuana by outright prohibition of all medical marijuana dispensaries in their locality.

The complaint in the underlying litigation sought a permanent injunction, based upon three causes [\*2] of action for "public nuisance" solely founded upon §3479, barring the Kruse Parties from doing business as a marijuana dispensary only at a particular location in the City. The case was tried as a court trial, without a jury. The trial court rendered a judgment on June 10, 2008 barring the Kruse Parties from doing such business anywhere within the City.

On August 11, 2008, the Kruse Parties filed their Notice of Appeal herein, believing that the trial court erred in numerous instances encompassed within its judgment.

#### **STATEMENT OF FACTS**

In November 1996, the Compassionate Use Act of 1996 (Proposition 215) became law in the State of California, authorizing the medical use of marijuana. As of January 1, 2004, the Medical Marijuana Program (S.B. 240) became law in the State of California, to facilitate the implementation of the Compassionate Use Act of 1996. The Compassionate Use Act of 1996 and the Medical Marijuana Program are hereafter jointly referred to as the "medical

marijuana laws".

In early July 2006, Kruse went to the offices of the City and met with a City planner there. Kruse wanted to open a medical marijuana collective in the City, and asked what applicable regulations [\*3] the City had. Kruse was told that the City did not have any regulations as to that type of business, but the planner did not think the City would let Kruse open such a business in the City. Kruse told the planner that this type of business was a legal but nonconforming use in any zone in any city where not otherwise regulated, and that if there were no regulations, such a business could be located where the business operator wanted. Reporter's Transcript ("RT") 15-17, 67-68.

As of September 14, 2006, the City had no zoning specifically addressing or excluding a medical marijuana collective or dispensary in the City. Appellants' Appendix ("App.") 163. However, Claremont Municipal Code Section 212 and Table 212.A therein specifically permitted "cigar/cigarette/smoke shops", "food/drug and kindred products", "health, herbal, botanical stores", "pharmacies", "counseling", and "offices for philanthropic, charitable and service organizations". Exhibit 103; App. 261.

On September 14, 2006, Kruse filed a Business Tax Application and a Business Permit Application with the City, to operate C.A.N.N.A.B.I.S. as a business in the City. Exhibits 1 and 2; App. 259.

On September 15, 2006, City [\*4] Manager Jeff Parker ("Parker") wrote to Kruse to inform him that the City was denying his applications for a business license and a business permit to operate C.A.N.N.A.B.I.S. within the City limits, because the proposed use, a "medical cannabis caregivers collective and information service" was assertedly not specifically addressed as a permitted use in any existing land use zoning district within the City. Parker stated that an amendment to the Land Use and Development Code would be necessary to permit this use, that Kruse would have to pay for the preparation and review of such amendment by City staff and the City attorney, that it would take at least six months to review and prepare such amendment, and there were no guarantees the amendment would be adopted. Exhibit 3; App. 259.

As of such date, there was a hypnotist in the same building as Kruse who had received a business license and business permit, although "hypnotist" was not specifically addressed as a permitted use in any existing land use zoning district within the City. Exhibit 160; RT 48-50, 70-71.

On or about September 16, 2006, Kruse began operating C.A.N.N.A.B.I.S. in the City, without a business license or business [\*5] permit. App. 163.

On September 21, 2006, Kruse timely filed an Appeal of Commission Decisions, regarding the denials of his applications for a business license and business permit. Exhibit 4; RT 27; App. 260.

On September 26, 2006, the City Council met, considered, and passed an interim urgency ordinance ("Ordinance No. 2006-08") to enact a 45-day moratorium on the establishment and operation of medical marijuana dispensaries in the City, assertedly pursuant to Government Code Section 65658. Exhibit 43; RT 29; App. 260. Ordinance No. 2006-08 stated, among other things, in Sections 4 and 5 thereof:

"SECTION 4. \* \* \*

"3. The Claremont Municipal Code and Land Use and Development Code do not address or regulate in any manner the existence or location of medical marijuana dispensaries.

\* \* \*

"5. ... [I]t appears there is currently a conflict between federal laws and California laws regarding the legality of medical marijuana dispensaries.

"6. To address the apparent conflict in laws, as well as the community and statewide concerns regarding the establishment of medical marijuana dispensaries, it is necessary for the City of Claremont to study the potential impacts [\*6] such facilities may have on the public health, safety, and welfare.

\* \* \*

"SECTION 5. The City Council hereby directs the Planning Division to consider and study possible means of regulating or prohibiting medical marijuana dispensaries, including zoning-based regulations and other regulations."

On October 5, 2006, Parker (the City Manager) wrote to Kruse and stated that Kruse's appeal was moot and would not be heard by the City Council because of the moratorium enacted September 26, 2006. Exhibit 7; RT 28, 69; App. 261.

The Kruse Parties continued in business, by providing medical marijuana to patients who were in compliance with the medical marijuana laws and possessed a valid recommendation from a California physician which the Kruse Parties had verified. App. 162-163.

The City started writing letters to Kruse and citing him for violations. Exhibits 9, 10, 17, 18, 20, 21, etc.

On October 24, 2006, the City Council met and passed another interim urgency ordinance ("Ordinance No. 2006-09"), extending the prior moratorium for an additional 10 months and 15 days. Exhibit 44; RT 29; App. 260.

The City continued to give Kruse administrative citations, which included more [\*7] than \$ 6,200 in fines.

This lawsuit was filed, and a preliminary injunction was issued. C.A.N.N.A.B.I.S. then ceased operating. App. 1,261.

On September 11, 2007, the moratorium was extended until September 24, 2008, by Ordinance No. 2007-06. Exhibit 45; RT 30; App. 261.

Prior to trial, the parties stipulated that certain matters were not issues in the case, and the trial court approved the stipulation at the trial. RT 4-5; App. 162-163.

There was no issue in this case whether or not: 1) the Kruse Parties were "primary caregivers" under the medical marijuana laws; 2) persons who purchased marijuana from the Kruse Parties were "qualified patients" or had identification cards under the medical marijuana laws; 3) the Kruse Parties operated within the requirements of the medical marijuana laws; or 4) persons who purchased marijuana from the Kruse Parties acted within the requirements of the medical marijuana laws. RT 4; App. 162-163.

There was no issue in this case whether or not the Kruse Parties sold marijuana in violation of California state law, but the City was still required to prove that the Kruse Parties created a nuisance. RT 4; App. 163.

There was no issue in this case [\*8] whether the Kruse Parties' sales of marijuana were nonprofit, made no profit, or made a profit. RT 5; App. 163.

## ARGUMENT

### I.

#### SUMMARY OF ARGUMENT

The trial court erroneously found that the Kruse Parties caused a nuisance pursuant to §3479, when there is no part

of §3479 which is applicable to the facts herein.

The trial court erroneously found that actions assertedly in contravention of the Federal Controlled Substances Act, but not in contravention of California law, could cause a nuisance under §3479.

The trial court erroneously attempted to effectuate, enforce, and incorporate federal marijuana laws into California nuisance law, contrary to clear recent California authority.

The trial court erroneously found that operating without a business license or tax certificate could cause a nuisance under §3479, when there is no part of §3479 which supports such conclusion.

The trial court erroneously found that operating without a business license or tax certificate could be a nuisance per se, when the City never pled any cause of action for nuisance per se, and there was no enactment by the City declaring that a person or business creates a nuisance by failing [\*9] to have a business license or tax certificate.

The trial court erroneously found that the Kruse Parties created a public nuisance, because the City failed to establish a connecting causative link to a threatened harm.

The trial court erroneously refused to determine whether or not being able to obtain and use medical marijuana was a matter of statewide concern, which in turn relates to issues of conflicts with local law and preemption.

The trial court erroneously refused to consider whether or not the State of California has preempted local action in the field of determining how the federal marijuana laws should be addressed in California, which relates to the City's moratorium on medical marijuana dispensaries that was enacted in substantial part so the City could analyze and determine the effect of federal law in California.

The trial court erroneously refused to consider whether or not the City in effect had prohibited all medical marijuana dispensaries prior to the moratorium, and whether or not this was invalid and preempted by California medical marijuana laws.

The trial court erroneously refused to consider whether or not the moratorium was invalid and preempted by California [\*10] medical marijuana laws because one of its primary stated purposes was so the City could consider prohibiting all medical marijuana dispensaries in the City.

The trial court erroneously found that the Kruse Parties' medical marijuana dispensary use did not fall within any existing category of use in the City, which is especially erroneous since the City allowed a hypnotist in the same building and such use is further from any existing category of use than the Kruse Parties' use.

The trial court erroneously refused to consider whether the Kruse Parties had a due process right to have their appeal regarding the denial of their application for a business license heard, on the merits in the appropriate forum.

The trial court erroneously extended the injunction it granted, so that it covered any location within the City, when all causes of action and the prayer of the verified complaint pertained solely to one specified location in the City.

## II.

### **THE CITY COULD NOT AND DID NOT ESTABLISH A NUISANCE UNDER CIVIL CODE SECTION 3479, ET SEQ., WHICH WAS THE ONLY BASIS OF ITS COMPLAINT**

All three causes of action of the City's complaint herein were for "public nuisance", and all [\*11] were founded upon §3479. However, there was no possible nuisance under §3479 under the facts herein.

§3479 reads in its entirety as follows: "Anything which is injurious to health, including, but not limited to, the

illegal sale of controlled substances, 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, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway; is a nuisance."

It is obvious that the only portion of §3479 which could possibly be applicable here is the "illegal sale of controlled substances". However, there was no such sanctionable activity in this case.

All of the sales of marijuana here were pursuant to the medical marijuana laws, no "illegal sale of controlled substances" under California law ever occurred here, and the City makes no assertion to the contrary. Indeed, any such assertion by the City would be totally precluded by the trial stipulations, which state that there is no issue in this case as to whether or not the Kruse [\*12] Parties sold marijuana in violation of California state law.

It should also be noted that Health and Safety Code Sections 11362.765 and 11362.775, part of the medical marijuana laws, specifically exempt individuals in compliance therewith from liability under Health and Safety Code Section 11570, which pertains to nuisances being enjoined. And Section 11362.765(b)(3) exempts any individual who provides specified services, not merely qualified patients and designated primary caregivers.

Furthermore, whether or not any sales of medical marijuana would be illegal under federal law is irrelevant to this case, and any such possible federal illegality does not violate a State statute such as §3479, as addressed in two recent California cases.

In *People v. Tilehkooh*, 113 Cal.App.4th 1433 (2003), the People asserted that a defendant could be punished under State law for violating probation by possessing marijuana in violation of federal (but not State) law. The Court of Appeal strongly disagreed, stating at page 1445:

"Failing these arguments the People claim defendant violated the federal criminal law and the '[p]ossession of marijuana remains a crime under [\*13] the law of the United States.'

"... [T]he only probation condition which defendant could have violated was that he 'obey the laws' of the state and United States...

"The People have misunderstood the role that the federal law plays in the state system. The California courts long ago recognized that state courts do not enforce the federal criminal statutes. 'The State tribunals have no power to punish crimes against the laws of the United States, *as such*. The same act may, in some instances, be an offense against the laws of both, and it is only as an offense against the State laws that it can be punished by the State, in any event.' [Footnote omitted.] (*People v. Kelly* (1869) 38 Cal. 145, 150, orig. emphasis; see also *People v. Grososky* (1946) 73 Cal.App.2d 15, 17-18 [165 P.2d 757].)

"Since the state does not punish a violation of the federal law 'as such,' it can only reach conduct subject to the federal criminal law by incorporating the conduct into the state law. The People do not claim they are enforcing a federal criminal sanction attached to the federal marijuana law. Rather, they seek to enforce the state sanction [\*14] of probation revocation which is solely a creature of state law. (§ 1203.2.) The state cannot do indirectly what it cannot do directly. That is what it seeks to do in revoking probation when it cannot punish the defendant under the criminal law." (Emphasis added.)

This is the same situation as our case. The City cannot enforce federal marijuana laws in State court. Therefore it seeks to incorporate federal marijuana law into State nuisance law, which is a specific State statute. The City is trying to do indirectly what it cannot do directly - obtain an injunction for nuisance when it cannot punish the Kruse Parties under criminal law. This is improper, as *Tilehkooh* clearly holds.

Tilehkooh was followed very strongly in *City of Garden Grove v. Superior Court (Kha)*, 157 Cal.App.4th 355 (2007) (review denied, 2008 Cal. LEXIS 3517; U.S. Supreme Court certiorari denied, 2008 U.S. LEXIS 8568). After quoting from Tilehkooh at great length, City of Garden Grove stated:

"Tilehkooh's reasoning is apropos here, insofar as the City is not attempting to enforce a federal sanction attached to the federal marijuana [\*15] laws. Instead, it seeks to enforce the sanction of property destruction under state law as expressed in section 11473.5. But to paraphrase Tilehkooh, the City cannot do indirectly what it could not do directly. That is what it seeks to do in destroying Kha's marijuana when it cannot punish him under the criminal law for possessing it." (Emphasis added.)

Again, that is what the City is improperly trying to do in our case - obtain an injunction against the Kruse Parties for selling marijuana when it cannot punish them under the criminal law for doing so. As reiterated strongly in both Tilehkooh and City of Garden Grove, the City (of Claremont) cannot do indirectly what it could not do directly.

City of Garden Grove added:

". . . But saying state judges may interpret federal law is a far cry from saying they may invoke it to punish conduct that is legally permissible under state law. Applying the reasons of Tilehkooh, we think judicial enforcement of federal drug policy is precluded in this case because the act in question - possession of medical marijuana - does not constitute an offense against the laws of both the state and the federal [\*16] governments. Because the act is strictly a federal offense, the state has "no power to punish [it] as such." (*People v. Tilehkooh, supra*, 113 Cal.App.4th at p. 1445, quoting *People v. Kelly, supra*, 38 Cal. at p. 150.) Indeed, we, and all the trial courts in the state, would be astonished if prosecutors began filing federal charges in state courts." (Emphasis added.)

Accordingly, the City could not and did not establish that there was any "illegal sale of controlled substances" for purposes of §3479 (a State law).

The trial court may have found that operating without a business license or tax certificate would be a nuisance within the meaning of §3479. However, there is no language in §3479, or any other authority, supporting a conclusion that such conduct is encompassed by §3479.

The trial court may also have found that a nuisance per se is encompassed within §3479. However, the language of §3479 does not support such an interpretation, and neither the trial court nor the City cited even a single authority which holds that a nuisance per se falls within §3479 if the underlying conduct does not otherwise fall within the description [\*17] of nuisance in §3479. In any event, there also was no nuisance per se in our case, as discussed hereafter.

Accordingly, the City could not and did not establish a claim under §3479, which is the foundation of each of its causes of action herein, and thus the judgment in the City's favor should be reversed.

### III.

#### THE CITY COULD NOT AND DID NOT ESTABLISH A NUISANCE PER SE

The City never pled any cause of action for nuisance per se, nor did it ever seek to amend to conform to proof on a nuisance per se theory. Nevertheless, the trial court found a nuisance per se here, despite a complete lack of support both in the pleadings and in the evidence.

A city may declare specified conduct a nuisance per se. For example, a city may enact a law finding that parking an automobile on the front lawn of a home in a residential area is a nuisance. However, no equivalent proper enactment occurred here.

There is no applicable statute in this case, enacted by the City or by any other authority, which declares that operating without a business license or tax certificate is a nuisance (or a nuisance per se).

Instead, the City attempted to rely upon the omnibus language of Municipal [\*18] Code Section 8.16.020C ("§8.16.020C"), which states: "A public nuisance is created by any building, structure, or property that is in violation of any provision of the Claremont Municipal Code, the Claremont Land Use and Development Code, or the statutes of the state of California." (Emphasis added.) The trial court rejected this assertion by the City.

On its face, §8.16.020C is inapplicable to the situation here (and the statute is also overbroad). Clearly, this statute expressly is limited to any "building, structure, or property". For example, if a person jaywalks, that may violate a statute, but since a person is not a "building, structure, or property", jaywalking does not create a nuisance per se and is not a public nuisance. Similarly, while the Kruse Parties may have violated some business license or permit regulations, these are personal violations, not violations by a "building, structure, or property". While the location where such asserted violations occurs may be a building, structure, or property, the location itself did not violate this law.

Of course, a building can certainly violate laws; for example, there are seismic laws which a building can violate. [\*19] But a building cannot violate a requirement to obtain a business license, because the building does not conduct business - a person or entity does.

The City could have drafted §8.16.020C differently, so as to substitute the words "person" or "business" in place of "building, structure, or property" n1, but the statute as written is not violated by a person's failure to obtain a business license or permit.

n1 Whether such overbroad language would be valid is a different issue.

On this point, the trial court ruled correctly, stating: "The court agrees with defendants [the Kruse Parties] that the City has failed to demonstrate that defendants' actions constituted a public nuisance under Municipal Code § 8.16.020C, which applies to a 'building, structure, or property' that is in violation of the Municipal Code, Land Use & Development Code, or the laws of the State of California." n2

n2 The trial court then added: "Rather, it is the actions of the defendants themselves that the court finds constitutes a nuisance." However, the trial court failed to indicate how such actions purportedly violated §3479 or otherwise constituted a nuisance, other than by assertedly violating federal law or by being a supposed nuisance per se without any connection to any specified conduct categorized as a nuisance by any statute, neither of which is sufficient to constitute a nuisance.

[\*20]

The City could not and did not show an applicable ordinance which specifically made the conduct by the Kruse Parties (failure to obtain a business license or permit) a nuisance. n3 All the City attempted to do was to bootstrap an overbroad omnibus statute (§8.16.020C), which was inapplicable because it related solely to a "building, structure, or property", and this was not sufficient.

n3 The City's Municipal Code §4.06.020 merely makes it unlawful (but not a nuisance) to transact business without a business license or permit.

"It is said that even at common law a city or town has power to abate a public nuisance. Usually it has statutory

power, vested in its governing body, to declare and abate public nuisances. But neither at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not.' (14 A.L.R.2d § 8, p. 82.)". *Leppo v. City of Petaluma*. 20 Cal.App.3d 711, 718 (1971).

Accordingly, [\*21] there was no proper basis for the trial court to find that the Kruse Parties' operation of their business without a business license or permit, or that any other conduct of the Kruse Parties, constituted a nuisance per se. Such personal conduct may have violated other provisions of the City's laws, but violated no law which declared it to be a nuisance. The trial court's opinion states: "Activities or conduct declared by law to be nuisances are nuisances per se" (App.), but that is markedly different from stating: "Activities or conduct declared by law to be illegal are nuisances per se." Unfortunately, the trial court failed to make this distinction, and therefore erroneously held that the Kruse Parties' "prior operation of a medical marijuana dispensary within the City of Claremont, without a business license or tax certificate ... constituted a nuisance per se allowing the City to seek injunctive relief." The trial court was simply totally wrong on this point, and its fundamental error requires reversal of the judgment herein.

#### IV.

#### **THE CITY FAILED TO SHOW THAT THE KRUSE PARTIES CAUSED ANY HARM, WHICH WAS A NECESSARY ELEMENT OF ITS NUISANCE CLAIM**

Proof of a cause of [\*22] action for public nuisance requires establishing a causation link between the defendant's conduct and an actual harm, not merely showing a risk of harm. Here, all the City has done is show that the Kruse Parties operated without a business license or permit, while they complied with the California medical marijuana laws. The City failed to show how this actually caused any harm, which is a prerequisite for a nuisance cause of action.

In *In Re Firearm Cases*, 126 Cal.App.4th 959 (2005), plaintiffs claimed that defendants' conduct was a public nuisance because it resulted in handguns being supplied to criminals and led to injury to the public. The Court stated, at page 986:

"... But the court did discuss the issue of public nuisance in its opinion and concluded that plaintiffs' evidence failed to show causation, a necessary element of a public nuisance claim.

\* \* \*

"The language of the Restatement presumes that the necessary elements for proof of a cause of action for public nuisance include the existence of a duty and causation... If a plaintiff could obtain an injunction absent a showing of causation of an interference with a public right, the plaintiff could [\*23] enjoin the manufacturing of a firearm solely because the mere existence of the firearm creates a risk of harm. A connecting element to the prohibited harm must be shown.

\* \* \*

"Merely engaging in what plaintiffs deem to be a risky practice, without a connecting causative link to a threatened harm, is not a public nuisance. [Numerous citations omitted.]" (Emphasis added.)

In our case, the City failed to establish the required causative link to a threatened harm, and so did not establish a public nuisance. What is the actual harm? Once again, merely allegedly violating other provisions of the City's laws does not constitute a public nuisance.

#### V.

#### **THE TRIAL COURT FAILED AND REFUSED TO DETERMINE WHETHER BEING ABLE TO OBTAIN AND USE MEDICAL MARIJUANA IS A MATTER OF STATEWIDE CONCERN, WHICH IT IS**

The trial court's tentative decision failed to address whether or not being able to obtain and use medical marijuana is a matter of statewide concern. Instead, all the trial court stated on this point was that an Attorney General Opinion cited by the Kruse Parties on this issue was inapplicable here. App. 237.

Accordingly, the Kruse Parties objected to the tentative [\*24] decision in this regard, and specifically requested that the trial court determine, one way or the other, whether being able to obtain and use medical marijuana is a matter of statewide concern, which in turn relates to issues of conflicts with local law and preemption. App. 244.

However, the trial court's response to this objection, which is part of the trial court's judgment, still dodged this issue, and the trial court would not decide whether this is a matter of statewide concern. App. 270.

Matters of health and medicine have been recognized by the Legislature as being of statewide concern. *Northern California Psychiatric Society v. City of Berkeley*, 178 Cal.App.3d 90, 106(1986).

"[T]he establishment and protection of a right to possess and use medical marijuana notwithstanding state criminal statutes is plainly a matter of statewide concern." Attorney General Opinion No. 04-709, page 5, footnote 5.

"[O]ne of the stated purposes of the Compassionate Use Act is to allow seriously ill persons access to medical marijuana for treatment of their conditions," as stated in the City's closing trial brief at page 12, lines 25-27. App. 182.

Accordingly, this Court [\*25] should address this issue ignored by the trial court, and hold that being able to obtain and use medical marijuana is a matter of statewide concern.

## VI.

### LOCAL REGULATIONS WHICH CONFLICT WITH MATTERS OF STATEWIDE CONCERN ARE PREEMPTED

Under Article XI, §7 of the California Constitution, a city is authorized to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws". In *Candid Enterprises, Inc. v. Grossmont Union High School District*, 39 Cal.3d 878 (1985), the Supreme Court stated at page 885:

"Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise their power within their territorial limits and subordinate to state law." (Emphasis added.)

A local law contradicts state law when it seeks to prohibit what the Legislature intends to authorize. *Northern California Psychiatric Society, supra*, at page 105; *Suter v. City of Lafayette*, 57 Cal.App.4th 1109, 1124(1997).

"...[C]harter cities may supersede state statutes 'with respect to [\*26] municipal affairs' involving 'areas which are of intramural concern only.' (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1,17; accord, *Johnson v. Bradley, supra*, 4 Cal.4th at p. 399; see 85 Ops.Cal.Atty.Gen. 210, 213-214 (2002).) This constitutional grant of authority for charter cities has no application here, however, because the establishment and protection of a right to possess and use medical marijuana notwithstanding state criminal statutes is plainly a matter of statewide concern... Hence, these state laws would prevail over any conflicting regulatory acts of a charter city. (See, e.g., *Johnson v. Bradley, supra*, 4 Cal.4th at p. 404; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507; 83 Ops.Cal.Atty.Gen. 24, 26-29 (2000); 82 Ops.Cal.Atty.Gen. 165, 167-170 (1999).)" (Emphasis added.) Attorney General Opinion No. 04-709, page 5, footnote 5.

A stated primary purpose of the State medical marijuana laws is to permit persons who qualify for medical marijuana to obtain medical marijuana. Therefore, any local law which [\*27] expressly or has the necessary practical effect of prohibiting such persons from obtaining medical marijuana conflicts with State law, and is preempted by State

law. Here, the City's conduct and enactments under review in this case completely preclude obtaining medical marijuana within the City.

A California city cannot lawfully prohibit all medical marijuana dispensaries within its boundaries, or declare them all to be nuisances. Some local regulation may be appropriate, but not regulation which has the necessary effect of prohibiting all medical marijuana dispensaries from a City. NIMBY ("not in my back yard") cannot be legally followed by a city as to medical marijuana dispensaries under the guise of zoning or licensing.

Testimony at trial from the City's sole witness (as well as from Kruse) established that the City would not permit any person or organization to obtain a business license to provide medical marijuana anywhere in the City. n4 RT 42. Thus, the necessary effect of the City's application of its laws, which laws were the basis of its claims for an injunction herein, was to bar all persons and organizations who distribute marijuana in full compliance with [\*28] the California medical marijuana laws (such as the Kruse Parties) from doing so anywhere in the City. RT 43.

n4 Accordingly, the specific zoning district where the Kruse Parties operated is not a relevant issue in this case.

As the Supreme Court stated, in *Candid Enterprises, Inc., supra, at page 885*: "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."

Clearly, the Legislature (and the voters of California) intended to facilitate access to medical marijuana. Clearly, the City intends to preclude access to medical marijuana; and even if this was not the City's intention, it is the necessary effect of its actions. The City's laws conflict with and contradict State law.

In the trial court, the City attempted an end run around the gist of the relevant issues, by asserting that the Kruse Parties "cannot establish preemption because the City enacted its moratorium under authority granted by Government Code Section 65658 ["§65658"], a generally [\*29] applicable California statute". The City apparently believes that if it enacts a law following any procedure which is not preempted, the enactment cannot be preempted on any other basis. The City's argument is frivolous. §65658 is merely a broad statute allowing a moratorium under certain circumstances. It has nothing whatsoever to do with preemption, and does not preclude preemption in any manner. For example, would the City contend it could enact a moratorium under §65658 precluding all lawyers or all churches or all handicapped access from the City, without such a §65658 moratorium being preempted by State law? Furthermore, in any event, the Kruse Parties' applications to the City were not denied on the basis of the moratorium (the denials preceded the moratorium).

The City also asserts that it has the power to regulate zoning within its jurisdiction. As a general proposition, that is correct, but it misses the entire issue presented here, which is that the City is overstepping on a matter of statewide concern. As stated by the Supreme Court in *Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal.2d 276, 292 (1963)*: "General law prevails over [\*30] local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern."

The denials of the Kruse Parties' applications for a business license and permit, which preceded the City's adoption of the moratorium, were based upon City regulations and policies which conflicted with matters of statewide concern and were thus preempted. Additionally, the City's moratoriums also conflicted with matters of statewide concern and hence were also preempted.

## VII.

### THE CITY'S DENIAL OF THE KRUSE PARTIES' APPLICATIONS FOR A BUSINESS LICENSE AND

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**PERMIT TO OPERATE A MEDICAL MARIJUANA DISPENSARY, ON THE BASIS THAT SUCH USE WAS NOT SPECIFICALLY ADDRESSED OR PERMITTED UNDER EXISTING ZONING, WAS IN ACTUAL EFFECT A PROHIBITION OF ANY MEDICAL MARIJUANA DISPENSARY IN THE CITY, IN CONFLICT WITH STATE LAW, AND WAS OTHERWISE IMPROPER, BUT THE TRIAL COURT FAILED AND REFUSED TO CONSIDER THIS**

The City denied the Kruse Parties' business license and permit applications on the grounds that their proposed use was not specifically addressed or permitted under existing zoning. [\*31] This denial was improper for many different reasons.

**A. Any Medical Marijuana Dispensary Would Be Prohibited From the City on This Basis, Which Conflicts With State Law Requiring That Qualified Persons Be Able to Obtain Medical Marijuana, and the City Would Be Rewarded for Dilatory Conduct**

The medical marijuana laws came into effect in 1996 and 2004. The Kruse Parties did not seek to open a medical marijuana dispensary in the City until the latter part of 2006.

The City certainly had knowledge of, or was on notice of, the State medical marijuana laws for years before the Kruse Parties sought a business license and permit in the City. RT 34-35. Any failure to specifically address such a common and well-known use in the City zoning regulations was the City's fault for being dilatory, not the Kruse Parties' fault. As noted above, the City cannot simply prohibit medical marijuana dispensaries, because that would be a clear conflict with State law, but that is the necessary effect of how the City has handled applications to operate medical marijuana dispensaries. The City should have specifically addressed this use (which it is required to permit) long before the Kruse Parties [\*32] first sought to operate in the City. The City cannot benefit from its own wrong, and cannot legally deny a business license because it failed to address a major public policy issue when it should have done so years earlier. (This situation is of course far different than if a business seeks to open in the City with an unusual use which the City could not reasonably have foreseen.)

Section 212 of the City Land Use and Development Code states in relevant part: "In the event a use is not listed or there is difficulty in categorizing a use as one of the uses listed in Table 212.A, the use shall be prohibited ..." To the extent the City seeks to utilize such language to preclude medical marijuana dispensaries, it conflicts with State law and is accordingly invalid.

**B. The Kruse Parties' Use Fell Within the Parameters of Uses Already Specifically Addressed in the Zoning Laws**

The City's zoning regulations already address and permit "cigar/cigarette/smoke shops", "food/drug and kindred products", "health, herbal, botanical stores", "pharmacies", "counseling", and "offices for philanthropic, charitable and service organizations". The Kruse Parties' use falls within most or all [\*33] of those categories, and so their business license application was improperly denied, particularly in light of the strong affirmative State policy to permit medical marijuana dispensaries, which would require the City to try to interpret the existing zoning to permit rather than prohibit such use.

In this regard, the City gave a business license to a "hypnotist" in the same building as the Kruse Parties, although such use is not specifically addressed or permitted anywhere in the zoning regulations, and is not a favored use under State law. Exhibit 160; RT 48-50, 70-71.

Thus, the City's determinations as to which businesses may obtain a license are simply made by ipse dixit fiat - "Why? Because we say so!" - rather than by evenhanded consideration of prospective businesses or in deference to the State in matters of statewide concern.

**C. The City's Directions to the Kruse Parties to Seek an Amendment to the Code Was in Practical Reality an**

### Improper Prohibition of Medical Marijuana Dispensaries in the City

In denying the Kruse Parties' applications for a business license and business permit, the City Manager stated:

"... [A]n amendment to the Land Use and Development [\*34] Code would be necessary to establish where such a business might be allowed, what the review process would be, and applicable operating regulations ... As a discretionary action, there are no guarantees that such an amendment would be adopted.

\* \* \*

"As the proponent of an amendment, you would be responsible for the staff and city attorney costs associated with the review of the amendment, which the City would bill on an hourly basis. Staff anticipates that such a code amendment would take at least six (6) months to review and prepare ..."  
Exhibit 3; App. 259.

As noted above, this is something the City should have done long ago at its own expense, after the adoption of the medical marijuana laws in 1996 and 2004.

Instead, once the Kruse Parties obtained a lease and applied for a business license, the City told them they would have to spend a lot of money and wait a very long time, and there were no guarantees anything would be accomplished.

This is not subtle. The City knew that these obstacles were not surmountable by the Kruse Parties, or by any other persons seeking to open a medical marijuana dispensary, as a practical matter. The necessary effect of these obstacles was [\*35] to prohibit medical marijuana dispensaries in the City, and that was the intended effect. NIMBY. But creating hurdles of this nature, particularly where the City should have done this work itself long ago, conflicts with State law on an important policy matter of statewide concern.

### VIII.

#### **THE CITY'S ATTEMPTED MORATORIUMS, WHICH FOCUSED ON DETERMINING HOW FEDERAL MARIJUANA LAW SHOULD BE ADDRESSED IN CALIFORNIA, AND WHICH CONSIDERED PROHIBITING ALL MEDICAL MARIJUANA DISPENSARIES IN THE CITY, WERE PREEMPTED BY THE CALIFORNIA MEDICAL MARIJUANA LAWS, AND THE CITY CANNOT PROPERLY SECONDGUESS THIS STATE ACTION**

The City enacted its moratoriums for improper reasons under State law, and therefore those moratoriums were invalid.

The text of the first moratorium focused substantially upon the asserted conflicts between federal and state law regarding medical marijuana, stating in part:

"WHEREAS, there is legal uncertainty between federal laws and California laws regarding medical marijuana dispensaries.

\* \* \*

"... Therefore, it appears there is currently a conflict between federal laws and California laws regarding the legality of medical marijuana dispensaries.

"To [\*36] address the apparent conflict in laws, as well as the community and statewide concerns regarding the establishment of medical marijuana dispensaries, it is necessary for the City of Claremont to study the potential impacts such facilities may have on the public health, safety, and welfare."

(Emphasis added.) Exhibit 43.

However, it was not the City's place to resolve conflicts between federal and State laws, and in deciding to do so the City conflicted with State laws, thereby invalidating this moratorium ordinance.

The State of California was well aware of federal marijuana laws when it enacted the California medical marijuana laws. The City cannot properly secondguess this action by the State, and particularly cannot "address the apparent conflict in laws". The State has already fully occupied the field of determining how the federal marijuana laws should be addressed in California. This is a paramount State concern, and local intermeddling cannot be tolerated on this issue. The City cannot decide whether the State is right or wrong on this issue (and particularly cannot decide that the State is wrong on this issue). Local regulation regarding this issue has unquestionably [\*37] been preempted by the State, and this local ordinance is accordingly invalid.

Indeed, the City is in essence challenging the constitutionality of the State medical marijuana laws, which the City cannot properly do.

This ordinance is additionally invalid for addressing what it expressly concedes are "statewide concerns regarding the establishment of medical marijuana dispensaries". (Emphasis added.)

This ordinance is further invalid because it blatantly enacts a moratorium so it can "consider and study possible means of regulating or prohibiting medical marijuana dispensaries", even though the City may not prohibit such uses, as discussed above.

The moratoriums were invalid ordinances, because the State has preempted local action on these topics. The City was, to put it politely, presumptuous in anointing itself as a higher authority to determine whether the State acted properly when enacting its medical marijuana laws, or whether the State properly considered federal marijuana laws. The moratoriums were the means whereby the City set itself up to secondguess the State, and they cannot pass constitutional muster. n5

n5 Also, as discussed below, since the moratoriums were invalid, they could not moot (or stay) the Kruse Parties' appeal of the denial of their business license and permit, so their appeal of that denial was wrongfully precluded.

[\*38]

## IX.

### **THE CITY IMPROPERLY PRECLUDED THE KRUSE PARTIES' APPEAL FROM THE DENIAL OF THEIR APPLICATIONS FOR A BUSINESS LICENSE AND PERMIT, AND THE TRIAL COURT FAILED AND REFUSED TO CONSIDER THE KRUSE PARTIES' DUE PROCESS RIGHTS TO HAVE THE MERITS OF THEIR APPEAL CONSIDERED IN THE APPROPRIATE FORUM**

The Kruse Parties timely appealed from the denial of their applications for a business license and permit.

However, on October 5, 2006, the City Manager wrote the Kruse Parties regarding such appeal, stating: "As you know, the Claremont City Council enacted a moratorium on such uses on September 26, 2006. For this reason, your appeal is moot and will not be heard by the City Council." Exhibit 7.

This was erroneous, and it precluded the trial court from deciding this matter by granting any permanent injunction in favor of the City.

The Kruse Parties' appeal was never heard by the City, and (according to the City) will never be heard. This is a

denial of due process.

The moratorium (if it was otherwise proper) might have been a basis for staying the Kruse Parties' appeal until the moratorium ended, but it did not make the appeal moot or require the appeal to be denied.

Clearly, [\*39] no permanent injunction in this matter could be properly granted by the trial court if the Kruse Parties disputed that their business license application was properly denied by the City staff (or City Manager) and if the Kruse Parties' appeal of that denial had not yet been heard - which was the situation here.

In *Morton v. Superior Court of San Mateo County*, 124 Cal.App.2d 577 (1954), the Court of Appeal stated, at page 586:

"... It is the theory of this cause of action that, because defendants have no permit to operate a quarry as required by county ordinance 961, [footnote omitted] such permit having been applied for and denied by the planning commission, the continued operation of the quarry without a permit, regardless of how operated, constitutes a nuisance. The trial court so found.

"... Certainly it is not and should not be the law that the superior court under such circumstances, on application by the county can enjoin this lawful business simply and solely because defendants do not have a permit, while the validity of such failure is being tested. . . .

\* \* \*

"It necessarily follows that as long as the planning commission's determination [\*40] is under direct legal attack, such inchoate determination denying to defendants the right to engage in a lawful business . . . cannot be used as the sole basis upon which a court may enjoin the operation of that business..." (Emphasis added.)

As in *Morton*, the Kruse Parties have directly attacked the underlying determination, and the merits of such matter have yet to be addressed. Thus, the Kruse Parties cannot properly be enjoined on the basis of nuisance for not having the required City approvals, at this time.

The trial court failed and refused to directly address this issue, notwithstanding the Kruse Parties' objections. App. 245,271. Instead, the trial court merely stated that any appeal would have been an idle act, in light of the moratoriums. App. 267. Of course, this conclusion assumes (incorrectly, in the Kruse Parties' opinion) that the moratoriums were valid. Also, in any event, the Kruse Parties were entitled, under due process, to have the merits of their appeal heard and considered in the appropriate forum, whether or not there were strong or weak arguments that their appeal lacked merit.

X.

#### **THE INJUNCTION IS OVERBROAD TO THE EXTENT THAT IT [\*41] APPLIES TO ANY LOCATIONS OTHER THAN THE KRUSE PARTIES' INDIAN HILL LOCATION**

All causes of action of the City's verified complaint herein, and its prayer, addressed only the Kruse Parties' 630 South Indian Boulevard location. App. 1, 11.

However, in its trial briefs, the City tried to extend the proposed permanent injunction vastly further, to cover any additional location in the City where the Kruse Parties may go in the future. The City belatedly asserted that the Kruse Parties should be permanently enjoined from operating a business anywhere in the City, to avoid multiple lawsuits. However, if that was a concern of the City, the causes of action and prayer of the complaint herein should have sought such relief. Due process precluded such a shift in direction at the late stages of the lawsuit.

And, this overbroad injunction improperly assumed that the City's current zoning regulations will be upheld, that

they will never change n6, that the Kruse Parties would not seek to commence business in a different business zone within the City, and that the Kruse Parties would not in fact comply with all applicable zoning and other requirements as they may exist at future dates.

n6 In fact, it is undisputable that the City's zoning regulations may change - the City Council did vote to permit a medical marijuana dispensary in the City, after Kruse's application for a business license was denied. App. 211.

[\*42]

Accordingly, the judgment permanently enjoining the Kruse Parties from operating a business anywhere in the City, rather than only at their Indian Hill location, is fatally overbroad.

XI.

### CONCLUSION

For the many reasons set forth above, the judgment against the Kruse Parties should be reversed.

DATED: January 26, 2009

Respectfully submitted,

/s/

Burton Mark Senkfor, Esq.  
Law Office of Burton Mark Senkfor  
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Attorneys for Appellants DARRELL KRUSE and  
CLAREMONT ALL NATURAL NUTRITION  
AIDS BUYERS INFORMATION SERVICE

### CERTIFICATE BY APPELLATE COUNSEL

Pursuant to Rule 8.204(c) of the California Rules of Court, the preceding brief contains 8,032 words, according to the word count of the computer program used to prepare the brief.

DATED: January 26, 2009

/s/

Burton Mark Senkfor, Esq.  
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Attorneys for Appellants DARRELL KRUSE and  
CLAREMONT ALL NATURAL NUTRITION  
AIDS BUYERS INFORMATION SERVICE

PROOF OF SERVICE BY MAIL

(C.C.P. 1013A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES) ss.

I am a resident of or employed [\*43] in the County of Los Angeles, over the age of eighteen years, and not a party to the within action. My business address is 9100 Wilshire Boulevard, Suite 715E, Beverly Hills, California 90212. I am readily familiar with this business' practice for collection and processing of correspondence for mailing, which is that correspondence is deposited with the United States Postal Service the same day in the ordinary course of business.

On **January 26, 2009**, I served the within **APPELLANTS' OPENING BRIEF** on the interested parties in this action, by causing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, to be placed on that date, following ordinary business practice, in the United States mail at Beverly Hills, California, addressed as follows:

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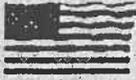
California Supreme Court  
300 [\*44] South Spring Street, Second Floor  
Los Angeles, California 90013-1233  
*(Four copies)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 26, 2009**, at Beverly Hills, California.

JO ANN SILVERTHORNE





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Date: 09-22-2009

Case Style: The City of Claremont v. Darrell Kruse, et al.

Case Number: B210084

Judge: Chavez

Court: California Court of Appeal, Second Appellate District, Division Two on appeal from the Superior Court of Los Angeles County

Plaintiff's Attorney: Jeffrey Dunn, Sonia Carvalho, and Marc S. Erlich for Plaintiff and Respondent.

Defendant's Attorney: Law Office of Burton Mark Senkfor and Burton Mark Senkfor; Allison Margolin, Law Offices of Allison B. Margolin, Beverly Hills, California for Defendants and Appellants.

Description: Defendants and appellants Darrell Kruse (Kruse) and Claremont All Natural Nutrition Aids Buyers Information Service (also known as CANNABIS) appeal from the judgment entered in favor of plaintiff and respondent City of Claremont (the City) after the trial court issued a permanent injunction preventing defendants from operating a medical marijuana dispensary anywhere within the City. We affirm the judgment.

### BACKGROUND

#### 1. Kruse's Permit Application

In July 2006, Kruse went to the Claremont City Hall and asked one of the City planners where he could open a medical marijuana dispensary. The planner referred Kruse to the City Planning Director, Lisa Prasse. Prasse told Kruse that because a marijuana dispensary was not an enumerated use under the City's Land Use and Development Code and could not easily be categorized under any existing permitted use, it would not be permitted at any location within the City and Kruse would have to seek a code amendment to allow such use. In response, Kruse said that state law required the City to allow for such use. Prasse reiterated that Kruse could seek a code amendment if he wished to pursue the matter further.

Kruse returned to City Hall on September 14, 2006, and submitted an application for a business permit and business license. On the permit application, Kruse described his proposed business as "Medical Cannabis Caregivers Collective and Information Service. Medical Marijuana Plants, Cuttings, Dried Flowers and Edibles." The permit application signed by Kruse contained the following acknowledgment: "All businesses must comply with Claremont's Land Use and Municipal Code requirements. The proposed business shall also not conflict with any state or federal laws. Completing and filing this business permit application with the City of Claremont, and paying the required fees, does not constitute approval of the proposed business at the location indicated on the application. Approval from the Planning and Building Division[s], as well as the Police and Fire Departments are required before the City approves a business permit. The City will notify you of its decision in writing." As Kruse signed the permit applications, he announced his intent to open for business the following day. Kruse also stated that the City had six weeks to amend its zoning code to accommodate his proposed use.

#### 2. The City's Denial of Kruse's Application

Sandy Schultz (Schultz), the City's Community Development Director, reviewed Kruse's permit application together with Prasse and the City Manager and concluded that Kruse's proposed use as a marijuana dispensary was not allowed under the Claremont Land Use and Development Code. In reaching this conclusion, the City's planning staff relied on table 212.A of the Land Use and Development Code, which enumerates the uses permitted within the City's commercial districts, and section 212(A) of the Land Use and Development Code, which states: "In the event a use is not listed or there is difficulty in categorizing a use as one of the uses listed in table 212.A, the use shall be prohibited unless a Finding of Similar Use is approved by the Director of Community Development pursuant to Chapter 2, Part 7." Neither table 212.A nor section 212(A) of the Land Use and Development Code contains any reference to marijuana dispensaries.

In a letter dated September 15, 2006, the City Manager notified Kruse that the City was denying his application for a business license and permit and would refund his application fees. In the letter, the City Manager further advised Kruse that he could appeal the denial of his application to the City Council within 10 calendar days and that he could seek a discretionary amendment to the Land Use and

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Development Code. Kruse did not apply for a code amendment, but commenced operating CANNABIS on September 15, 2006.

On September 21, 2006, Kruse filed an administrative appeal. As the basis for his appeal, Kruse stated: "An amendment to the Land Use Code is not necessary at this time. A medical marijuana caregivers collective is a legal but not conforming business anywhere in the state where it is not regulated. I informed your associate planner of that over 45 days prior to submitting my application, and repeated it to him and his supervisor on another occasion. You had sufficient time with that knowledge to notify and hold hearings and regulate if you chose to do so."

### 3. The City's Moratorium

On September 26, 2006, the City adopted an ordinance pursuant to Government Code section 65858 imposing a 45-day moratorium preventing the approval or issuance of any permit, variance, license, or other entitlement for the establishment of a medical marijuana dispensary in the City. The recitals to the ordinance state that California voters adopted the Compassionate Use Act of 1996, the intent of which was to enable persons in need of medical marijuana for medicinal purposes to obtain and use it under limited, specified circumstances; that the City's municipal code does not address or regulate the existence or location of medical marijuana dispensaries; that there is a correlation between such dispensaries and increases in crime; that there was uncertainty between federal laws and California laws regarding medical marijuana dispensaries; and that the regulation of such dispensaries required careful consideration and thorough study. On October 5, 2006, the City Manager wrote to Kruse informing him that the moratorium had rendered moot Kruse's appeal of the City's denial of his business license and permit applications. On October 24, 2006, the City extended the moratorium for 10 months and 15 days, and on September 11, 2007, extended the moratorium for an additional year.

### 4. The City's Enforcement Actions Against Defendants

In a letter dated October 5, 2006, Schultz directed Kruse to cease and desist from further activity at CANNABIS because he was operating without a business license. On October 12, 2006, Kruse called Schultz and requested a meeting. Kruse met with Schultz and Prasse on October 16, 2006. At that meeting, Schultz explained that by operating CANNABIS without a business permit or license, Kruse was violating the City's zoning requirements. Schultz advised Kruse that the City would conduct a code compliance inspection of CANNABIS on October 18, 2006.

On October 18, 2006, Schultz and Prasse visited CANNABIS and found Kruse present. Schultz asked Kruse whether he was open for business and Kruse said "yes." Based on that inspection, Schultz sent Kruse a notice of violation, instructing him to cease and desist from operating CANNABIS and warning him that failure to comply by October 25, 2006, would subject him to an administrative citation.

Schultz and Prasse returned to CANNABIS on October 25, 2006, where Kruse informed them that CANNABIS was still open for business. Schultz issued an administrative citation ordering Kruse to appear in Pomona Superior Court on December 26, 2006.

On December 26, 2006, the Los Angeles County Superior Court set a date for Kruse's code enforcement trial. At the January 9, 2007 trial, the court found Kruse guilty of operating CANNABIS without a business license or permit, in violation of Claremont Municipal Code section 4.06.020, and fined him for that violation.

In a letter dated January 11, 2007, the City Attorney made a final demand that Kruse cease operating CANNABIS without a business license and warned that the City would file a civil action to enjoin further operation of CANNABIS. Kruse disregarded the warning and continued to operate CANNABIS. The City issued administrative citations to Kruse on January 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30 and 31, and on February 1, 2007.

### PROCEDURAL HISTORY

On January 19, 2007, the City filed this action against Kruse for a temporary restraining order and a preliminary and permanent injunction to abate a public nuisance. The City's complaint alleged, among other things, that the Claremont Municipal Code requires a person to obtain a business license and business permit, and to procure a tax certificate by paying the appropriate business tax before operating a business within the City and that Kruse's operation of CANNABIS without a business license was a public nuisance as a matter of law. On February 2, 2007, the City obtained a temporary restraining order and order to show cause why a preliminary injunction should not issue to prevent Kruse from operating CANNABIS for the duration of the action. After a hearing on the order to show cause, the trial court issued a preliminary injunction order on April 4, 2007.

A court trial took place on March 17, 2008. Pursuant to a stipulation between the parties, the following facts were established: (1) medical marijuana dispensaries are not specifically addressed in the Claremont Land Use and Development Code; (2) defendants operated without a business license or permit from September 15, 2006, until February 2, 2007; and (3) defendants operated within the requirements of the Compassionate Use Act or Medical Marijuana Program. In addition, the trial court took judicial notice of certain portions of the City's municipal code and Land Use and Development Code, as well as Kruse's conviction for operating a business without a license in violation of Claremont Municipal Code section 4.06.020, and the temporary restraining order and preliminary injunction issued against him. The City and Kruse presented the testimony of several witnesses. At the conclusion of the testimony, the trial court granted the parties' request to submit closing briefs in lieu of argument. On April 22, 2008, the trial court issued a tentative statement of decision, to which defendants filed objections. On May 12, 2008, the trial court issued its final statement of decision, in which the court addressed defendants' objections. In its statement of decision, the trial court made certain findings of fact, including that the City informed Kruse that marijuana dispensaries are not permitted uses under the Land Use and Development Code, and that the City denied Kruse's business permit and license applications on that basis. Kruse appealed the denial of his applications, but the City deemed the appeal to be moot when it enacted the moratorium on medical marijuana dispensaries.

The trial court also reached several conclusions of law: The Compassionate Use Act does not preempt the City from imposing the moratorium involved in this action, because "there is nothing in the text or history of the Compassionate Use Act that suggests that the voters intended to mandate that municipalities allow medical marijuana dispensaries to operate within their city limits, or to alter the fact that land use has historically been a function of local government under their grant of police power." The moratorium was a valid exercise of the City's authority under Government Code section 65858. In light of the moratorium, the City properly dismissed as moot defendants' appeal of the denial of the business permit and license applications. Defendants' insistence on operating a medical marijuana dispensary within the City without a business license or tax certificate, and in violation of the federal Controlled Substances Act (21 U.S.C. § 801 et seq.), constituted a nuisance per se, entitling the City to permanent injunctive relief so long as the moratorium is in effect. Judgment was entered in the City's favor on June 10, 2008. This appeal followed.

### DEFENDANTS' CONTENTIONS



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Defendants contend the trial court erred by concluding that their operation of CANNABIS constituted a public nuisance under Civil Code section 3479 because there was no evidence that any illegal sale of controlled substances occurred or that CANNABIS's operations caused any actual harm. Defendants further contend the trial court's finding of a nuisance per se must be reversed because the City never pled a cause of action for nuisance per se, and because Claremont Municipal Code section 1.12.010 cannot be the basis for finding a nuisance per se.

Defendants claim that California's medical marijuana laws, the Compassionate Use Act, and the Medical Marijuana Program, preempt the City's enactment of a temporary moratorium on medical marijuana dispensaries and preclude the City from denying their application for a business license and permit to operate a medical marijuana dispensary. Defendants also claim that the City's moratorium is invalid because it was enacted for improper reasons under state law. Defendants challenge the validity and scope of the permanent injunction issued against them. They maintain that the basis for the injunction -- operating without a business license and permit -- was the subject of a pending administrative appeal, and that the City's dismissal of that appeal as moot after enacting the moratorium deprived defendants of their due process rights. Defendants contend the injunction issued was overbroad and should have been limited to the specific location at which CANNABIS had been operated.

## DISCUSSION2.

### I. Nuisance

Civil Code section 3479 defines a nuisance as: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, 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. . . ." "A nuisance may be a public nuisance, a private nuisance, or both. [Citation.] (Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal.App.4th 334, 341.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.)

"[A] nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance. . . . [T]o rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (Beck Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1206-1207.) "[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made." (Id. at p. 1207.) "Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance." [Citations.] (City of Costa Mesa v. Soffer (1992) 11 Cal.App.4th 378, 382, fn. omitted.)

We review factual issues underlying the trial court's issuance of the injunction to abate a public nuisance under the substantial evidence standard. Issues of pure law are subject to de novo review. (People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1136-1137.)

Defendants contend their operation of CANNABIS cannot be enjoined as a nuisance under Civil Code section 3479 because the only portion of the statute that could possibly apply is the "illegal sale of controlled substances" and there was no such illegal activity in this case. They maintain that all sales of marijuana in this case complied with California's medical marijuana laws and that pursuant to the parties' stipulation, "[t]here is no issue in this case whether or not Defendants sold marijuana in violation of California state law." The trial court's determination that defendants' operation of a medical marijuana dispensary constituted a nuisance per se was based not on violations of state law, however, but on violations of the City's municipal code.3 Section 4.06.020 of the Claremont Municipal Code states that it is unlawful to transact business without first procuring a tax certificate from the City to do so. It is undisputed that defendants operated CANNABIS without first obtaining a business license or tax certificate.

In addition, Claremont's Land Use and Development Code expressly prohibits any use that is not specifically enumerated therein or that cannot easily be categorized as an enumerated use. It is also undisputed that medical marijuana dispensaries are not specifically addressed in the City's Land Use and Development Code. The City advised Kruse that his proposed use was not permitted in any of the City's existing land use zoning districts. The City further advised Kruse that he could seek an amendment to the Land Use and Development Code to establish where such a business might be allowed. He did not do so but chose to operate CANNABIS in violation of the applicable requirements.

Defendants contend their operation of a medical marijuana dispensary could have been categorized under any of the following existing permitted uses enumerated in the City's Land Use and Development Code: "cigar/cigarette/smoke shops," "food/drug and kindred products," "health, herbal, botanical stores," "pharmacies," "counseling," and "offices for philanthropic, charitable and service organizations." They maintain that the City improperly denied their applications for a business license and permit for this reason. Defendants cannot challenge the denial of their applications for a business license and permit in this appeal, however, because they chose to commence operating without obtaining the requisite approvals to do so, in violation of applicable city laws. Moreover, after the City dismissed defendants' administrative appeal from the denial of their applications for a business license and permit, defendants' proper recourse was to file a petition for writ of mandate. (Code Civ. Proc., § 1085; American Federation of State, County & Municipal Employees v. Metropolitan Water Dist. (2005) 126 Cal.App.4th 247, 261.) They did not do so. Instead, they continued to operate illegally, despite the City's repeated directives to cease and desist from doing so. The City's discretionary decision to deny defendants' applications is not at issue in this action to enjoin defendants from operating in violation of the City's municipal code. Section 1.12.010 of the Claremont Municipal Code expressly states that a condition caused or permitted to exist in violation of the municipal code provisions may be abated as a public nuisance: "In addition to the penalties provided in this chapter, any condition caused or permitted to exist in violation of any of the provisions . . . of this code is declared a public nuisance, and may be abated by civil proceedings such as restraining orders, civil injunctions, abatement proceedings or the like."<sup>4</sup> Defendants' operation of a nonenumerated and therefore expressly prohibited use, without obtaining a business license and tax certificate, created a nuisance per se under section 1.12.010.

The facts presented here are materially indistinguishable from those in City of Corona v. Naulls (2008) 166 Cal.App.4th 418 (Naulls). The defendant in Naulls, like Kruse, opened a medical marijuana dispensary without the approval of the City of Corona.<sup>5</sup> The business license application signed by the defendant in Naulls contained an acknowledgment similar to that in Kruse's application, stating that all businesses must comply with municipal code requirements and that the approval of the planning department was required prior to opening. (Id. at p. 427.) Corona's municipal code, like Claremont's municipal code, listed all of the permitted uses within each zoning district, but did not include selling or distributing marijuana among the classified uses. (Id. at p. 431.) Persons seeking to use their property for a nonclassified use in Corona were required to follow procedures for obtaining the planning commission's approval of such use. The defendant in Naulls, like Kruse, failed to follow those procedures. (Id. at p. 432.) Corona's municipal code, like section

1.12.010 of Claremont's municipal code, expressly stated that any condition caused or permitted to exist in violation of its provisions constituted a public nuisance. (Id. at p. 433.) The court in Naulls found that substantial evidence supported the trial court's conclusion that the defendant's failure to comply with the city's procedural requirements before operating a medical marijuana dispensary "created a nuisance per se" pursuant to Corona's municipal code, and upheld the issuance of a preliminary injunction. (Id. at p. 433.) We find Naulls persuasive here. Kruse's operation of a medical marijuana dispensary without the City's approval constituted a nuisance per se under section 1.12.010 of the City's municipal code and could properly be enjoined. (Naulls, supra, 166 Cal.App.4th at p. 433.)

Defendants contend the City failed to establish a public nuisance because it made no showing that CANNABIS's operations caused any actual harm and such showing is a necessary element of a nuisance cause of action. No such showing is required, however, for a cause of action for nuisance per se. For nuisances per se, "no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved." (McClatchy v. Laguna Lands, Ltd. (1917) 32 Cal.App.718, 725.) In re Firearm Cases (2005) 126 Cal.App.4th 959, on which defendants rely, contradicts rather than supports their position. The court in that case stated that in order to establish a public nuisance, "it is not necessary to show that harm actually occurred." (Id. at p. 988.)

Defendants claim the trial court's determination of a nuisance per se must be reversed because the City never pled a cause of action for nuisance per se. They provide no citation to legal authority, however, as required by California Rules of Court, rule 8.204, to support this contention. We therefore treat that contention as waived. (Mansell v. Board of Administration (1994) 30 Cal.App.4th 539, 545-546.)

Defendants suggest that Claremont Municipal Code section 1.12.010 should not be considered on appeal because it "was never presented to the trial court, and was not a basis for the City's theory of the case at trial nor for the trial court's rulings." The trial court did consider and apply the doctrine of nuisance per se, however, and facts sufficient to sustain application of that doctrine were presented to the trial court. "A legal theory to sustain a judgment may be considered on appeal even though it was not raised in the trial court, as long as it does not raise factual issues not presented to the trial court." [Citation.] (Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal.App.3d 35, 43 [Labor Code section not raised in trial court properly considered on appeal so long as it does not raise factual issues not presented below].) Defendants next contend Claremont Municipal Code section 1.12.010 is "an overbroad omnibus statute" that attempts to "bootstrap" every municipal code violation into a public nuisance. They maintain that allowing the City to enforce section 1.12.010 will lead to absurd results. They argue by way of example that because section 1.14.050 of the Claremont Municipal Code requires all fines and penalties to be paid within 30 calendar days, "paying a fine late to the City will constitute a nuisance as a matter of law" under section 1.12.010. The plain language of section 1.12.010 itself, however, precludes such an absurdity. Section 1.12.010 states: "In addition to the penalties provided in this chapter, any condition caused or permitted to exist in violation of any of the provisions of this code is declared a public nuisance, and may be abated by civil proceedings such as restraining orders, civil injunctions, abatement proceedings or the like." (Italics added.) The ordinance thus declares the condition giving rise to a fine or penalty to be a nuisance, not the late payment of the penalty itself.

Defendants cite *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711 as support for their argument that the City cannot enforce an ordinance that declares a condition that exists in violation of the municipal code to constitute a public nuisance. *Leppo* did not involve the enforcement of such an ordinance nor did it apply the doctrine of nuisance per se. The issue presented in that case was whether a city could dispense with a due process hearing and summarily demolish a building pursuant to its power to abate a public nuisance. (Id. at pp. 717-718.) The court in *Leppo* held that a municipality may abate a nuisance only after a judicial determination that the property is a nuisance has been made based upon competent evidence. (Id. at p. 718.) Defendants in this case were accorded their due process right to such a judicial determination. The trial court did not err by concluding that defendants' operation of a medical marijuana dispensary, without obtaining a business license and permit, constituted a nuisance per se under section 1.12.010 of the City's municipal code. (Naulls, supra, 166 Cal.App.4th at p. 433.)

## II. Preemption

Defendants contend the Compassionate Use Act and the Medical Marijuana Program preempt the City's enactment of a moratorium on medical marijuana dispensaries and preclude the City from denying them a business license and permit to operate such a dispensary.

### A. Applicable Legal Principles

"Whether state law preempts a local ordinance is a question of law that is subject to de novo review. [Citation.]" (*Roble Vista Associates v. Bacon* (2002) 97 Cal.App.4th 335, 339.) "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. [Citation.]" (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (*Big Creek Lumber*)).

"[T]he 'general principles governing state statutory preemption of local land use regulation are well settled. . . ." [Citations.]" (*Big Creek Lumber*, supra, 38 Cal.4th at p. 1150.) Under article XI, section 7 of the California Constitution, "[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." "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." [Citation.]" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams*), quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) There are three types of conflict that give rise to preemption: "(1) a conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" [Citations.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.)

"[I]t is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute." [Citation.]" [L]ocal legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: "(1) 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; (2) 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 further or additional local action; or (3) 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 benefit to the" locality [citations]." [Citation.]" (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252.)

"[A]bsent a clear indication of preemptive intent from the Legislature," we presume that local regulation "in an area over which [the local government] traditionally has exercised control" is not preempted by state law. [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica*, supra, 41 Cal.4th at p. 242.) A local government's land use regulation is one such area. "[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will

presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute. [Citation.]” (Big Creek Lumber, supra, 38 Cal.4th at p. 1149.)

## B. California’s Medical Marijuana Laws

### 1. Compassionate Use Act

The Compassionate Use Act (CUA) was approved by voters as a ballot initiative in 1996. The law is codified at Health and Safety Code section 11362.56 and provides, in relevant part, as follows: “(b)(1) The people of the State of California hereby find and declare that the purposes of the [CUA] are as follows:

“(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person’s health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

“(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

“(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

“(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

“(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

“(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.

“(e) For the purposes of this section, “primary caregiver” means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.” The nature of the right to use marijuana created by the CUA has been examined in several California court decisions. In *People v. Mower* (2002) 28 Cal.4th 457, the California Supreme Court rejected the defendant’s argument that the CUA provided an absolute defense to arrest and prosecution for certain marijuana offenses and concluded that the statute provides a limited defense from prosecution for cultivation and possession of marijuana. (Id. at p. 470.) The defense accorded by the CUA is limited to “patients and primary caregivers only, to prosecution for only two criminal offenses: section 11357 (possession) and section 11358 (cultivation).” (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1400 (Peron).) In view of the statute’s narrow reach, “courts have consistently rejected attempts by advocates of medical marijuana to broaden the scope of these limited specific exceptions.” (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773 (Urziceanu).) For example, courts have determined that the CUA did not create “a constitutional right to obtain marijuana” (id. at p. 774), and have refused to expand the scope of the CUA to allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. (Ibid.; Peron, supra, at pp. 1389-1390.)

### 2. Medical Marijuana Program

In 2003, the Legislature enacted the Medical Marijuana Program (§ 11362.5 et seq.) (MMP). The MMP was passed in part to “[c]larify the scope of the application of the [CUA] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers[.] [p]romote uniform and consistent application of the act among the counties within the state . . . [and] [e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.” (Stats. 2003, ch. 875, § 1.) In order to do so, the MMP created a voluntary program for the issuance of identification cards to qualified patients and primary caregivers. (§ 11362.71.) The MMP also “immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. [Citation.]” (*People v. Mentch* (2008) 45 Cal.4th 274, 290 (Mentch).) Section 11362.765 accords qualified patients, primary caregivers, and holders of valid identification cards, an affirmative defense to certain enumerated penal sanctions that would otherwise apply to transporting, processing, administering, or giving away marijuana to qualified persons for medical use.

In *Mentch*, the California Supreme Court “closely analyzed” section 11362.765 and concluded that the statute provides criminal immunity for specified individuals under a narrow set of circumstances: “[T]he immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws. Subdivision (a) provides in relevant part: ‘Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, on that sole basis, to criminal liability under [enumerated sections of the Health and Safety Code].’ (§ 11362.765, subd. (a), italics added.) Thus, subdivision (b) identifies both the groups of people who are to receive immunity and the ‘sole basis,’ the range of their conduct, to which the immunity applies, while subdivision (a) identifies the statutory provisions against which the specified people and conduct are granted immunity.” (*Mentch*, supra, 45 Cal.4th at pp. 290-291.)

The MMP also provides a new affirmative defense to criminal liability for qualified patients, caregivers, and holders of valid identification cards who collectively or cooperatively cultivate marijuana. (Urziceanu, supra, 132 Cal.App.4th at pp. 785-786.) Section 11362.775 provides: “Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.”<sup>7</sup>

In addition, the MMP quantifies the amount of marijuana a qualified patient may possess (§ 11362.77), provides that employers need not accommodate the medical use of marijuana (§ 11362.785), and identifies places and circumstances where medical use of marijuana is prohibited (§ 11362.79).<sup>8</sup>

### C. Express Preemption

Whether the CUA and MMP expressly preempt the City’s actions in this case turns on whether the field occupied by those statutes encompasses the challenged City ordinances. That analysis requires a review of the statutory language as the best indicator of legislative intent. (Big Creek Lumber, supra, 38 Cal.4th at p. 1152.) If that language is unambiguous, we presume that the Legislature, or, in the

case of an initiative measure, the voters, intended the meaning apparent on the face of the statute. (Urziceanu, supra, 132 Cal.App.4th at p. 786.) A court "may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." [Citation.] (People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 301.) If that statutory language "is susceptible to more than one reasonable interpretation, we look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citations.] (Big Creek Lumber, supra, at p. 1153.)

#### 1. No Express Preemption by the CUA

The CUA does not expressly preempt the City's actions in this case. The operative provisions of the CUA do not address zoning or business licensing decisions. The statute's operative provisions protect physicians from being "punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes" (§ 11362.5, subd. (c)), and shield patients and their qualified caregivers from criminal liability for possession and cultivation of marijuana for the patient's personal medical purposes if approved by a physician (§ 11362.5, subd. (d)). The plain language of the statute does not prohibit the City from enforcing zoning and business licensing requirements applicable to defendants' proposed use.

The CUA does not authorize the operation of a medical marijuana dispensary, (§ 11362.5; Peron, supra, 59 Cal.App.4th at pp. 1389-1390), nor does it prohibit local governments from regulating such dispensaries. Rather, the CUA expressly states that it does not supersede laws that protect individual and public safety: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . ." (§ 1362.5, subd. (b)(2).) The CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries, enacted as an urgency measure "for the immediate preservation of the public health, safety, and welfare."

Defendants point to the findings and declarations preceding the CUA's operative provisions, stating that one purpose of the CUA is "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,"<sup>9</sup> as evidence of the voters' intent to make the ability to obtain and use medical marijuana a matter of statewide concern. The California Supreme Court, in *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920 (Ross), rejected a similarly broad interpretation of this statutory language and refused to extend the limited protection accorded by the CUA to the area of employment law. (Id. at p. 928.) The plaintiff in Ross was a qualified medical marijuana user under the CUA who was discharged from his employment after testing positive for marijuana in an employment related drug test. He sued the employer, claiming the discharge was in violation of public policy and the Fair Employment and Housing Act. The Supreme Court affirmed the sustaining of the employer's demurrer, concluding that "[n]othing in the text or history of the [CUA] suggests the voters intended the measure to address the respective rights and duties of employers and employees." (Id. at p. 924.) The Supreme Court noted that neither the operative provisions of the statute nor the findings and declarations preceding those operative provisions mention employment law. (Id. at p. 928.) The court rejected the plaintiff's argument that one of the stated purposes of the CUA, "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" (§ 11362.5, subd. (b)(1)(A)) should be interpreted broadly. The court instead determined that the "limited" right granted by the CUA was the right of a patient or primary caregiver to possess or cultivate marijuana for the patient's personal medical use upon the approval of a physician without becoming subject to criminal liability. (Ross, at p. 929.)

The court in Ross also found support for its narrow reading of the CUA in the statute's history: "The proponents of the [CUA] (Health & Safe. Code, § 11362.5) consistently described the proposed measure to the voters as motivated by the desire to create a narrow exception to the criminal law. The proponents spoke, for example, of their desire to "protect patients from criminal penalties for marijuana" (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60) and not to "send cancer patients to jail for using marijuana" (id., rebuttal to argument against Prop. 215, p. 61). Although the measure's opponents argued the act would "make it legal for people to smoke marijuana in the workplace . . . or in public places . . . next to your children" (id., rebuttal to argument in favor of Prop. 215, p. 60), the argument was obviously disingenuous because the measure did not purport to change the laws affecting public intoxication with controlled substances (Pen. Code, § 647, subd. (f)) or the laws addressing controlled substances in such places as schools and parks (Health & Saf. Code, §§ 11353.5, 11353.7), and the act expressly provided that it did not "supersede legislation prohibiting persons from engaging in conduct that endangers others" (id., § 11362.5, subd. (b)(2)). Proponents reasonably countered the argument by observing that, under the measure, "[p]olice officers can still arrest anyone for marijuana offenses.

Proposition 215 simply gives those arrested a defense in court, if they can prove they used marijuana with a doctor's approval." (Ballot Pamp., supra, rebuttal to argument against Prop. 215, p. 61.)" (Ross, supra, 42 Cal.4th at p. 929, fn. omitted.)

The court in Ross concluded: "[G]iven the [CUA's] modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use. . . . [¶] . . . There is no question . . . that the voters had the power to change state law concerning marijuana in any respect they wished. Thus, the question before us is not whether the voters had the power to change employment law, but whether they actually intended to do so. As we have explained, there is no reason to believe they did. For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process; the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote." (Ross, supra, 42 Cal.4th at p. 930.)

The same reasoning applies here. Zoning and licensing are not mentioned in the findings and declarations that precede the CUA's operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. The CUA accordingly did not expressly preempt the City's enactment of the moratorium or the enforcement of local zoning and business licensing requirements.

#### 2. No Express Preemption by the MMP

The MMP does not expressly preempt the City's actions at issue here. The operative provisions of the MMP, like those in the CUA, provide limited criminal immunities under a narrow set of circumstances. The MMP provides criminal immunities against cultivation and possession for sale charges to specific groups of people and only for specific actions. (§ 11362.765; Mentch, supra, 45 Cal.4th at pp. 290-291.) It accords additional immunities to qualified patients, holders of valid identification cards, and primary caregivers who "collectively or cooperatively cultivate marijuana for medical purposes." (§ 11362.775.) Medical marijuana dispensaries are not mentioned in the text or history of the MMP. The MMP does not address the licensing or location of medical marijuana dispensaries, nor does it prohibit local governments from regulating such dispensaries. Rather, like the CUA, the MMP expressly allows local regulation. Section 11362.83 of the MMP states: "Nothing in this article shall prevent a city or other local governing body from

adopting and enforcing laws consistent with this article." Nothing in the text or history of the MMP precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries.

#### D. Implied Preemption

Neither the CUA nor the MMP impliedly preempt the City's actions in this case. Neither statute addresses, much less completely covers the areas of land use, zoning and business licensing. Neither statute imposes comprehensive regulation demonstrating that the availability of medical marijuana is a matter of "statewide concern," thereby preempting local zoning and business licensing laws. The statement of voter intent in the CUA, "[t]o ensure that seriously ill Californians have the right of access to obtain and use marijuana for medical purposes" (§ 11362.5, subd. (b)(1)(A)), on which defendants rely as the basis for claiming that the availability of medical marijuana is a matter of statewide concern, does not create "a broad right to use marijuana without hindrance or convenience" (Ross, supra, 42 Cal.4th at p. 928), or to dispense marijuana without regard to local zoning and business licensing laws. Neither the CUA nor the MMP partially covers the subject of medical marijuana "in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (Sherwin-Williams, supra, 4 Cal.4th at p. 898.) Neither statute precludes local action, except in the areas of punishing physicians for recommending marijuana to their patients, and according qualified persons affirmative defenses to enumerated penal sanctions. (§ 11362.5, subds. (c), (d); 11362.765; 11362.775.) The CUA expressly provides that it does not "supersede legislation prohibiting persons from engaging in conduct that endangers others" (§ 11362.5, subd. (b)(2)), and the MMP expressly states that it does not "prevent a city or other local governing body from adopting and enforcing laws consistent with this article." (§ 11362.83). "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." (People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal.3d 476, 485.)

Finally, neither the CUA nor the MMP provides partial coverage of a subject that "is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit" to the City. (Sherwin-Williams, supra, 4 Cal.4th at p. 898, quoting In re Hubbard (1964) 62 Cal.2d 119, 128.) "[A] local ordinance is not impliedly preempted by conflict with state law unless it "mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates." [Citation.] That is because, when a local ordinance "does not prohibit what the statute commands or command what it prohibits," the ordinance is not "inimical to" the statute. [Citation.]" (Big Creek Lumber, supra, 38 Cal.4th at p. 1161.) Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP.

#### E. Adequacy of Trial Court's Findings

Defendants argue that the trial court "erroneously refused to determine whether or not being able to obtain and use medical marijuana is a matter of statewide concern," and suggest that such a determination was necessary in order to decide whether the CUA and MMP preempted the City's actions in this case. 10. The trial court's statement of decision adequately sets forth the factual and legal bases for its conclusion that state marijuana laws do not preempt the City's actions. (Central Valley General Hospital v. Smith (2008) 162 Cal.App.4th 501, 513 [statement of decision adequate if it fairly discloses the determinations as to ultimate facts and material issues in the case.]) The trial court was responsible for determining whether the City's regulation conflicted with state law because it duplicates, contradicts, or enters an area fully occupied by state law, either expressly or by legislative implication. (Action Apartment Assn., Inc. v. City of Santa Monica, supra, 41 Cal.4th at p. 1242.) It fulfilled that responsibility.

#### III. Other Bases for Challenging the City's Moratorium

Defendants claim the City's moratorium on medical marijuana dispensaries is invalid because it purports to "resolve conflicts between federal and State laws" in a field that the state "has already fully occupied." Defendants further contend that by enacting the moratorium, "the City is in essence challenging the constitutionality of the State medical marijuana laws, which the City cannot properly do."

The moratorium neither addresses nor challenges the constitutionality of the CUA or the MMP. Although the ordinance does refer to a current "conflict between federal laws and California laws regarding the legality of medical marijuana dispensaries," it does not purport to resolve that conflict. The ordinance clearly states the City's intent, in light of the conflict of laws, to study the potential impact of medical marijuana dispensaries and to impose a temporary moratorium on the operation of such dispensaries until completion of its study. The relevant provisions of Ordinance No. 2006-08 state:

"5. The United States Supreme Court addressed marijuana use in California in United States v. Oakland Cannabis Buyers' Cooperative, (2001) 532 U.S. 483. The Supreme Court held that the federal Controlled Substances Act continues to prohibit marijuana use, distribution, and possession, and that no medical necessity exception exists to these prohibitions. Further, the Supreme Court recently held in Gonzales v. Raich (2005) 125 S.Ct. 2195, that the federal Controlled Substances Act prohibits local cultivation and use of marijuana under all circumstances. Therefore, it appears that there is currently a conflict between federal laws and California laws regarding the legality of medical marijuana dispensaries.

"6. To address the apparent conflict in laws, as well as the community and statewide concerns regarding the establishment of medical marijuana dispensaries, it is necessary for the City of Claremont to study the potential impacts such facilities may have on the public health, safety, and welfare. "7. Based on the foregoing, the City Council finds that issuing permits, business licenses, or other applicable entitlements providing for the establishment and/or operation of medical marijuana dispensaries, prior to the completion of the City of Claremont's study of the potential impact of such facilities, poses a current and immediate threat to the public health, safety, and welfare, and that therefore a temporary moratorium on the issuance of such permits, licenses, and entitlements is necessary."

A local government's authority to adopt an interim ordinance prohibiting particular land uses is expressly granted by Government Code section 65858, which authorizes the legislative body of a city to "adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time." (Gov. Code, § 65858, subd. (a).) The City's adoption of the interim ordinance imposing a temporary moratorium on medical marijuana dispensaries came within the scope of this authority.

#### IV. Validity of Injunction

Defendants contend the trial court was not authorized to issue a permanent injunction against them because the basis of that injunction - operating without a business license and permit - was the subject of an administrative appeal that had not yet been heard. Defendants

further contend the City's dismissal of their appeal from the denial of their applications for a business license and permit, based on the City's subsequent enactment of the moratorium, denied them their due process rights, and that the trial court erred by determining such dismissal was proper.

The City could properly dismiss defendants' appeal from the denial of their applications for a business license and permit based on the enactment of the moratorium. "Governmental agencies may generally apply new laws retroactively where such an intent is apparent. [Citation.]" (Davidson v. County of San Diego (1996) 49 Cal.App.4th 639, 646.) Although "zoning ordinances may not operate retroactively to divest a permittee of vested rights previously acquired. . . . [i]t is well settled that the new ordinance may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided that the applicant has not already engaged in substantial building or incurred expenses in connection therewith." (Igna v. City of Baldwin Park (1970) 9 Cal.App.3d 909, 913-914.)

The City's reliance on the moratorium as the basis for dismissing defendants' appeal did not deprive defendants of any vested right. At the time the moratorium was enacted, defendants' applications for a business license and permit had already been denied. The trial court found that defendants did not incur substantial expenses prior to the denial of their applications, and substantial evidence supports that finding. After the City denied defendants' applications for a business license and permit, and after City representatives told defendants that their proposed use would not be permitted, defendants commenced operating a medical marijuana dispensary without a license or permit, in violation of the City's municipal code. That violation was the subject of the injunction issued by the trial court. Neither the issuance of the injunction nor the dismissal of defendants' administrative appeal deprived defendants of any vested right.

Morton v. Superior Court of San Mateo County (1954) 124 Cal.App.2d 577, on which defendants rely, is distinguishable. In that case, a quarry appealed from a judgment enjoining its operations because it was operating without a permit and hence, constituted a nuisance per se. The quarry had been operating for 25 years at the time the County of San Mateo enacted an ordinance requiring an operating permit. When the ordinance took effect, the quarry applied for a permit, which the county planning commission denied. The quarry filed a petition for writ of mandate challenging the validity of the county's denial of its permit application. While the mandamus proceeding was still pending, the county obtained an injunction prohibiting continued operation of the quarry. The Court of Appeal reversed, concluding that the quarry could not be deprived of its "vested right" "to engage in a lawful business" while the mandamus proceeding was still pending. (Id. at pp. 587-588.) Here, in contrast, defendants had no "vested right," their operation of CANNABIS was not lawful, and they did not challenge any of the City's actions in a mandamus proceeding. Morton is thus inapposite.

Defendants were not entitled to commence operating a medical marijuana dispensary without first obtaining a business license and permit.

#### V. Scope of Injunction

Defendants challenge the scope of the injunction issued against them, claiming that it is overbroad because it precludes them from operating a medical marijuana dispensary anywhere within the City. They claim the injunction should have been limited to the specific location at which they operated CANNABIS. Defendants further contend the injunction is overbroad because it assumes the City's zoning regulations will never change and that defendants' operations will never comply with any future zoning regulations.

A trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed without a showing of a clear abuse of discretion. (Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904, 912.) "The exercise of discretion must be supported by the evidence and, to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard." [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]" (Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 390.)

The injunction issued by the trial court precludes defendants "from operating a medical marijuana dispensary within the City of Claremont, as long as the City's Moratorium against the establishment of medical marijuana dispensaries remains in effect, and unless and until the City grants Defendants a business license and issues Defendants a tax certificate authorizing them to operate a medical marijuana dispensary." The injunction by its terms is limited to the duration of the moratorium. It does not bar defendants from operating a medical marijuana dispensary under future zoning regulations.

That the injunction encompasses the entire City, rather than just the specific location where CANNABIS was operated, does not make it overbroad. Given defendants' disregard of the City's licensing and zoning laws, and Kruse's stated intent to operate and actual operation of CANNABIS in violation of those laws, the injunction issued was not an abuse of the trial court's discretion. (Shapiro v. San Diego City Council, supra, 96 Cal.App.4th at p. 912.)

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See: <http://www.courtinfo.ca.gov/opinions/documents/B210084.PDF>

**Outcome:** The judgment is affirmed. The City is awarded its costs on appeal.

**Plaintiff's Experts:**

**Defendant's Experts:**

**Comments:**

**FILED**  
Superior Court of California  
County of Los Angeles

DEC 10 2010 *MC*

John A. Clark, Executive Officer/ Clerk

By *M. Cervantes*, Deputy  
M. CERVANTES

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

MEDICAL MARIJUANA COLLECTIVES LITIG  
AMERICANS FOR SAFE ACCESS, et al.

Case No.: BC433942

Plaintiffs,

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS' MOTION  
FOR A PRELIMINARY INJUNCTION**

vs.

CITY OF LOS ANGELES, a municipal  
corporation, et al.,

Defendants.

**I. Introduction**

On January 26, 2010, the City of Los Angeles ("the City") enacted a law governing medical marijuana collectives, Ordinance No. 181069 ("the Ordinance"). Pursuant to the Ordinance, the City has taken a number of steps calculated to limit the number of medical marijuana collectives ("collectives").

11/21/10

1 Plaintiffs are collectives and, in one case, patient members of a collective.<sup>1</sup> Their lawsuits  
2 against the City raise a number of constitutional and procedural challenges and ask for injunctive relief  
3 that would block the city from enforcing the Ordinance. The court has heard several oral arguments in  
4 these actions and now makes the following rulings.

5 In the background of this controversy are two state measures and an earlier, but now defunct,  
6 interim control ordinance that the City adopted. In 1996, California voters approved Proposition 215,  
7 The Compassionate Use Act ("CUA"), which legalized the use of marijuana for medical purposes and  
8 allowed people to grow or possess marijuana based on the recommendation of a licensed physician.  
9 Thereafter, the state legislature enacted The Medical Marijuana Protection Act (MMPA). In 2007, the  
10 City of Los Angeles passed an interim control ordinance ("the ICO") designed to prevent new medical  
11 marijuana dispensaries from opening.  
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14 A time line of pertinent events may be helpful:

- 15 • 1996—California passes Proposition 215, (the CUA) (Cal. Health and Safety Code § 11362.5).  
16 Prop. 215 provided, for the first time, the right for seriously ill Californians to use marijuana for  
17 medical purposes when recommended by a physician.
- 18 • 2003—California passes Senate Bill 420, (the MMPA) (Cal. Health and Safety Code §  
19 11362.775). The MMPA permitted, for the first time, qualified patients and caregivers of  
20 qualified patients to collectively cultivate marijuana for medical purposes with freedom from  
21 prosecution.

22 <sup>1</sup> According to the case homepage website, the following collectives have joined in the motion for a preliminary injunction:  
23 Holistic Cannabis Collective; Trinity Holistic Caregivers, Inc.; Galaxy Caregivers Group, LLC.; Green Leaf  
24 Collective/Marijuana Collective; 420 Collective; Valley Holistic Caregivers, Inc.; Natural Ways Always; Herbal Remedies  
25 Caregivers, Inc.; Starbudz; 420 Caregivers, LLC; Exclusive Caregivers of California, Inc.; Buddha Bar Collective; The Shop  
26 at Greenbush; Jcg Inc. Wilshire medical Marijuana Collective; Healers on Third, Inc., Healers on 3<sup>rd</sup> Medical Marijuana  
27 Collective; Green Joy Inc., Medical Cannabis Dispensary; Compassionate Caregivers of San Pedro; Medical Wellness  
28 Center, Inc., A Medical Marijuana Collective; The Hills Caregivers, A Medical Marijuana Collective; Sunset Junction  
Organic Medicine Medical Marijuana Collective; West Valley Caregivers; American Sobriety Inc., Green Hills Collective;  
Herbal Medicine Care, Inc.; Nature's Wonder Caregivers Group, Inc.; 420 Highway Pharmacy, Inc.; Colorado Pain Relief,  
Inc.; Infinity Medical Alliance, Inc.; Natural Solutions Patient Care, Inc.; Greenthumb Medicinal Clinic, Inc.; The  
Hollywood Collective; Harmony House Collective, Inc.; Natural Choice Healing Center, Inc.; House of Kush, Inc.; Kush  
Korner IV; Herbology, Inc.; Cancare Collective, Inc.; Cannamerebant, Inc.; Downtown Natural Caregivers; God's Gift; L.A.  
Area Herbal Delivery, Inc.; Mid City Cannabis Club, Inc.; New Era Caregivers; Safe Life Caregivers; Kush Korner V, Inc.;  
Exclusive Caregivers of California.

- 1 • 2006—City Council Member Dennis Zine makes a motion to the Los Angeles City Council basically bringing to the council's attention the increased number of collectives in Los Angeles and their effect on crime and safety in the city.
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- 3 • August 1, 2007—Los Angeles adopts Ordinance No. 181027 (the ICO). The ICO permitted all collectives that existed prior to August 1, 2007, and that submitted a series of documents to the City Clerk's Office by November 13, 2007, to continue operation.
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- 5 • September 15, 2007—The ICO loses effect by operation of law and expires<sup>2</sup>.
- 6 • November 13, 2007—The deadline for submitting documents to the City Clerk's Office pursuant to the ICO passes. Plaintiffs admit that none of them submitted the required documents.
- 7 • August 2008—The Attorney General issues "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use," hereinafter "Guidelines."
- 8 • 2008 to 2009—Plaintiffs begin operation of collectives in the City of Los Angeles<sup>3</sup>.
- 9 • January 26, 2010—The Ordinance is passed. Among other things, the Ordinance limits the operation of collectives in the City of Los Angeles to only those that had registered by November 13, 2007, pursuant to the defunct ICO.
- 10 • May 3, 2010—The mayor signs the Ordinance into law after approving a finalized fee schedule.
- 11 • May 4, 2010—The City sends letters to many collectives telling them to shut down immediately or risk facing criminal and civil prosecution.
- 12 • June 7, 2010—The Ordinance becomes effective. Only collectives that were registered pursuant to the ICO may begin submitting applications for continued operation to the City Clerk's Office—all others must terminate operations.
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- 14 • June 14, 2010—Last day for collectives which were registered pursuant to the ICO to submit their applications for continued operation as required by the Ordinance.
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16 **II. Summary of Rulings:**

17 Two portions of the Ordinance are pre-empted by state law. The Ordinance violates the equal  
 18 protection clauses of the state and federal constitutions. The Ordinance violates the due process clause  
 19 of the Constitution of the State of California. The Ordinance violates Plaintiffs' informational privacy  
 20 rights under the Constitution of the State of California as to their general contact information.  
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25 <sup>2</sup> Government Code § 65858(a) and (b) provides that interim ordinances lose effect within 45 days of adoption unless a legislative body extends the interim ordinance pursuant to the terms of Government Code § 65090. Plaintiffs argue that the ICO expired on September 15, 2007. Defendant does not contest this allegation or otherwise argue that the ICO was extended pursuant to Government Code § 65090.

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27 <sup>3</sup> 420 Collective was issued a tax registration certificate on August 30, 2008 (Motion 3<sup>rd</sup> Ex. 3); 420 Caregivers was issued a tax registration certificate on May 6, 2009 (Motion, 2<sup>nd</sup> Ex. 3); Green Horizon was issued a tax registration certificate on March 20, 2009 (Motion, 4<sup>th</sup> Ex. 2); and Organic Healing Center was issued a tax registration certificate on July 7, 2009 (Motion, 5<sup>th</sup> Ex. 2).

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III. Discussion:

CCP § 526 specifies a number of instances in which a court may grant a preliminary injunction

Two are relevant to this motion:

- 1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
- 2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

The issuance of a preliminary injunction requires the court to weigh two factors: the likelihood the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. *Hunt v. Superior Court* (1999) 21 Cal.4<sup>th</sup> 984, 999. "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Butt v. State of California* (1992) 4 Cal.4<sup>th</sup> 668, 678.

A. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS:

The bulk of this order is devoted to the likelihood of Plaintiffs' success on the merits of their constitutional claims. The relative interim harm to the parties is addressed below in Section II(B).

1. The CUA and the MMPA do not preempt the bulk of the Ordinance:

Article XI Section 7 of the California Constitution controls preemption: "a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws." Plaintiffs claim that the CUA and the MMPA (both state laws) preempt the Ordinance (a local law enacted by the City of Los Angeles.)

There are three main types of preemption. "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" (Citation.) *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4<sup>th</sup> 1232,

1 1242. The burden in establishing preemption of a local ordinance by state law is on the party claiming  
2 preemption. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4<sup>th</sup> 1139, 1149.

3 In *City of Claremont v. Kruse* (2009) 177 Cal.App.4<sup>th</sup> 1153, the court discussed when  
4 preemption occurs based on an area of the law being "fully occupied:"

5 [L]ocal legislation enters an area that is "fully occupied" by general law when the  
6 Legislature has *expressly manifested its intent to "fully occupy" the area [citation]*, or  
7 when it has *impliedly done so in light of one of the following indicia of intent*: "(1) the  
8 subject matter has been so fully and completely covered by general law as to clearly  
9 indicate that it has become exclusively a matter of state concern; (2) the subject matter  
10 has been partially covered by general law couched in such terms as to indicate clearly  
11 that a paramount state concern will not tolerate further or additional local action; or (3)  
12 the subject matter has been partially covered by general law, and the subject is of such a  
13 nature that the adverse effect of a local ordinance on the transient citizens of the state  
14 outweighs the possible benefit to the" locality [citations].<sup>1</sup> [Citation.]"

12 *Kruse, supra*, 177 Cal.App.4<sup>th</sup> at 1169 (emphasis added.) In other words, preemption by full occupation  
13 of the field can be *express* or *implicit*. Here, neither has occurred.

14 The CUA does not provide for the collective cultivation and distribution of medical marijuana.  
15 *People v. Urziceanu* (2005) 132 Cal.App.4<sup>th</sup> 747, 758. Instead, the CUA encourages state and federal  
16 governments to implement a plan to provide for the safe and affordable distribution of medical  
17 marijuana to those patients who need it. Health and Safety Code § 11362.5(b)(1)(C). Meanwhile the  
18 MMPA contemplates the formation and operation of medicinal marijuana collectives that would receive  
19 reimbursement for marijuana and for services in connection with providing medical marijuana. (See  
20 *Urziceanu, supra*, at 785, "[The MMPA.] represents a dramatic change in the prohibitions on the use,  
21 distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers  
22 and fits the defense defendant attempted to present at trial. Its specific itemization of the marijuana sales  
23 law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that  
24 would receive reimbursement for marijuana and the services provided in conjunction with the provision  
25 of that marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the  
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1 cases ... which took a restrictive view of the activities allowed by the Compassionate Use Act"  
2 (emphasis added); Guidelines, § I(C) "the MMP[A] also defines certain terms ... and recognizes a  
3 qualified right to collective cultivation of medical marijuana;" See also, Guidelines § 4(A)(2) and §  
4 (4)(B-C).

5 In neither the CUA nor the MMPA did the legislature express its intent to occupy the field of  
6 medical marijuana legislation. If anything, the statutes display a contrary intent. The CUA expressly  
7 says it does not supersede laws that protect individual and public safety. The MMPA supplemented the  
8 CUA because the CUA did not discuss how qualified individuals could obtain and legally use medical  
9 marijuana. See e.g., Health and Safety Code § 11362.775; *Urziceanu, supra*, at 785.<sup>4</sup> The MMPA also  
10 lacks any express indication that it fully governs the area of medical marijuana. Medical marijuana  
11 collectives are conspicuously absent from the language in the history of the MMPA. Moreover, the  
12 MMPA contains the following language, at section 11362.93: "Nothing in article shall prevent a city or  
13 other local governing body from adopting and enforcing laws consistent with this article." *Kruse, supra*,  
14 177 CalApp.4<sup>th</sup> at 1175

15 In *Kruse*, the Court of Appeal held that a moratorium on medical marijuana dispensaries was not  
16 impliedly or expressly preempted by the CUA or the MMPA. The court noted that the CUA's  
17 provisions do not address zoning or business licensing decisions, nor does its plain language prohibit a  
18 city from enforcing zoning and business licensing requirements. Moreover, the CUA does not authorize  
19 the establishment and operation of a medical marijuana collective and does not prohibit local  
20 governments from regulating them.

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<sup>4</sup> Health and Safety Code § 11362.775 provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357 [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]."

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1 In both the CUA and the MMPA, the legislature never expressed its intent to occupy the field of  
2 medical marijuana legislation. Indeed, the CUA was supplemented by the MMPA because the CUA  
3 failed to discuss how qualified individuals could come into possession of and legally use medical  
4 marijuana.

5 Turning to implied preemption, the legislature has not sufficiently indicated its intent to fully  
6 occupy the field with either law. The CUA merely carved out immunities to criminal prosecution. As  
7 noted above, the CUA did not even contemplate how one could legally grow or possess medical  
8 marijuana. The MMPA, while more comprehensive, also falls short. Plaintiffs seem to recognize this in  
9 their reply when they state, "the MMPA show[s] a legislative intent to decriminalize the use of  
10 properties for medical marijuana activities." (Reply, 4:3-4.) This limited scope—focusing on the  
11 criminal consequences possibly associated with a particular use of a property—does not deal with issues  
12 like (1) who must be involved in the cultivation, (2) whether cultivation must occur at the collective, and  
13 (3) whether money in exchange for medical marijuana is acceptable. Because the MMPA fails to  
14 address these concerns, the court cannot clearly infer that the legislature intended to reserve medical  
15 marijuana as a matter solely of state concern. The Guidelines specifically contemplated by the MMPA  
16 also indicate that the MMPA was not intended to occupy the field.<sup>5</sup> Again, as referenced above, the  
17 MMPA specifically permits local laws to regulate the area. *Kruse, supra*, 177 Cal.App.4<sup>th</sup> at 1175.

18 Plaintiffs argue that many of the restrictions set out in the Ordinance (e.g., audits, pre-inspection,  
19 maintenance of records, and warrantless searches) contradict the MMPA because they attempt to define  
20 what a lawful "collective" is. The problem with this argument is that the Plaintiffs assume that the  
21 MMPA adequately defines what a "collective" is. The argument fails because the MMPA does not  
22 define a valid "collective." Some material on what constitutes a lawful collective comes from the  
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28 <sup>5</sup> Health and Safety Code §11362.81(d) states "[T]he 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 [CUA]."

1 Guidelines and the cases, but not nearly enough to support a preemption argument. If anything, local  
2 entities are encouraged to make attempts to regulate, and presumably define, medical marijuana  
3 cooperatives.

4 In two areas, however, Plaintiffs have a high likelihood of success on the merits of their  
5 preemption claim. We turn to them now.

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7 1. The criminal penalties set out in the Ordinance are preempted:

8 The criminal sanctions portion, at section 45.19.6.9, provides, in pertinent part, that "Each and  
9 every violation (of the ordinance) shall constitute a separate violation and shall be subject to all remedies  
10 and enforcement measures authorized by Section 11.00 of this Code." Section 11.00's remedies include  
11 fines and imprisonment.<sup>6</sup>

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13 "Local legislation 'is "contradictory" to general law, when it is inimical thereto.' (Citation.) A  
14 local ordinance is preempted by a state statute only to the extent that the two conflict." *Action*  
15 *Apartment Assn. supra*, 41 Cal.4<sup>th</sup> 3232, 1242-43. "Local Laws contradict state laws if they prohibit  
16 what the statute commands or command what it prohibits." *Sherman-Williams v. City of Los Angeles*  
17 (1993) 4 Cal.4<sup>th</sup> 893, 902.

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19 The criminal sanctions portion of the Ordinance contradicts the MMPA. Support for this  
20 conclusion comes from *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4<sup>th</sup> 734:

21 The trial court apparently did not consider whether the MMPA's provisions that are  
22 distinct from the CUA, including sections 11362.765 and 11362.775, preempt the city's  
23 ordinance. The court in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4<sup>th</sup> 1383,  
24 1390, held that the "general availability of injunctive relief under [s]ection 11570 against  
25 buildings and drug houses used to sell controlled substances is not affected by" the CUA.  
26 The Legislature subsequently enacted the MMPA. Sections 11362.765 and 11362.775 of  
27 the MMPA immunize operators of medical marijuana dispensaries-provided they are

28 <sup>6</sup> Section 11.02.080 provides the penalty for violation of the code: "Violation of Division 1 of Title 11 is punishable by a fine  
of not more than \$500.00, or by imprisonment in the County Jail for not more than six months, or by both such fine and  
imprisonment. Each day during any portion of which any violation of any provision of this Division 1 is committed,  
continued or permitted makes such violation of a separate offense. (Ord. 7583 Part 1 § 110, 1959.)"

1 qualified patients, possess valid medical marijuana identification cards, or are primary  
2 caregivers-from prosecution under state nuisance abatement law (§ 11570) "solely on the  
3 basis" that they use any "building or place ... for the purpose of unlawfully selling,  
4 serving, storing, keeping, manufacturing, or giving away any controlled substance...."  
5 Sections 11362.765 and 11362.775 also provide qualifying persons immunity from  
6 nonfederal criminal sanctions imposed "solely on the basis" of "open[ing] or  
7 maintain[ing] any place for the purpose of unlawfully selling, giving away, or using any  
8 controlled substance ..." (§ 11366) or for "rent[ing], leas[ing], or mak[ing] available for  
9 use ... [a] building, room, space, or enclosure for the purpose of unlawfully  
10 manufacturing, storing, or distributing any controlled substance ..." (§ 11366.5).

11 Whether the MMPA bars local governments from using nuisance abatement law and  
12 penal legislation to prohibit the use of property for medical marijuana purposes remains  
13 to be determined. Unlike in *Ross*, where the Supreme Court observed that "[t]he  
14 operative provisions of the [CUA] do not speak to employment law" (42 Cal.4th at p.  
15 928), the MMPA explicitly touches on land use law by proscribing in sections 11362.765  
16 and 11362.775 the application of sections 11570, 11366, and 11366.5 to uses of property  
17 involving medical marijuana. Here, viewing the allegations of the complaint most  
18 favorably to the plaintiffs, as is required on demurrer, it appears incongruous at first  
19 glance to conclude a city may criminalize as a misdemeanor a particular use of property  
20 the state expressly has exempted from "criminal liability" in sections 11362.765 and  
21 11362.775. Put another way, it seems odd the Legislature would disagree with federal  
22 policymakers about including medical marijuana in penal and drug house abatement  
23 legislation (compare 21 U.S.C. §§ 812 & 856 with §§ 11362.765 & 11362.775), but  
24 intend that local legislators could side with their federal-instead of state-counterparts in  
25 prohibiting and criminalizing property uses "solely on the basis" of medical marijuana  
26 activities. (§§ 11362.765 & 11362.775.) After all, local entities are creatures of the state,  
27 not the federal government.

28 *Qualified Patients Assn.*, *supra*, 187 Cal.App.4th at 753-54.

As *Qualified Patients Assn.* suggests, there is a statutory and logical contradiction between the  
Ordinance and the MMPA. The MMPA prohibits criminal sanctions for collective cultivation if one  
uses land for that sole purpose, while the Ordinance criminally sanctions that same conduct. There is no  
readily apparent way to reconcile these two contradictory laws. The criminal sanctions language from  
the MMPA controls.

The City argues that *People v. Mentch* (2008) 45 Cal.4th 275, controls. *Mentch* only provides  
guidance on *who* is immune from criminal prosecution under the MMPA and the CUA and in *what*

1 scenarios someone is immune, not what uses of property are permitted under the MMPA and the CUA.

2 This is clear from the language of the opinion:

3 Here, this means Mentch, to the extent he assisted in administering, or advised or  
4 counseled in the administration or cultivation of, medical marijuana, could not be charged  
5 with cultivation or possession for sale "on that sole basis." (§ 11362.765, subd. (a).) It  
6 does not mean Mentch could not be charged with cultivation or possession for sale on  
7 any basis; to the extent he went beyond the immunized range of conduct, i.e.,  
8 administration, advice, and counseling, he would, once again, subject himself to the full  
9 force of the criminal law. As it is undisputed Mentch did much more than administer,  
10 advise, and counsel, the [MMPA] provides him no defense, and the trial court did not err  
11 in failing to instruct on it.

12 *Mentch, supra*, 45 Cal.4<sup>th</sup> at 292. *Mentch* explains what the "solely on the basis" language from  
13 *Qualified Patients Assn.* and the MMPA means. For instance, someone selling medical marijuana for a  
14 profit would not be immunized under the MMPA, nor would someone providing medical marijuana to  
15 another if that person does not qualify as a "primary caregiver" as defined in *Mentch*; however, this is  
16 the limit of the opinion. The cases before this court reach beyond the facts and the holding of *Mentch*.  
17 Plaintiffs are allegedly collectively cultivating medical marijuana as permitted by the MMPA. The  
18 Ordinance stands to criminalize that otherwise immunized conduct, because Plaintiffs are not one of the  
19 seventy collectives permitted to continue operating. *Mentch* does not control under these facts. The  
20 criminal sanctions language from the Ordinance must be stricken because it commands what the state  
21 law prohibits: criminal prosecution for collective cultivation of medical marijuana.

22 2. The Sunset Provision is preempted:

23 Section 45.19.6.10 of the Ordinance provides that its provisions shall sunset two years after the  
24 effective date "and all collectives shall cease operation immediately, unless the City Council adopts an  
25 ordinance to extend these provisions."

26 This section of the Ordinance will prevent collectives even though the MMPA permits their  
27 existence (put another way, it will "prohibit what the statute commands." *Sherman-Williams, supra*, 4  
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1 Cal.4<sup>th</sup> at 902.) While the Ordinance prohibits all but seventy collectives to continue operating, it still  
2 permits collectives to operate. On this point, there is no clear contradiction. But a blanket ban on all  
3 collectives in the City of Los Angeles, as the sunset provision purports to do, goes too far and  
4 contradicts the MMPA. The court recognizes the possibility that the City will adopt an alternative  
5 ordinance to permit collectives to operate within its borders, a fact that arguably makes this point too  
6 uncertain and perhaps not ripe for a ruling. Nevertheless, the court believes it is preferable to decide this  
7 issue now, while the City has the luxury of time to rework the Ordinance, as opposed to waiting two  
8 years and creating another round of litigation.  
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11 **2. The Ordinance deprives certain Plaintiffs of equal protection of the laws:**  
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13 The Ordinance caps the maximum number of collectives at seventy, to be distributed about the  
14 City. § 45.19.6.2 (B). To become one of those seventy, the Ordinance requires collectives to file a  
15 "registration form." (Ordinance § 45.19.6.2 (A).) The only collectives eligible to file this form are those  
16 that, among other things, registered pursuant to the ICO on or before November 13, 2007. (*Id.* at §  
17 45.19.6.2(B)(2).) In other words, the medical marijuana collectives that did not register under the ICO  
18 may not register now.  
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20 The relief requested by many of the Plaintiffs (who allegedly have operated lawfully and without  
21 complaints from neighbors) is not to continue operating, but to be given the chance to continue  
22 operating by submitting an application and registering in accordance with the Ordinance. The question  
23 becomes whether the classification of collectives into those that registered under the ICO and those that  
24 did not denies Plaintiffs the equal protection of the laws.  
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26 Both the federal and state constitutions guarantee equal protection of the laws to all persons.  
27 *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199. "The first prerequisite to a meritorious claim is a  
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1 showing that the state has adopted a classification that affects two or more similarly situated groups in  
2 an unequal manner." *Id.* at 1199. "The equal protection clause requires more of a state law than  
3 nondiscriminatory application within the class it establishes. (Citation.) It also imposes a requirement  
4 of some rationality in the nature of the class singled out." *Id.* "When a showing is made that two  
5 similarly situated groups are treated disparately, the court must then determine whether the government  
6 has a sufficient reason for distinguishing between them." *G.G. Doe v. California Dept. of Justice* (2009)  
7 173 Cal.App.4<sup>th</sup> 1095, 1111. "In resolving equal protection issues, the United States Supreme Court has  
8 used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon  
9 fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to  
10 achieve a compelling state interest. Classifications based on gender are subject to an intermediate level  
11 of review. But most legislation is tested only to determine if the challenged classification bears a rational  
12 relationship to a legitimate state purpose." *Hofsheier, supra*, at 1200.

15 Here, the City's statutory scheme treats two similarly situated groups differently. The rational  
16 basis test applies, because the ordinance does not create a suspect classification and does not touch upon  
17 a fundamental interest. Under the rational basis test, "a statutory classification that neither proceeds  
18 along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal  
19 protection challenge if there is any reasonably conceivable state of facts that could provide a rational  
20 basis for the classification. (Citations.) Where there are 'plausible reasons' for [the classification] 'our  
21 inquiry is at an end.'" *Hofsheier, supra*, at 1200-01, Citing *Kasler v. Lockyer* (2000) 23 Cal.4th 472,  
22 481-482. "The party raising an equal protection challenge has the burden of establishing  
23 unconstitutionality." *G.G. Doe, supra*, 173 Cal.App.4th at 1111. The classification "must be reasonable,  
24 not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the  
25 object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster*  
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1 *Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). Put simply, the City cannot  
2 legislate different treatment on the basis of criteria that is wholly unrelated to the purpose of the  
3 ordinance. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

4 At first blush, the City's legislation of different treatment is based on criteria related to the  
5 Ordinance's purpose, which is public safety. Collectives that registered under the ICO and have  
6 remained in operation since November 2007 have a "track record." The rationale is that because the  
7 pre-ICO collectives followed the City's laws and filed their documents by November 13, 2007, they are  
8 more likely to abide by the City's laws moving forward. Compliance with the City's laws will further  
9 the public safety and welfare goals of the Ordinance. The classification appears "reasonable, not  
10 arbitrary," and rests upon "some ground of difference having a fair and substantial relation to the object  
11 of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano*  
12 *Co.*, *supra*, at 415.

15 Plaintiffs cannot successfully argue that the Ordinance unfairly favors existing, or older,  
16 collectives over newer ones. In *Martinet v. Department of Fish and Game* (1988) 203 Cal.App.3d 791,  
17 the court summarized similar distinctions under the equal protection analysis:

19 An economic regulation creating classifications with some reasonable basis does not  
20 result in denial of equal protection simply because the classifications are mathematically  
21 imprecise or because their application results in some inequality. *Ferrante v. Fish &*  
22 *Game Commission* (1946) 29 Cal.2d 365, 372. A law which favors existing businesses  
23 over new ones will be upheld if there is any reasonable and substantial justification for  
24 the distinction. *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 382. The person  
25 challenging such a classification has the burden of proving it is arbitrary and without  
26 reasonable foundation. *Ferrante, supra*, 29 Cal.2d at p. 372. "[I]f any state of facts  
27 reasonably can be conceived that would sustain it, the existence of that state of facts at  
28 the time the law was enacted must be assumed." (*Ibid.*)

26 *Martinet, supra*, 203 Cal.App.3d at 794. One of the clearest examples of such a distinction, which was  
27 upheld by the United States Supreme Court, appears in *City of New Orleans v. Duke* 427 U.S. 297  
28 (1976). The City of New Orleans sharply limited the number of street and pushcart vendors in their

1 French Quarter "as a means 'to preserve the appearance and custom valued by the Quarter's residents  
2 and attractive to tourists.'" *Dukes, supra*, at 304. The Supreme Court found that:

3 The legitimacy of that objective is obvious. The City Council plainly could further that  
4 objective by making the reasoned judgment that street peddlers and hawkers tend to  
5 interfere with the charm and beauty of a historic area and disturb tourists and disrupt  
6 their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the  
7 heart of the city's tourist industry, might thus have a deleterious effect on the economy  
8 of the city. They therefore determined that to ensure the economic vitality of that area,  
9 such businesses should be substantially curtailed in the Vieux Carre, if not totally  
10 banned.

11 *Dukes, supra*, at 304-05. In 1972, the City of New Orleans banned most of the peddlers and hawkers,  
12 but adopted a "grandfather provision" that allowed peddlers who had registered before January 1972 to  
13 stay in existence:

14 It is suggested that the "grandfather provision," allowing the continued operation of  
15 some vendors was a totally arbitrary and irrational method of achieving the city's  
16 purpose. But rather than proceeding by the immediate and absolute abolition of all  
17 pushcart food vendors, the city could rationally choose initially to eliminate vendors of  
18 more recent vintage. This gradual approach to the problem is not constitutionally  
19 impermissible. The governing constitutional principle was stated in *Katzenbach v.*  
20 *Morgan* 384 U.S. 641, 657(1966): "[W]e are guided by the familiar principles that a  
21 'statute is not invalid under the Constitution because it might have gone farther than it  
22 did,' (Citation,) that a legislature need not 'strike at all evils at the same time,' (Citation,) and that 'reform may take one step at a time, addressing itself to the phase of the  
23 problem which seems most acute to the legislative mind,'" (Citation.) . . .

24 The city could reasonably decide that newer businesses were less likely to have built up  
25 substantial reliance interests in continued operation in the Vieux Carre and that the two  
26 vendors who qualified under the "grandfather clause" — both of whom had operated in  
27 the area for over 20 years rather than only eight — had themselves become part of the  
28 distinctive character and charm that distinguishes the Vieux Carre. We cannot say that  
these judgments so lack rationality that they constitute a constitutionally impermissible  
denial of equal protection.

*Dukes, supra*, at 305.

Legislatures may implement their program step by step, (Citation,) in such economic  
areas, adopting regulations that only partially ameliorate a perceived evil and deferring  
complete elimination of the evil to future regulations. (Citation.) In short, the judiciary  
may not sit as a superlegislature to judge the wisdom or desirability of legislative policy  
determinations made in areas that neither affect fundamental rights nor proceed along

1 suspect lines, (Citation;) in the local economic sphere, it is only the invidious  
2 discrimination, the wholly arbitrary act, which cannot stand consistently with the  
3 Fourteenth Amendment. (Citation.)

3 *Dukes, supra*, at 303-04.

4 If the facts here matched *Dukes*, there would be no equal protection violation. What complicates  
5 the instant case is that on September 15, 2007, almost sixty days before the November 13 deadline, the  
6 ICO expired by operation of law. The natural result of the ICO's expiration would be to remove any  
7 reason and incentive for collectives to file documents with the City Clerk's Office as required by the  
8 ICO so as to demonstrate a "willingness" to follow the City's laws. A collective that existed and was  
9 entirely law-abiding before November 13, 2007, may have decided not to register because, quite simply,  
10 there was no longer any need to. Now thanks to that choice, which was quite logical at the time, the  
11 collective would find itself unable to continue in business. The court does not see how this result serves  
12 the purpose of the Ordinance. The Ordinance's use of the November 13, 2007 deadline loses any  
13 relation to the Ordinance's stated purpose of enhancing public safety, because the ICO was invalid  
14 before the deadline came. There was no longer any reason to comply. A collective that procrastinated  
15 and delayed filing only to learn that the law had been invalidated does not make it less likely to comply  
16 with the City's laws moving forward. The collective's "track record" is no worse than those collectives  
17 that filed early. The United States Supreme Court discussed the type of connection between a law's  
18 purpose and the classification necessary to satisfy the equal protection clause:

19 [E]ven in the ordinary equal protection case calling for the most deferential of standards,  
20 we insist on knowing the relation between the classification adopted and the object to be  
21 attained. The search for the link between classification and objective gives substance to  
22 the Equal Protection Clause; it provides guidance and discipline for the legislature,  
23 which is entitled to know what sorts of laws it can pass; and it marks the limits of our  
24 own authority. In the ordinary case, a law will be sustained if it can be said to advance a  
25 legitimate government interest, even if the law seems unwise or works to the  
26 disadvantage of a particular group, or if the rationale for it seems tenuous.

27 *Romer v Evans* 517 U.S. 620, 632 (1996).

1 The record indicates that an increase in the number of collectives has been linked to increased  
2 crime, which is inimical to the health, safety and welfare of residents of Los Angeles. As articulated in  
3 the preamble,<sup>7</sup> a goal of the ordinance was to limit the number of collectives in order to protect the  
4 citizenry. This is laudable and necessary. Crime, including violent crime, has followed the opening of  
5 certain medical marijuana collectives in this community. Nevertheless, the focus of judicial inquiry  
6 should be on the correspondence between the classification and the legislative goals (*People v. Valdez*  
7 (2009) 174 Cal.App.4th 1528, 1531), not on the classification's overall effect on those goals. The  
8 classification should serve the ordinance's purpose thanks to more than happenstance. The connection  
9 between classification and legislative goals as seen in *Dukes, supra*, constitutes a good example of a  
10 proper link. Other cases include the following:

- 13 • In *Martinet, supra*, 203 Cal.App.3d at 795, the court upheld a law limiting shark and swordfish  
14 permits to fishermen with a certain amount of experience, in order to protect against overfishing.  
15 The court focused on the reliance of the more experienced fisherman on the continued  
16 availability of fishing for their livelihood.
- 17 • In *Bradley v. Public Utilities Com.* 289 U.S. 92, 97 (1933), the United States Supreme Court  
18 upheld a state order, which denied a common carrier a certificate to use state highway, as a valid  
19 exercise of the police power in order to promote safety by reducing highway congestion. The  
20 court stated that a "classification based on priority of authorized operation has a natural and  
21 obvious relation to the purpose of the regulation." *Id.* at 97.

22 However, in *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, a law denied permits to fish  
23 reduction plants that were not housed in separate buildings. *Id.* at 381-82. The purpose of the law was  
24 to make it easier for inspectors to determine whether the facilities in a building consisted of one or  
25 multiple fish reduction plants. *Id.* at 383. The law contained an exception for plants that had been  
26 issued permits in the prior year. *Id.* at 382. Our Supreme Court found the classification of whether  
27 plants were/were not allowed was not rationally based because the year in which the plant had last

28 <sup>7</sup> E.g., "WHEREAS, there have been recent reports from the Los Angeles Police Department and the media of an increase in  
and escalation of violent crime at the location of medical marijuana dispensaries in the City of Los Angeles, and the  
California Police Chiefs Association has compiled an extensive report detailing the negative secondary effects associated  
with medical marijuana dispensaries;..."

1 received a permit would not make it easier for inspectors to determine the number of plants in any given  
2 building. *Id.* at 384.

3  
4 In the case at bar, the only difference between those collectives that registered by November 13,  
5 2007, and the others is the (idle, as it turned out) act of submitting various paperwork to the City Clerk's  
6 Office. The justification for using that date as a bright line was compromised, if not confounded, by the  
7 fact that it was unnecessary to register. The requirement had ceased almost two months earlier, and no  
8 one could have anticipated that compliance with a dead statute would be necessary in order to continue  
9 as a collective three years later. Like the classification in *Del Mar Canning Co.*, there is no rational  
10 relationship between the classification and the purpose of the Ordinance. Therefore, the court finds the  
11 use of the November 13, 2007 deadline arbitrary and capricious such that it violates the equal protection  
12 clauses of the constitutions of the United States and the State of California. Had the Ordinance done  
13 nothing more than give a calendar date before which collectives were "grandfathered," the Ordinance  
14 probably would have been in line with cases like *Dukes, supra*. Amending the Ordinance accordingly  
15 would most likely be the easiest way to avoid another equal protection challenge. At a subsequent  
16 hearing, should there be a question about when a collective opened, those that filed documents in  
17 connection with the expired ICO would still be able to use that fact as evidence, for the file-stamped  
18 papers would be relevant as to when a collective was operating. Conversely, if by November 13, 2007,  
19 the management of a collective was unaware that the ICO had expired yet failed to register with the City  
20 Clerk's Office, that fact would be probative evidence with respect to a collective's willingness to follow  
21 the laws. However, for the reasons stated, compliance with the expired ordinance cannot become the  
22 *sine qua non* of the right to continue operating.

23 **3. The Ordinance violates the procedural due process rights of certain Plaintiffs:**

24 Plaintiffs argue that by preventing them from operating their collectives, the City has deprived  
25 them of their vested property right without the opportunity of a neutral hearing. Plaintiffs argue that  
26 section 45.19.6.7 deprives them of their vested property right without due process of law.  
27  
28

1 It is undisputed that Plaintiffs were denied any hearing prior to being forced to shut down their  
2 businesses. The letter from the City dated May 4, 2010, simply stated that Plaintiffs were in violation of  
3 the Ordinance by "not register[ing] with the City Clerk prior to November 13, 2007." (Motion, 2<sup>nd</sup> Ex.  
4 9.) The letter goes on to state that Plaintiffs "must therefore immediately cease [their] operations." *Id.*  
5 Therefore, if due process rights are triggered, then a violation has occurred because the City provided no  
6 opportunity for the collectives to be heard at a meaningful time and in a meaningful matter.  
7

8 *Ryan v. California Interscholastic Federation*, (2001) 94 Cal.App.4<sup>th</sup> 1048, controls the due  
9 process issue here. The *Ryan* court held that in order to enjoy procedural due process protection, the  
10 plaintiff must have a statutorily conferred benefit. *Ryan, supra*, 94 Cal.App.4<sup>th</sup> at 1071.<sup>8</sup> This is an  
11 important distinction from what is required under the U.S. Constitution in order to state a claim for due  
12 process protection. *Ryan* (cited at length below) summarized how due process protection is triggered by  
13 statutorily conferred benefits:  
14

15 Our state due process constitutional analysis differs from that conducted pursuant to the  
16 federal due process clause in that the claimant need not establish a property or liberty  
17 interest as a prerequisite to invoking due process protection. *People v. Ramirez* (1979) 25  
18 Cal.3d 260, 263-264; *Smith v. Board of Medical Quality Assurance* (1988) 202  
19 Cal.App.3d 316, 327, focused rather on an individual's due process liberty interest to be  
20 free from arbitrary adjudicative procedures (*People v. Ramirez, supra*, 25 Cal.3d at 263,  
21 268), procedural due process under the California Constitution is "much more inclusive"  
22 and protects a broader range of interests than under the federal Constitution (*San Jose*  
23 *Police Officers Assn. v. City of San Jose* (1988) 199 Cal.App.3d 1471, 1478 superseded  
24 by statute as stated in *Knapp v. City of Gardena* (1990) 221 Cal.App.3d 344, 347-348;  
25 (Citation.) According to our Supreme Court, it "has expanded upon the federal analytical  
26 base by focusing on the administrative process itself." (*Saleby v. State Bar* (1985) 39  
27 Cal.3d 547, 564.) In *People v. Ramirez, supra*, 25 Cal.3d at pages 263-264, our Supreme  
28 Court held that application of the due process clauses of the California Constitution

<sup>8</sup> The facts of *Ryan* are admittedly different from the case at bar. An Australian student sought to transfer to a US high school ("RBV"), and later to attend and play football for the University of Colorado. *Ryan, supra*, at 1053-54. The plaintiff tried to play football for RBV in preparation for later attending the University of Colorado. He applied for eligibility as required to the California Interscholastic Federation ("CIF"). *Id.* His application was denied and he appealed his denial to the CIF. His appeal was denied. Plaintiff then petitioned the courts for administrative mandamus. Trial court awarded Ryan his requested relief, but the Court of Appeal reversed, holding among other things, that plaintiff had failed to identify the requisite statutorily conferred benefit or interest of which he had been deprived. (*Id.* at 1072.) Therefore, he had no due process protections afforded by the California Constitution in a review hearing.

1 "must be determined in the context of the individual's due process liberty interest in  
2 freedom from arbitrary adjudicative procedures. Thus, when a person is deprived of a  
3 statutorily conferred benefit, due process analysis must start not with a judicial attempt  
4 to decide whether the statute has created an 'entitlement' that can be defined as 'liberty'  
5 or 'property,' but with an assessment of what procedural protections are constitutionally  
6 required in light of the governmental and private interests at stake." (Accord, *In re*  
7 *Jackson* (1987) 43 Cal.3d 501, 510; *Hernández v. Department of Motor Vehicles* (1981)  
8 30 Cal.3d 70, 81, n. 12.) The *Ramirez* court instructed the state courts to "evaluate the  
9 extent to which procedural protections can be tailored to promote more accurate and  
10 reliable administrative decisions in light of the governmental and private interests at  
11 stake' rather than relying 'on whether or not the state limits administrative control over a  
12 statutory benefit or deprivation by the occurrence of specified conditions....'" (*Saleeby v.*  
13 *State Bar, supra*, 39 Cal.3d at 564-565, quoting *People v. Ramirez, supra*, 25 Cal.3d at  
14 267.) The *Ramirez* court further held that "the due process safeguards required for  
15 protection of an individual's statutory interests must be analyzed in the context of the  
16 principle that freedom from arbitrary adjudicative procedures is a substantive element of  
17 one's liberty. [Citation.] This approach presumes that when an individual is subjected to  
18 deprivatory governmental action, he always has a due process liberty interest both in fair  
19 and unprejudicial decision-making and in being treated with respect and dignity." (*Id.* at  
20 268.)

13 Although under the state due process analysis an aggrieved party need not establish a  
14 protected property interest, the claimant must nevertheless identify a statutorily conferred  
15 benefit or interest of which he or she has been deprived to trigger procedural due process  
16 under the California Constitution and the *Ramirez* analysis of what procedure is due.  
17 (*People v. Ramirez, supra*, 25 Cal.3d at 264, 266, 268; *Schultz v. Regents of University of*  
18 *California, supra*, 160 Cal.App.3d at 786; see also *In re Jackson, supra*, 43 Cal.3d at 510,  
19 n. 8; *Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236, 1246; *San Jose*  
20 *Police Officers Assn. v. City of San Jose, supra*, 199 Cal.App.3d at 1479.) The  
21 "requirement of a statutorily conferred benefit limits the universe of potential due  
22 process claims: presumably not every citizen adversely affected by governmental action  
23 can assert due process rights; identification of a statutory benefit subject to deprivation  
24 is a prerequisite." (*Schultz v. Regents of University of California, supra*, 160 Cal.App.3d  
25 at 786.)

22 *Ryan, supra*, 94 Cal.App.4<sup>th</sup> at 1069-71 (emphasis added.)

23 The City argues that Plaintiffs have no statutorily conferred benefit to operate a collective. The  
24 court considers the CUA and the MMPA together and finds that the State of California authorized  
25 certain people to operate collectives. The CUA provided, for the first time, the right for seriously ill  
26 Californians to use marijuana for medical purposes when recommended by a physician. The MMPA  
27 permitted, for the first time, qualified patients and caregivers of qualified patients to collectively  
28

1 cultivate marijuana for medical purposes with freedom from prosecution.<sup>9</sup> Regardless of whether the  
2 City of Los Angeles conferred a right to operate a specific type of business within its borders,<sup>10</sup> the State  
3 of California permits collective cultivation by statute. In the absence of machinery for a neutral hearing,  
4 the Ordinance removes rights conferred by state law as found in the Health and Safety Code. To do that,  
5 *Ryan* requires some procedural due process. Here there was none.<sup>11</sup> Therefore, the Ordinance denies  
6 without due process of the law the statutorily conferred right to operate a collective. To this extent, the  
7 Ordinance is unconstitutional.<sup>12</sup>

9 In reaching this conclusion, the court hastens to add that the City has the "power to govern – the  
10 inherent reserved power... to subject individual rights (including rights conferred by the CUA and the  
11 MMPA) to reasonable regulation for the general welfare." (See e.g., Witkin, *Summary of California*  
12 *Law*, 10<sup>th</sup> edition, Constitutional Law §§ 976, 977, 978 and cases cited therein.) The record in the  
13 actions before this court displays a serious threat to the public welfare caused by the burgeoning  
14 number of medical marijuana collectives in our community. The City has a duty to address the problem  
15 of drug dealers and recreational users who are attempting to hijack California's medical marijuana  
16  
17

18  
19 <sup>9</sup> The express intent of the Legislature in adopting the MPMA was to: "(1) Clarify the scope of the application of the [CUA]  
20 and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid  
21 unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. (2)  
22 Promote uniform and consistent application of the [CUA] among the counties within the state. (3) Enhance the access of  
23 patients and caregivers to medical marijuana through *collective, cooperative cultivation projects.*" (emphasis added). Health  
& Safety Code § 11362.775 provides: "Qualified patients, persons with valid identification cards, and the designated primary  
caregivers of qualified patients and persons with identification cards, who associate within the State of California in order  
collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject  
to state criminal sanctions . . ."

24 <sup>10</sup> Permits can sometimes trigger due process protection. The parties argued at length about whether Plaintiffs were required  
to obtain a permit in order to operate a collective within the city. Plaintiffs obtained no permits and no permits existed for  
operating collectives within the city. While permits are one way of triggering due process protection, statutorily conferred  
rights also trigger due process protection under *Ryan*.

25 <sup>11</sup> The Legislature cannot cut off all remedy. Unless it leaves a reasonably efficient remedy, the right itself (here, to operate a  
26 medical marijuana collective) is affected, and the statute will be held invalid as an impairment of a substantive right. *Lane*  
*v. Wilson* (2939) 307 U.S. 268; *Coleman v. Superior Court* (1933) 135 C.A. 74, 76

27 <sup>12</sup> Plaintiff also puts forth an interesting argument by citing to *County of Butte v. Superior Court*, (2009) 175 Cal.App.4<sup>th</sup> 729,  
731-32. See Reply to Defendant's Supp. Memo, 4:20-5:16. This argument is less convincing because the court dealt with an  
28 individual patient's due process rights relative to a criminal investigation. That case only went as far as to hold that patients  
have a statutory benefit which is protected under the Constitution—not collectives, who are the Plaintiffs in this action.

1 legislation for their own benefit. Failure to do will not only endanger the citizens as a whole, but will  
2 negatively impact the ability of legitimate patients to obtain the medical marijuana they need. But in  
3 discharging its powers and duties under the police power, the City must not lose sight of the fact that the  
4 People of the State of California have conferred on qualified patients the right to obtain marijuana for  
5 medical purposes. No local subdivision should be allowed to curtail that right wholesale or regulate it  
6 out of existence.  
7

8 The judicial branch is not the legislature, and this court will not endeavor to usurp the function of  
9 the Los Angeles City Council. Having said that, the court wishes to note several issues the City should  
10 consider in its salutary attempt to regulate marijuana collectives. Most troubling are the complaints that  
11 the police have raided collectives where, allegedly, no laws have been broken. From the outside looking  
12 in, it can be hard, sometimes impossible, for an officer to determine whether a criminal offense has  
13 occurred when a person enters a collective and, minutes later, leaves with marijuana. The City takes the  
14 position that this scenario constitutes an illegal sale. This conclusion is based on undercover activity:  
15 according to the record, an officer enters a collective, shows a physician's recommendation, signs  
16 whatever documentation is required to join the collective, and then pays money for medical marijuana.  
17 Plaintiffs contend that patients may obtain medical marijuana in this fashion so long as they have a valid  
18 doctor's recommendation and join the collective. The law is unclear in this regard, with the result that  
19 the police face an extraordinarily difficult enforcement challenge. Underlying the controversy is the fact  
20 that what constitutes a medical marijuana collective remains a matter for debate.  
21  
22

23  
24 As provided for under the MMPA,<sup>13</sup> the Attorney General promulgated guidelines, which among  
25 other things discuss how collectives should conduct their business. In attempting to determine what  
26 constitutes a collective, one must consider the Guidelines, which were quoted with approval in *People v.*  
27

28 <sup>13</sup> Health and Safety Code § 11362.81(d) requires the Attorney General to adopt "guidelines to ensure the security and  
nondiversion of marijuana grown for medical use."

52/15/11

1 *Hochanadel* (2009) 176 Cal.App.4<sup>th</sup> 997.<sup>14</sup> The Guidelines provide some instruction to law enforcement  
2 as to whether activities comply with the CUA and MMPA. In this regard, the Guidelines specifically  
3 address "Storefront Dispensaries." (Guidelines, *supra*, at p. 11, boldface omitted.) The Attorney  
4 General is of the opinion that while "dispensaries, as such, are not recognized under the law," "a  
5 properly organized and operated collective or cooperative that dispenses medical marijuana through a  
6

7  
8 <sup>14</sup> Besides those listed in the main text of this order, the AG's Guidelines also include the following as outlined in  
9 *Hochanadel, supra*, 176 Cal.App.4<sup>th</sup> at 1010-11:

10 "Further, the A.G. Guidelines provide a definition of "cooperatives" and "collectives." A cooperative "must  
11 file articles of incorporation with the state and conduct its business for the mutual benefit of its members.  
12 [Citation.] No business may call itself a 'cooperative' (or 'co-op') unless it is properly organized and  
13 registered as such a corporation under the Corporations or Food and Agriculture Code. [Citation.]  
14 Cooperative corporations are 'democratically controlled and are not organized to make a profit for  
15 themselves, as such, or for their members, as such, but primarily for their members as patrons.' [Citation.]"  
16 (A.G. Guidelines, *supra*, at p. 8.) Further, "[c]ooperatives must follow strict rules on organization, articles,  
17 elections, and distribution of earnings, and must report individual transactions from individual members  
18 each year." (*Ibid.*)

19 A collective is "'a business, farm, etc., jointly owned and operated by the members of a group.' [Citation.]"  
20 (A.G. Guidelines, *supra*, at p. 8.) Thus, "a collective should be an organization that merely facilitates the  
21 collaborative efforts of patient and caregiver members—including the allocation of costs and revenues."  
22 (*Ibid.*) Further, the A.G. Guidelines opine, "The collective should not purchase marijuana from, or sell to,  
23 non-members; instead, it should only provide a means for facilitating or coordinating transactions between  
24 members." (*Ibid.*)

25 The A.G. Guidelines further provide guidelines for the lawful operation of cooperatives and collectives.  
26 They must be nonprofit operations. (A.G. Guidelines, *supra*, at p. 9.) They may "acquire marijuana only  
27 from their constituent members, because only marijuana grown by a qualified patient or his or her primary  
28 caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative . . .  
29 *Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its*  
30 *members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no*  
31 *purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical*  
32 *markets, collectives and cooperatives should document each member's contribution of labor, resources, or*  
33 *money to the enterprise. They should also track and record the source of their marijuana." (Id. at p. 10,*  
34 *italics added.)*

35 Distribution and sales to nonmembers is prohibited: "State law allows primary caregivers to be reimbursed  
36 for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or  
37 distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical  
38 marijuana to any person who is not a member in good standing of the organization. A dispensing collective  
39 or cooperative may credit its members for marijuana they provide to the collective, which it may then  
40 allocate to other members. [Citation.] Members also may reimburse the collective or cooperative for  
41 marijuana that has been allocated to them. Any monetary reimbursement that members provide to the  
42 collective or cooperative should only be an amount necessary to cover overhead costs and operating  
43 expenses." (A.G. Guidelines, *supra*, at p. 10.)

1 storefront may be lawful under California law, but ... dispensaries that do not substantially comply with  
2 the guidelines [covering collectives and cooperatives] are likely operating outside the protections of [the  
3 CUA] and the MMP[A], and ... the individuals operating such entities may be subject to arrest and  
4 criminal prosecution under California law. *For example, dispensaries that merely require patients to*  
5 *complete a form summarily designating the business owner as their primary caregiver—and then*  
6 *offering marijuana in exchange for cash 'donations'—are likely unlawful.” (Guidelines, supra, at p. 11,*  
7 *italics added.)” While the Attorney General’s views do not bind this court, they are entitled to*  
8 *considerable weight. Hochanadel supra, 176 Cal.App.4<sup>th</sup> at 1011. The court concludes that under*  
9 *proper conditions, as set out in the cases and the Guidelines, a storefront dispensary can be a legitimate*  
10 *medical marijuana collective. The Guidelines also suggest that under proper circumstances, an*  
11 *exchange of money for medical marijuana is allowed. (E.g., “...cooperatives should document each*  
12 *member’s contribution of labor, resources, or money to the enterprise.” Id., at p. 10.)*

13  
14  
15  
16 **4. The Ordinance violates members’ rights to privacy in their general contact information;**  
17 **certain of Plaintiffs’ privacy arguments are moot; others are unpersuasive:**

18 Article I Section 1 of the California Constitution guarantees the people of the State of California,  
19 among other things, the right of privacy. Defendant argues that Plaintiffs lack standing to assert privacy  
20 claims. It is therefore important to consider the threshold question: who or what can claim the  
21 protections of the right to privacy?  
22

23 The general rule is that the right of privacy is limited to “people” and does not apply to  
24 corporations. *Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 791. However, the inquiry changes  
25 when a corporation is asserting the rights of its members:  
26

27 Although corporations have a lesser right to privacy than human beings and are not  
28 entitled to claim a right to privacy in terms of a fundamental right, some right to privacy  
exists. Privacy rights accorded artificial entities are not stagnant, but depend on the

1 circumstances. *United States v. Hubbard, supra*, 650 F.2d 293 speaks to this point:  
2 'However, we think one cannot draw a bright line at the corporate structure. The public  
3 attributes of corporations may indeed reduce *pro tanto* the reasonability of their  
4 expectation of privacy, but the nature and purposes of the corporate entity and the nature  
5 of the interest sought to be protected will determine the question whether under given  
6 facts the corporation per se has a protectable privacy interest. Moreover at least certain  
7 types of organizations -corporate or non-corporate-should be able to assert in good faith  
8 the privacy interests of their members. Finally, whether acting for itself or on behalf of its  
9 members, surely the privacy interests of a 'church' [which was at issue in Hubbard] must  
10 be assessed somewhat differently from the privacy interests of other sorts of  
11 'corporations.''' (Citation).

12 It is clear to us that the law is developing in the direction that the strength of the privacy  
13 right being asserted by a nonhuman entity depends on the circumstances. Two critical  
14 factors are the strength of the nexus between the artificial entity and human beings and  
15 the context in which the controversy arises.

16 *Roberts, supra*, 147 Cal.App.3d at 796-97. Although it seems that collectives could assert privacy rights  
17 of their members, based on these facts, *Roberts* makes it clear that the right to privacy claimed by the  
18 corporate entities in this action would not rise to the level of a fundamental right.

19 The patient Plaintiffs' claims are different. There is one patient plaintiff class action: *Kevin*  
20 *Anderson, et al. v. City of Los Angeles*, (BC438671).<sup>15</sup> On these claims, and on the freedom of  
21 association claims (which can be asserted by either patient Plaintiffs themselves or by the collectives,  
22 assuming they have associational standing), a heightened level of scrutiny applies.

23 The California Supreme Court articulated a three-prong test for determining whether violation of  
24 the right to privacy has occurred:

25 A plaintiff alleging an invasion of privacy in violation of the state constitutional right to  
26 privacy must establish each of the following: (1) a legally protected privacy interest; (2) a  
27 reasonable expectation of privacy in the circumstances; and (3) conduct by defendant  
28 constituting a serious invasion of privacy.

*Hill v. National Collegiate Athletic Association*, (1994) 7 Cal.4<sup>th</sup> 1, 39-40. A defendant prevails on this  
claim by negating only one of the three elements. *Id* at 40.

<sup>15</sup> There was a class action as part of the *Timothy Leary Case* (BS126927); however, Plaintiffs' amended pleading dropped all  
class allegations.

1 We are concerned here with two types of legally protected privacy interests: (1) informational  
2 privacy—interest in precluding the dissemination or misuse of sensitive and confidential information;  
3 and (2) autonomy privacy—interests in making intimate personal decisions or conducting personal  
4 activities without observation, intrusion, or interference. *Hill, supra*, at 35.

5 Plaintiffs claim the Ordinance violates their informational privacy rights by (1) requiring  
6 collectives to keep a log of all members' general contact information, and (2) by permitting the  
7 disclosure of their medical history information. Section 45.19.6.4 allows the police to obtain  
8 documents without a warrant, subpoena, or other court process.<sup>16</sup> It appears that with the  
9 exception of private medical records, members of the Los Angeles Police Department can, at  
10 will, inspect a collective's records. Those records include the names and identifying information  
11 of all of the members of a collective.  
12  
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14 While the Ordinance requires certain procedural steps before the police can obtain "private  
15 medical records,"<sup>17</sup> the name, address, and telephone number of a member (patient) is not protected, nor  
16 is there any control with respect to what the police may do with this information. During a hearing,  
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19 <sup>16</sup> Section 45.19.6.4 states in pertinent part: "A medical marijuana collective shall maintain records at a location accurately  
20 and truthfully documenting, among other things: (1) the full name, address, and telephone number(s) of the owner, landlord  
21 and/or lessee of the location; (2) the full name, address, and telephone number(s) of all members who are engaged in the  
22 management of the collective and the exact nature of each member's participation in the management of the collective; (3)  
23 the full name, address, and telephone number(s) of all patient members to whom the collective provides medical marijuana, a  
24 copy of a government-issued identification card for all patient members, and a copy of every attending physician's or  
25 doctor's recommendation or patient identification card; (4) the full name, address, and telephone number(s) of all primary  
26 caregiver members to whom the collective provides medical marijuana and a copy of every written designation(s) by the  
27 primary caregiver's qualified patient(s) or the primary caregiver's identification card; (5) written documentation of all  
28 circumstances under which the collective provided medical marijuana to a non-member, including but not limited to the  
recipient's name, address, and telephone number, amount of medical marijuana received, and medical emergency  
justification; . . . (8) a log documenting each transfer of marijuana reflecting . . . the full name of the member to whom it was  
transferred; . . . These records shall be maintained by the collective for a period of five years and shall be made available by  
the collective to the Police Department upon request, except that private medical records shall be made available by the  
collective to the Police Department only pursuant to a properly executed search warrant, subpoena, or court order."  
(emphasis added)

<sup>17</sup> <sup>17</sup> Ordinance section 45.19.6.1.B defines a "private medical record" as: "Documentation of the medical history of a  
qualified patient or person with an identification card. 'Private medical record' shall not include the recommendation of an  
attending physician or doctor for the medical use of marijuana, an identification card, or the designation of a primary  
caregiver by a qualified patient or by a person with an identification card."

1 counsel for the City candidly admitted that the police may run a member's name through databases in  
2 order to determine whether that person has a criminal record, and if so, the police may monitor that  
3 person or place that person under surveillance. The court understands the reasons why law enforcement  
4 may want this ability, but a person with a criminal record has the right to obtain medical marijuana  
5 should a licensed physician so recommend, and she should not have her rights abridged for doing so. As  
6 explained below, because the Ordinance permits police to obtain medical marijuana patients' general  
7 contact information without any procedural safeguards, portions of Section 45.19.6.4 violate the  
8 Plaintiffs' right to informational privacy under the *Hill* test.

9  
10 1. Legally Protected Privacy Interest:

11 The court in *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669,  
12 quoted two California Supreme Court decisions analyzing the need to protect patients' medical  
13 information from government collection:  
14

15 The Supreme Court, in *White v. Davis* [] (1975) 13 Cal.3d 757, articulated four purposes  
16 of the 1972 amendment (of Article I § 1 of the California Constitution) in light of the  
17 statement contained in the election brochure (drafted by the proponents) stating:

18 "First, the statement identifies the principal 'mischiefs' at which the amendment is  
19 directed: (1) 'government snooping' and the secret gathering of personal information;  
20 (2) the overbroad collection and retention of unnecessary personal information by  
21 government and business interests; (3) the improper use of information properly  
22 obtained for a specific purpose, for example, the use of it for another purpose or the  
23 disclosure of it to some third party; and (4) the lack of a reasonable check on the  
24 accuracy of existing records."

25 ...  
26 And in *People v. Privitera* (1979) 23 Cal.3d 697, 709, the Supreme Court discerned:

27 ""(T)he moving force behind the new constitutional provision (to Article I § 1) was a  
28 more focused privacy concern, relating to the accelerating encroachment on personal  
freedom and security caused by increased surveillance and data collection activity in  
contemporary society. The new provision's primary purpose is to afford individuals  
some measure of protection against this most modern threat to personal privacy.""

In short the amendment was a voter response to a public awareness and concern that  
"proliferation of government snooping and data collecting is threatening to destroy our

1 traditional freedoms. Government agencies seem to be competing to compile the most  
2 extensive sets of dossiers of American citizens. Computerization of records makes it  
3 possible to create "cradle-to-grave" profiles of every American." (*People v. Privitera*,  
4 *supra*, at p. 709)

5 *Gherardini, supra*, 93 Cal.App.3d at 677-78 (emphasis added.) As the *Gherardini* court  
6 recognized, the addition of the privacy right to Article I § 1 was principally motivated to prevent  
7 personal data collection and government snooping. Our courts have also recognized the threat  
8 to privacy interests stemming from, specifically, increased surveillance and data gathering. The  
9 City has admitted that the police may run a member's name through databases in order to  
10 determine whether that person has a criminal record and monitor him if he does so. This is the  
11 exact type of governmental "mischief" the California Supreme Court identified as the impetus  
12 for the 1972 amendment to Article I § 1. *White v. Davis, supra*, at 775. Given the facts of this  
13 case, the members' general contact information constitutes a legally protected privacy interest.

#### 14 2. Reasonable Expectation of Privacy:

15 Second, the court finds Defendants arguments against a reasonable expectation of privacy  
16 unpersuasive. The *Hill* court reviewed what constitutes a reasonable expectation of privacy:  
17

18 Customs, practices, and physical settings surrounding particular activities may create or  
19 inhibit reasonable expectations of privacy. (Citations) . . . A "reasonable" expectation of  
20 privacy is an objective entitlement founded on broadly based and widely accepted  
21 community norms.

22 *Hill, supra*, 7 Cal.4<sup>th</sup> at 36-37.

23 The City analogizes to Health and Safety Code § 11100(a) (regulating pharmacies). However,  
24 this section does not regulate as the City claims it does. § 11100(a) deals with the wholesale,  
25 manufacture and retail sale of the most dangerous of chemicals—it does not specifically regulate  
26

1 pharmacies. In fact, § 11100(a) specifically exempts pharmacists from § 11100.<sup>18</sup> Moreover, §  
2 11100(a) does not permit the Justice Department to access those records without a warrant. California  
3 Code of Regulations § 1707 (Division 17, Title 16) requires pharmacies to "maintain medication profiles  
4 on all patients who have prescriptions filled in that pharmacy" when they are prescribed dangerous  
5 chemicals. These profiles include the patients' full name, address, telephone number, date of birth,  
6 gender, and the name, strength and dosage of the prescription. Patients who receive any of the  
7 dangerous chemicals (from the pharmacy) are notified that their medical records will be kept for three  
8 years and patients may apply for an offsite storage waiver. There is also no indication in § 1707 that the  
9 police may obtain patients' records without a search warrant, subpoena, or court order. The City also  
10 argues that the Combat Methamphetamine Epidemic Act of 2005 ("CMEA") is analogous to the  
11 Ordinance. This analogy fails for the same reason. The CMEA does not provide for warrantless police  
12 searches of records; rather, it specifically requires the Attorney General to provide express guidelines on  
13 how to access those records.

14  
15  
16 Members of collectives have an objectively reasonable expectation of privacy because they  
17 receive no indication or warning that the government will be able to obtain their medical records in the  
18 first instance. The Ordinance contains no requirement that patients receive notice that their records can  
19 be turned over to the police, nor are there any procedural safeguards limiting the governments' access to  
20 Plaintiffs' personal contact information. *Hill* directs courts to consider "the customs, practices, and  
21 physical settings surrounding particular activities." *Hill, supra*, 7 Cal.4<sup>th</sup> at 36. A medical marijuana  
22 patient who patronizes a collective does not impliedly consent to possible unlimited police surveillance.  
23 Plaintiffs have a reasonable expectation of privacy in their general contact information.  
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26  
27 <sup>18</sup> Subsection "(c)" states "This section shall not apply to any of the following: (1) Any pharmacist or other authorized person  
28 who sells or furnishes a substance upon the prescription of a physician, dentist, podiatrist, or veterinarian."

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3. Serious Invasion of Privacy:

Third, it is what the Ordinance does not say about how this information will be used that constitutes a serious invasion of privacy. We are left to speculate how police will utilize medical marijuana patients' general contact information. The City Attorneys' honesty at the hearing regarding the possible uses of this information, while laudable and appreciated, does not dispel the court's concerns. The court is remains worried about the limits of the use of contact information that may be entered into databases or used to set up surveillance of patients. The uncertainty surrounding the possible uses of that information renders the invasion of privacy serious enough to trigger constitutional protection. While *Hill* does not require the City to show a compelling interest (*Hill, supra*, at 34), it does not do away with the consideration of whether less restrictive alternatives exist to achieve a law's stated purpose. Here, the City does not claim that less restrictive alternatives are impossible or improbable. The court believes that the City can pursue the Ordinance's stated purpose by less restrictive means. While adding procedural protections to the Ordinance and/or some additional transparency in the use of patients' general contact information may remedy the constitutional shortcomings, as written, the Ordinance's provisions regarding disclosure of patients' general contact information violate the right to privacy under Article I Section 1 of the Constitution of the State of California.

The Ordinance also requires collectives to track how much marijuana they sell to people in emergency situations and the medical reasons for needing that marijuana. This provision of the Ordinance does not violate patient Plaintiffs' informational privacy rights.

When an ordinance "regulates business behavior, constitutional requirements are more relaxed than they are for statutes that are penal in nature." *Amaral v. Cinats Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1181. As noted above, section 45.19.6.4 requires collectives to keep records of the

1 "medical emergency justification" when non-members are forced to use another collective in a medical  
2 emergency. The Ordinance includes a member's "medical history" as a "Private Medical Record" in  
3 section 45.19.6.1.B. This definition reasonably encompasses the emergency situation contemplated in  
4 section 45.19.6.4 (referring to "medical emergency justification") where collectives are forced to log  
5 emergency non-member distributions of medical marijuana. The "Private Medical Records" definition  
6 from section 45.19.6.4.B reasonably encompasses both members' medical history and justification for  
7 using medical marijuana. Both require additional procedural safeguards before the police may obtain  
8 that information.  
9

10 There is no other requirement in the Ordinance that collectives must record members' reasons for  
11 using medical marijuana. No other portion of the Ordinance requires collectives to track members'  
12 medical history or their justification for using medical marijuana. Therefore, the only scenario when a  
13 medical log containing patients' medical conditions would even exist is when non-member patients  
14 receive medical marijuana from a collective in an emergency situation. Because the Ordinance provides  
15 added protection (requiring the police to first obtain a "properly executed search warrant, subpoena or  
16 court order") for the more sensitive "medical history" and "medical emergency justification"  
17 information, the court finds that the Ordinance does not violate the third-prong of the *Hill* test. *Hill*,  
18 *supra*, 7 Cal.4<sup>th</sup> at 40. The City's conduct in obtaining a search warrant, subpoena, or court order prior  
19 to obtaining private medical information does not constitute a serious invasion of privacy. On balance,  
20 the need for the police to track and prevent the illegal sales and diversion of medical marijuana greatly  
21 outweighs the small percentage of members who would ever be required to disclose Private Medical  
22 Records to a collective because of some emergency.  
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25 The court acknowledges that a patient with a physician's recommendation could visit a large  
26 number of collectives claiming a medical emergency and build a stockpile of marijuana to sell illegally.  
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1 By adding the requirement that emergency patients disclose their justification for not attending their  
2 normal collective, thereby making it more difficult to obtain emergency medical marijuana, the City  
3 Council hopes to limit this kind of activity. Finally, because the Ordinance provides procedural  
4 protections before obtaining Private Medical Records, the risk of a serious invasion of privacy or abuse  
5 is greatly reduced. As they relate to patients' Private Medical Records, the court finds that the  
6 Ordinance's record-keeping and disclosure provisions do not violate Plaintiffs' privacy rights.

7  
8 Plaintiffs claim the Ordinance violates their autonomy privacy rights by infringing on their right  
9 to choose medical marijuana as a medication. The problem with this argument is that it does not deal  
10 with the ability of individuals to join other collectives and still easily maintain their right to use medical  
11 marijuana for their illnesses. Plaintiffs cite cases like *American Academy of Pediatrics v. Lundgren*  
12 (1997) 16 Cal.4<sup>th</sup> 307, in support of their autonomy privacy argument. The analogy fails. In *Lundgren*,  
13 the California Supreme Court was called to decide whether an assembly bill violated minors' rights to  
14 choose medical treatment. The assembly bill required a pregnant minor to secure parental consent or  
15 judicial authorization before she could obtain an abortion. *Id.* at 313. Without parental consent or  
16 judicial authorization, the pregnant minor was prevented from choosing certain medical treatment. The  
17 instant case is different. The Ordinance does not prohibit collectives, nor does it prevent patients from  
18 obtaining their choice of medicine or selecting their medical treatment. Plaintiffs have failed to show  
19 any significant interference with their right to choose medical marijuana as a form of medical  
20 treatment.<sup>19</sup> California case law provides that *de minimis* infringements do not violate the right to  
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25 <sup>19</sup> The only evidence provided by Plaintiffs regarding any impact on individuals' ability to obtain medical marijuana exists,  
26 by implication only, in the declarations of Chris Conrad and Brian Silveira submitted with the Motion for Preliminary  
27 Injunction in the *Kevin Anderson, et al. v. City of Los Angeles*, (BC438671) filed June 4, 2010. The declarations combine to  
28 demonstrate how much space is needed to provide medical marijuana cultivation and the limited number of spaces in three  
distinct neighborhoods in Los Angeles: Wilshire, Westlake and Hollywood. (Decl. of Silveira, ¶ 3.) Plaintiffs' declarants  
hypothesize that, of the 38 total "Areas Allowed" for collectives in the three neighborhoods, 36 areas would not allow  
collectives "after taking into account all of the restrictions stated in Ordinance No. 181069." *Id.* at ¶ 6. This is apparently due  
to the space required to cultivate medical marijuana along with the numerous distance restrictions imposed by the Ordinance

1 privacy. (See *Hill, supra*, requiring a "serious invasion of privacy," 7 Cal.4<sup>th</sup> at 31; and *Lundgren,*  
2 *supra*, "[*Hill's*] threshold elements [] permit courts to weed out claims that involve so insignificant or *de*  
3 *minimis* an intrusion on a constitutionally protected privacy interest[s] . . ." 16 Cal.4<sup>th</sup> at 331.) Plaintiffs  
4 provide evidence showing, at most, a *de minimis* infringement on their right to choose medical  
5 marijuana as a treatment. It follows that their autonomy privacy claims fail.

6  
7 The freedom to associate falls under the right of privacy. *Hill, supra*, 7 Cal.4<sup>th</sup> at 42-43.  
8 Plaintiffs include corporate entities and also a class of patient Plaintiffs. The freedom to associate is so  
9 important that it is recognized as a fundamental right that triggers a compelling interest test requiring the  
10 court to review infringements with strict scrutiny. *Id.* at 34. In order to infringe on a fundamental right,  
11 a government must show a compelling interest and demonstrate that it has used the least restrictive  
12 means in achieving that interest. *Id.* While *Hill* departed from the strict scrutiny analysis for claims of  
13 straight privacy violations, the same strict scrutiny analysis still applies to freedom of association claims.  
14  
15 This is evident from the opinion:

16  
17 As we have observed in part 2(a)(2), ante, there is no clear or uniform "compelling  
18 interest" standard emanating from the federal penumbral "privacy" decisions. Based on  
19 its language and the authority it cites, our decision in *White* signifies only that some  
20 aspects of the state constitutional right to privacy—those implicating obvious government  
21 action impacting freedom of expression and association—are accompanied by a  
22 "compelling state interest" standard.

23 *Hill, supra*, 7 Cal.4<sup>th</sup> at 34 (emphasis added.)<sup>20</sup>

24 (Plaintiffs claim that 15,000 square feet is needed to provide medical marijuana for 570 patients). The implication of  
25 Plaintiffs' evidence is that by limiting three neighborhoods to only two possible locations for collectives to operate, patients  
26 will be denied their ability to obtain medical marijuana. However, these numbers are unreliable as they presume that  
27 cultivation must take place on site. (Compare Decl. of Conrad, ¶¶ 34-36 with Decl. of Silveira, ¶ 7.) There is no requirement  
28 in the Ordinance or in the Health and Safety Code that marijuana must be cultivated at the collective. Therefore, limiting the  
number of possible locations for collectives would not limit patients' access to medical marijuana in the same way. Other  
than these declarations, there is no evidence that patients will be significantly limited in their ability to obtain medical  
marijuana after the Ordinance takes effect.

<sup>20</sup> There was some question regarding the appropriate test for determining whether a violation of the freedom of association  
had occurred. During the hearing, the court asked defense counsel why this quoted language did not control. Defense  
counsel provided no reason and the court is unaware of any contrary controlling authority. *Hill* says that a compelling  
interest test applies to freedom of association claims by relying on the concurrence from *Grirwold v. Connecticut*, (1965) 381  
U.S. 479. As the court in *Hill* notes, the compelling interest test was never expressly adopted by the majority in *Grirwold*;

1 Although it predates *Hill*, the court in *City of Los Altos v. Barnes*, (1992) 3 Cal.App.4<sup>th</sup> 1193,  
2 provides guidance on what the freedom of association entails:

3 We begin with the right of privacy and free association. (5) "The right to privacy is the  
4 right to be left alone. It is a fundamental and compelling interest. It protects our homes,  
5 our families, our thoughts, our emotions, our expressions, our personalities, our freedom  
6 of communion and our freedom to associate with the people we choose. ..." (Citation).  
7 The United States Supreme Court "has recognized the vital relationship between freedom  
8 to associate and privacy in one's associations. ... Inviolability of privacy in group  
association may in many circumstances be indispensable to preservation of freedom of  
association ...." (Citation).

9 *Barnes, supra*, 3, Cal.App.4<sup>th</sup> at 1199-1200. As *Hill* and *Barnes* demonstrate, the freedom to associate  
10 triggers the compelling interest test and is broad enough to apply to various group settings where  
11 individuals come together to associate with one another. Collectives arguably fall into that category.  
12 However in evaluating whether a violation has occurred, California law carves out an exception of sorts  
13 for zoning ordinances.  
14

15 An important distinction arises when zoning ordinances are at issue, especially when the  
16 ordinance focuses on the use of property instead of the people who use the property. As the court  
17 explained in *City of Santa Barbara v. Adamson*, (1980) 27 Cal.3d 123, "In general, zoning ordinances  
18 are much less suspect when they focus on the use than when they command inquiry into who are the  
19 users." *Id.* at 133 (emphasis in original). *Adamson* is a good starting point. The City of Santa Barbara  
20 passed an ordinance prohibiting certain numbers and types of people from residing together in an  
21 apparent effort to "maintain family-style living." *Id.* at 131. The ordinance defined a family as two or  
22 more people related by blood, marriage or adoption, or a group not to exceed five persons. If inhabitants  
23 of a home did not qualify under the ordinance's criteria, they could not live together. The California  
24 Supreme Court struck down the ordinance as violating the freedom to associate after applying the strict  
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28 however, *Hill* still appears to adopt the compelling interest test as indicated from the plain language of the opinion cited  
above.

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1 scrutiny test. *Id.* at 133-34. While the Santa Barbara ordinance had a *use* component (for family-style  
2 living) it also inquired into *who* was living at the home. This "who" inquiry triggered strict scrutiny, and  
3 the court struck down the law, stating:

4 • The fatal flaw in attempting to maintain a stable residential neighborhood through the use  
5 of criteria based upon biological or legal relationships is that such classifications operate  
6 to prohibit a plethora of uses which pose no threat to the accomplishment of the end  
7 sought to be achieved. ... As long as a group bears the "generic character of a family unit  
8 as relatively permanent household," it should be equally as entitled to occupy a single  
9 family dwelling as its biologically related neighbors." (Citation).

8 *Adamson, supra*, 27 Cal.3d at 134. The *Adamson* court noted the flaw in focusing on the biological and  
9 legal relationships of inhabitants. The court noted that because the ordinance focused on the inhabitants  
10 as opposed to the use of the home, it violated the freedom of association. Put another way, the  
11 ordinance was overly broad in limiting who could associate with whom after considering the law's  
12 purpose.

13 The City argues, as it must, for cases like *Ewing v. City of Carmel-By-The-Sea* (1991) 234  
14 Cal.App.3d 1579, and *Barnes, supra*, to control.<sup>21</sup> In those cases, courts found the strict scrutiny test did  
15 not apply because the ordinances focused on *use* of property, not who used it. *Ewing, supra*, 234  
16 Cal.App.3d at 1598; *Barnes, supra*, 3 Cal.App.4<sup>th</sup> at 1201.

17 In *Ewing*, plaintiffs challenged the constitutionality of a zoning ordinance prohibiting transient  
18 commercial use of residential property for less than 30 consecutive days. *Ewing, supra*, at 1585. The  
19 court refused to apply strict scrutiny and found the ordinance constitutional, stating:

21 [The ordinance] differs sharply from the ordinances, policies, and covenants declared  
22 unconstitutional in the cases cited by plaintiffs. The rule challenged in each of those cases  
23 prohibited cohabitation by certain people or groups of people. In effect, each rule  
24 governed with whom residents could reside, based upon the number of people or upon  
25 their familial relationship. The ordinance here does no such thing. Plaintiffs are free to  
26 live with whom they wish. They may entertain whom they wish. They may rent to whom  
27 they wish—the only condition being that the occupancy, possession, or tenancy last at least  
28 30 consecutive calendar days. As the Supreme Court emphasized in *City of Santa  
Barbara v. Adamson, supra*, 27 Cal.3d at page 133, "In general, zoning ordinances are  
much less suspect when they focus on the use than when they command inquiry into who

<sup>21</sup> The City makes no argument that the Ordinance is the least restrictive means to achieve the stated purpose of the Ordinance ("ensuring the health, safety and welfare of the residents of the City of Los Angeles." Ordinance § 45.19.6.)

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are the users." The ordinance here does just that. *It prohibits the transient commercial use of residential property for remuneration in the R-1 District-regardless of who the parties are. Because [the ordinance] focuses on use, rather than users, it does not violate fundamental rights and does not warrant stricter scrutiny than is normally accorded zoning laws.*

The facts in *[Adamson]* differ sharply from the circumstances here. In *[Adamson]*, the government sought to intrude into private areas of individual lives. In *[Adamson]*, the ordinance governed with whom residents could reside. . . . The Los Altos ordinance, by contrast, does not intrude into Barnes's private affairs. *It does not regulate with whom she resides, inquire into whom she employs or force her to divulge information about whom her associates are.* All the ordinance does is regulate the use of her home. In particular, the ordinance places limits upon the use of her residence for commercial purposes. As we emphasized in *(Ewing)* "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." (Citation). *Because the ordinance does not seek to regulate any aspect of Barnes's private life, and does not dictate with whom she resides, works, or associates, it does not violate her constitutionally protected rights of privacy or association.*

3 Cal.App.4<sup>th</sup> at 1201 (emphasis added).

The parties disputed the nature of the Ordinance at length during the hearings. The court has reviewed the supplemental briefing requested on this issue and finds the Ordinance to be part zoning and part public safety. While the Ordinance contains language relating to public safety<sup>22</sup> as well as language relating to the use of property for zoning purposes,<sup>23</sup> placing substance over form, the court relies on the Ordinance's focus on use of properties as collectives in finding that it qualifies as a zoning ordinance for purposes of evaluating Plaintiffs' freedom of association claims. In one sense, the Ordinance resembles the law in *Adamson*, because it limits its application to collectives of four or more persons. The *Adamson* ordinance also limited the number of persons who could use a property. However, this is not an inquiry in the same way it was in *Adamson*. In *Adamson* the number of people inhabiting a home

<sup>22</sup> Some of the sections dealing with public safety include: Preamble, 45.19.6, 45.19.6.2(D), 45.19.6.3(B), and 45.19.6.5.  
<sup>23</sup> Some of the sections dealing with zoning include: 45.19.6.1 (definition of "Location,"), 45.19.6.2(B)(1)(including Table 1), 45.19.6.2.(B)(2), 45.19.6.2(D), 45.19.6.3(A), and 45.19.6.3(B).

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1 only became relevant when those individuals were not "related." An inquiry into *who* was inhabiting a  
2 home was always necessary under the *Adamson* ordinance: the first question under the *Adamson*  
3 ordinance would be, "is everyone related?" If the answer was yes, then the number of people living in a  
4 home became irrelevant. On the other hand, if the answer was no, then the number of inhabitants could  
5 not exceed five. The Los Angeles Ordinance does not inquire into characteristics of the members of  
6 collectives. While it does extend the state law requirements that members be qualified patients and/or  
7 caregivers, it makes no other inquiry.  
8

9 Another type of "inquiry" could be the Ordinance's record keeping requirements (name, address  
10 phone number, etc.). However, those are not at issue because the Ordinance does not prevent  
11 association of members based on those records—it just requires that collectives maintain the records.  
12 No part of the Ordinance looks at who makes up each collective. As the Supreme Court emphasized in  
13 *Adamson*, "In general, zoning ordinances are much less suspect when they focus on the use than when  
14 they command inquiry into who are the users." *Adamson, supra*, 27 Cal.3d at page 133. The Ordinance  
15 here does just that.<sup>24</sup>  
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20 <sup>24</sup> The parties also argued that if the Ordinance was a "zoning ordinance," then it was required to be referred to the City  
21 Planning Commission per City Charter § 558. Plaintiffs argue that because the Ordinance was not referred to the City  
22 Planning Commission, it is invalid. However, Plaintiffs have failed to show prejudice resulting from any failure to refer to  
23 Ordinance to the City Planning Commission. There is an applicable safe harbor provision in Gov. Code § 65010, which  
24 provides, "there shall be no presumption that error is prejudicial or that injury was done if the error is shown." In *Mack v.*  
25 *Ironside* (1973) 35 Cal.App.3d 127, 130, the court described the need to show prejudice before a court can overturn  
26 legislative acts: "That there should be applied such a liberal construction appears from the mandate of Government Code  
27 section 65801 (the precursor to § 65010), which is that *no action by any legislative or administrative body shall be set aside*  
28 *by any court as to any matter pertaining to appeals or any matters of procedure whatever, unless after consideration of the*  
*entire case, including the evidence, a different result would have been probable if the error had not occurred*" (emphasis  
added.) In this case, Plaintiffs have not shown that any failure to refer to the Ordinance to the City Planning Commission  
resulted in prejudice. The City Council is the final decision-maker on all legislation and the City Planning Commission  
provides only recommendations to the City Council. City Charter §§ 240, 249. Moreover, the Ordinance went through  
sixteen hearings prior to being adopted, seven of which were before the Planning and Land Use Management Committee of  
the City Council. Plaintiffs have not shown a lack of notice of these sixteen hearings. Plaintiffs have also not shown that  
they were prevented from raising concerns about the process for enacting the Ordinance during those hearings. This leads the  
court believe that even if the Ordinance had been referred to the City Planning Commission pursuant to City Charter § 558, a  
different result would not have occurred. Any failure to refer the Ordinance to the City Planning Commission did not result  
in prejudice; therefore, the court declines to invalidate the City Council's legislative enactment.

1 Plaintiffs argue that by closing down their collective, the City is preventing them from freely  
2 associating with other members of that collective. Perhaps this is true. However, because the Ordinance  
3 focuses on use, a lesser level of scrutiny controls as was applied in *Ewing* and *Barnes*. Applying the  
4 rational basis test, the City has articulated a strong justification for closing down collectives—the  
5 Ordinance will ensur[e] the health, safety and welfare of the residents of the City of Los Angeles.”  
6 (Ordinance, § 45.19.6.) As noted above, the record reflects an increase in crime corresponding with an  
7 increase in collectives. The purpose of the Ordinance is sufficiently related to its restrictive provisions.  
8 The Ordinance does not violate Plaintiffs’ freedom of association.  
9

10 The court treats as moot arguments that the Plaintiffs raised about the portion of the Ordinance  
11 pertaining to ownership requirements. Ordinance § 45.19.6.2(B) required the same  
12 ownership/management of each collective from September 13, 2007, through the present as a condition  
13 to filing a notice of intent to register. The court understands that this language was recently amended to  
14 liberalize the ownership requirements. Any arguments pertaining to Plaintiffs’ freedom of association  
15 claims as they relate to the same ownership/management clause of the Ordinance are now MOOT.  
16  
17  
18

19 **5. Summary of Plaintiffs’ Likelihood of Success on the Merits:**

20 Plaintiffs have shown a high likelihood of success on the merits of: (1) some of their preemption  
21 claims, (2) their equal protection claims, (3) their due process claims, and (4) some of their privacy  
22 claims. While Plaintiffs show a lower likelihood of success on the merits for other aspects of their  
23 preemption claims and privacy claims, an injunction can still issue as to several portions of the  
24 Ordinance.  
25  
26  
27  
28

**B. THE BALANCE OF RELATIVE INTERIM HARM DOES NOT OVERPOWER PLAINTIFFS' HIGH LIKELIHOOD OF SUCCESS ON THE MERITS:**

2. "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-  
3 harm factors; *the greater the plaintiff's showing on one, the less must be shown on the other to support*  
4 *an injunction.*" *Butt v. State of Cal., supra, 4 Cal.4<sup>th</sup>* at 678 (emphasis added.) Because Plaintiffs have  
5 shown a high likelihood of success on the merits, the City must demonstrate significantly higher relative  
6 interim harm to prevent an injunction from issuing. The City has not met its burden in that regard.

8 If an injunction is not issued, Plaintiffs will have to cease operations and close their doors. They  
9 may face criminal and/or civil penalties, certain of which the court believes are preempted. The record  
10 shows that Plaintiffs could lose costs spent constructing and improving their businesses and will never  
11 recoup their startup expenses because the businesses are, by definition, non-profit. Plaintiffs may be  
12 forced to breach their leases and incur civil liability. They will have to lay off employees, including  
13 owners who work at the collectives and receive compensation for their employment.

16 Defendant claims that Plaintiffs have no claim for irreparable harm because their operations were  
17 illegal in the first instance. This argument puts the cart before the horse. This case is all about whether  
18 the Ordinance makes their operation illegal. While in some instances, purely monetary harm may not  
19 satisfy the irreparable harm prong (*Sampson v. Murray, 415 U.S. 61, 90 (1974)*), Plaintiffs' claimed  
20 injuries encompass more than purely monetary harm.

22 Defendant claims substantial immediate and irreparable harm if the law is found unconstitutional  
23 and invalid. The public health and safety reasons recited in Captain McCarthy's declaration support  
24 Defendants' claim. The City claims that without the ability to enforce the Ordinance, more collectives  
25 will be formed in Los Angeles, driving up crime and endangering the citizenry.

27 Plaintiffs claim that the City faces no harm if an injunction were to issue because all that  
28 Plaintiffs request is the opportunity to submit an application and register pursuant to the Ordinance.

03/15/11

1 This misses the point. Plaintiffs' injunction challenges the constitutional validity of the Ordinance and  
2 does so, in part, successfully. Portions of the Ordinance found unconstitutional become ineffective.  
3 Because the Ordinance is the only law preventing new collectives from opening up and the only law  
4 preventing recently shut down collectives from reopening, there is a good chance that a large number of  
5 collectives could open once the injunction takes effect. This would endanger the City's interest in  
6 protecting its residents. The City has a real claim for immediate irreparable harm.

7  
8 The court recognizes that the City will have a second chance to regulate and limit the collectives  
9 within its borders by passing a new or amended version of the Ordinance to remedy the issues identified  
10 in this order.<sup>25</sup> Plaintiffs, on the other hand, may incur harm which cannot be so easily remedied. While  
11 the balance of interim harm does not tip heavily in either direction, Plaintiffs' high likelihood of success  
12 on the merits warrants enjoining enforcement of portions of the Ordinance as follows:  
13

14 The court GRANTS a preliminary injunction barring the City from enforcing the  
15 following portions of the Ordinance:

- 16 • Section 45.19.6.9: the first sentence of that section which provides "Each and  
17 every violation (of the ordinance) shall constitute a separate violation and shall be  
18 subject to all remedies and enforcement measures authorized by Section 11.00 of  
19 this Code."
- 20 • Section 45.19.6.10: the first paragraph, i.e., the sunset clause, which, the court  
21 assumes, should have been designated as Sec. 1.
- 22 • Section 45.19.6.2(A): to the extent it deprives Plaintiffs of vested property rights  
23 without a neutral hearing.
- 24 • Section 45.19.6.2(B)(2): the following language "was registered pursuant to the  
25 Interim Control Ordinance No. 179,027 with the City Clerk's office on or before  
26 November 13, 2007."
- 27 • Section 45.19.6.4: the following language "(3) the full name, address, and  
28 telephone number(s) of all patient members to whom the collective provides  
medical marijuana."

28 <sup>25</sup> The Court notes that the City has already amended the Ordinance since the filing of the instant motion. Those amendments became effective on December 1, 2010. (See Ex. A to "Response by City of Los Angeles to Court's November 29, 2010 Request for Copies of All Amendments to the City's Medical Marijuana Ordinance" filed November 30, 2010.)

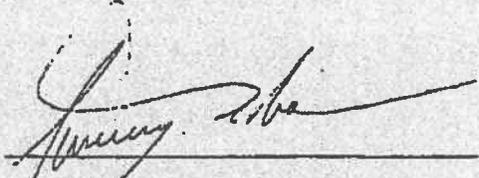
1 Plaintiffs' motions are otherwise DENIED.<sup>26</sup>

2 The court orders counsel to brief the question of the need for a bond and if so, its amount. A  
3 hearing on that question is scheduled for January 7, 2011, at 10:00 A.M., and briefs are due by  
4 December 30, 2010.

5 Although this order is most likely appealable, a party may wish to petition for writ relief. For  
6 this reason, and pursuant to CCP § 166.1, the court states its belief that there is a controlling question of  
7 law as to which there are substantial grounds for difference of opinion, appellate resolution of which  
8 may materially advance the conclusion of the litigation.  
9

10 IT IS SO ORDERED.

11 DATED: December 10, 2010

12   
13 \_\_\_\_\_  
14 Anthony J. Mohr

15 Judge of the Los Angeles Superior Court  
16  
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26

27 <sup>26</sup> Section 4 of section 45.19.6.10 of the Ordinance is a severability clause. It provides that, "...if any provision of this  
28 ordinance is found to be unconstitutional or otherwise invalid, ...that invalidity shall not affect the remaining provisions of  
this ordinance which can be implemented without the invalid provision, and, to this end, the provisions of this ordinance are  
declared to be severable."

To Whom it may concern:

We sincerely implore you to seriously consider not to allow legalization of Marijuana Dispensaries in our city. And to do away with the ones that are already operating illegally. It is bad enough that our city has already been shackled with the blight of the Peaches Club by former Council members with despicable taste. Do you really want to add your names to theirs with these dispensaries?

Thank you,  
Barry and Laurie Yovanovich  
17950 Yucca St.  
Hesperia, Ca. 92345

6-14-2011

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## Marijuana Dispensaries Linked to Fatal Car Crash Dispensary Sold Drugs to Man Who Crashed into C.H.P. Officer While Under the Influence of Marijuana

MAY 27 --(LOS ANGELES) The owner-operator of six Los Angeles-area "medical marijuana" dispensaries and his wife were arrested this morning on a host of federal charges, including operating several dispensaries within 1,000 feet of schools and churches. Authorities are seeking a third defendant, an employee who allegedly sold a pound of marijuana out the back door of one of the dispensaries.

The investigation into three THC outlets in Compton, Gardena and Los Angeles, as well as Western Caregiver Group in Los Angeles, MedXnow.com in Los Angeles and Southern California Caregivers in Van Nuys, began after a horrific accident in which a CHP officer was critically injured and the driver he had stopped was killed.

"The consequences of marijuana use extend far beyond those who abuse and traffic the drug," said Timothy J. Landrum, Special Agent in Charge of the DEA in Los Angeles. "The individuals arrested today claimed to sell marijuana for medicinal use, but it is clear that they are nothing more than drug traffickers. DEA is committed to enforcing federal laws that exist to prevent similar tragedies like this one from occurring in the future."

The defendants arrested this morning are: Virgil Edward Grant III, 41, of Carson and Grant's wife, Psytra Monique Grant, 33, also of Carson. The Grants were indicted by a federal grand jury on May 21, 2008 and are expected to make their initial court appearances this afternoon in U.S. District Court in Los Angeles.

The third defendant named in the indictment is THC employee Stanley Jerome Cole, 39.

On December 19, 2007, CHP Officer Anthony Pedefferri was conducting a routine traffic stop on the shoulder of Highway 101 near Faria Beach, just north of the City of Ventura. Officer Pedefferri was speaking to driver Andreas Parra at the driver's side window of Parra's car when a pick-up truck drifted onto the shoulder and struck Parra's vehicle. Parra was killed, and Pedefferri was gravely injured. He remains paralyzed.

The pick-up truck was driven by Jeremy White, who is currently being prosecuted by the Ventura County District Attorney's Office for gross vehicular manslaughter while intoxicated. The investigation revealed a large amount of marijuana and marijuana edibles in White's vehicle. According to

search warrants filed in federal court, in his post-arrest statement, White acknowledged being under the influence of marijuana when the accident took place, saying he had purchased the marijuana from a "medical marijuana" dispensary in Compton.

After meeting with local investigators in Ventura County, federal investigators determined that White had purchased the marijuana from THC in Compton. After a number of undercover buys at several of Grant's dispensaries – including a \$5,700, one-pound transaction facilitated by Cole – the grand jury indicted the Grants and Cole.

"This case demonstrates the harm that can occur when individuals seek to line their pockets while operating under the guise of California's medical marijuana laws," said United States Attorney Thomas P. O'Brien. "The dispensaries involved in this case were simply drug-dealing enterprises designed to generate profits for those who chose to ignore federal law and flout state law. The tragic accident that killed Andreas Parra and crippled CHP Officer Pedefferri can be directly linked to this disregard of the laws."

Debra D. King, Special Agent in Charge of IRS-Criminal Investigation's Los Angeles Field Office, stated: "The indictment of Virgil Grant, Pshyra Grant, and Stan Cole on narcotics trafficking, money laundering and asset forfeiture charges is the result of a highly successful multi-agency investigation into the Grant's marijuana trafficking operation. The investigation resulted in not only criminal narcotics and money laundering charges, but also asset forfeiture charges. IRS-Criminal Investigation plays a unique role in federal law enforcement's counter-drug effort in that we target the profit and financial gains of drug traffickers. IRS-Criminal Investigation specializes in following the money in illegal narcotic operations, enabling increased criminal prosecutions and asset forfeitures as a result."

This case is the result of an investigation by the Drug Enforcement Administration and IRS-Criminal Investigation.

An indictment contains allegations that a defendant has committed a crime. Every defendant is presumed innocent unless proven guilty in court.

The Hearn Family  
18303 Yucca Street  
Hesperia, CA 92345

July 14, 2011

Planning Department  
City of Hesperia  
9700 Seventh Avenue  
Hesperia, CA 92345

ATTN: Planning Commission

Dear Chairman Elvert,

Thank you for serving our city!

It is our hope to be at the Planning Commission meeting this evening to encourage you and the other commissioners to vote against having Medical Marijuana Dispensaries in our city.

The financial and social issues could cost the city much more than the benefits it would receive from them.

Barring any unforeseen circumstances, we will see you this evening.

Sincerely,



Carol Hearn

Mike & Margaret Withers  
18247 Yucca Street  
Hesperia, CA 92345

July 14, 2011

City of Hesperia  
Planning Commission  
9700 Seventh Ave.  
Hesperia, CA 92345

RE: Medical Marijuana Dispensaries

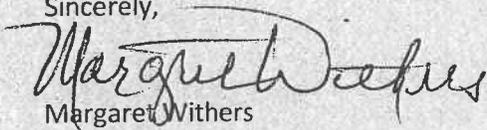
Dear Planning Department Members,

It has come to our understanding that the city is considering the establishment of Medical Marijuana Dispensaries in our community.

We feel that this would not only increase drug use, but also negatively affect neighborhoods. Communities that have allowed such dispensaries have later decided to forbid them.

Neighboring cities and San Bernardino County have taken a stand against such businesses. We feel you should as well.

Sincerely,

  
Margaret Withers

Mr. & Mrs. Robert Garrison  
18250 Sumac Avenue  
Hesperia, CA 92345

July 14, 2011

City of Hesperia  
9700 Seventh Avenue  
Hesperia, CA 92345  
ATTN: Planning Commission

Dear Planning Commission,

The Hesperia Star Newspaper stated the Planning Commission would be meeting this evening to discuss Hesperia allowing Medical Marijuana Dispensaries within our city.

We would like to discourage this. The Food and Drug Administration is normally responsible for the quality of products which our country endorses. Having local manufacturers of such a product, with little to no regulations regarding the quality or dispensing of the product; opens our city up to potential problems.

Crime could also result with the increased availability of such a drug.

Please vote against this measure.

Respectfully,



Robert Garrison

Lena Molina  
18297 Yucca Street  
Hesperia, CA 92345

July 14, 2011

City of Hesperia – Planning Department  
9700 Seventh Avenue  
Hesperia, CA 92345

Dear Planning Commissioner Elvert, and members of the board,

Please consider carefully your decision to allow Medical Marijuana Dispensaries within our city.

I feel it would lend to increased crime, and have a generally negative impact on our neighborhoods.

Drugs should be dispensed by Pharmacists.

Please vote against this.

Sincerely,

A handwritten signature in cursive script that reads "Lena Molina".

Lena Molina

Emily Hearn  
18303 Yucca St.  
Hesperia, CA 92345

July 14, 2011

City of Hesperia Planning Commission  
9700 7th Avenue  
Hesperia, CA 92345

Hello Members of the Hesperia Planning Commission,

Recently it was brought to my attention that there has been debate and discussion made regarding the proposed Medical Marijuana Dispensaries within the city. There are several concerns that I have in this regard, and would like to share some of my thoughts with you.

Personally I am quite opposed to the idea of having these dispensaries, but I thought that my personal thoughts are not enough to warrant your time. I have been reading several studies that have been conducted regarding the positive and negative effects that these dispensaries can have, not only on people using their services, but also what effects they can have on a community as well. Countless studies have been conducted and articles written with supposed conclusive results both in favor and against medical marijuana, but today I would like to focus on a few of the negative aspects. Some of my concerns are coming from the idea that with medical marijuana dispensaries, comes a possible increase in drug abuse, not only in adults, but also in adolescents.

With the introduction of laws allowing marijuana to be taken for medical reasons, there has suddenly been a spike in the amount of people "needing" the drug for their pain. I admit that there are many people who do have legitimate pain that could be lessened with the use of medical marijuana. However, as more and more people are able to easily fill prescriptions from some not so very reputable "dispensaries", there is little to no regulation on how much is actually being given to the patients.

Another concern regarding Medical Marijuana is that the most widely used drug among America's youth is marijuana, and that with an increase in adult patients filling their prescriptions, it will become more widely available to their children. Among adolescents who use drugs, approximately 60 percent of them use marijuana only. Of the 14.6 million underage marijuana users in 2002, about one third, or 4.8 million persons, used it on 20 or more days in the past month. Studies in 2001 showed that 67 percent of all marijuana users were younger than 18 and that is before it started becoming more readily available.

Marijuana can also be dangerous to your health; although not entirely proven; there is evidence to show that possible permanent brain injuries can occur when marijuana is used. Other studies have also shown that there are problems that can occur in the male reproductive system when marijuana is used.

Even though marijuana has been banned at the federal level, the state of California has permitted its use, but even though this is the case, there is nothing to guarantee that in the future the federal government will not begin enforcing it. If this happened, the city of Hesperia would not be exempt from lawsuits filed by those harmed by its use.

There are also other concerns regarding the legality of the issue. Several law enforcement officials in California have noted the inconsistency between federal and state law as a substantial problem, particularly regarding how seized marijuana is handled. According to a member of the California Attorney General office, state and local law enforcement officials are frequently faced with this issue; if the court or prosecutor concludes that marijuana seized during an arrest was legally possessed under California law, then law enforcement officials are ordered to return the marijuana. Returning it puts officials in violation of federal law for dispensing a Schedule I narcotic, according to the California State Sheriffs' Association, and in direct violation of the court order if they don't return it. As you can see, this could lead to some possibly challenging legal issues that could quite possibly turn into some sort of bigger battle between the local and federal courts.

I do not have all of my ideas fully formulated regarding this issue, but I thought that I would express some of my concerns, and kindly ask that you diligently consider all of the possible repercussions of such an issue before coming to a decision.

Thank you for your ongoing service to our community.

Sincerely,

A handwritten signature in cursive script that reads "Emily R. Heers".



**DATE:** August 11, 2011  
**TO:** Planning Commission  
**FROM:** Dave Reno, AICP, Principal Planner  
**BY:** Lisette Sánchez-Mendoza, Assistant Planner

**SUBJECT:** Consideration of revised Site Plan Review SPR11-10182, to expand an existing automotive repair facility and reconfigure the vacuum area; and Variance VAR11-10208, to allow the vacuum area canopy to encroach 10 feet into the minimum 20-foot rear yard setback at 17985 Bear Valley Road (Applicant: Hesperia Car Wash, LLC.; APN: 0399-132-31).

---

### RECOMMENDED ACTION

It is recommended that the Planning Commission adopt Resolution Nos. PC-2011-28 and PC-2011-30, approving VAR11-10208 and SPR11-10182.

### BACKGROUND

**Proposal:** A revised site plan review to expand an existing automotive repair facility and reconfigure the vacuum area and a variance to allow the vacuum area canopy to encroach 10 feet into the required 20-foot rear setback.

**Location:** 17985 Bear Valley Road

**Current General, Plan, Zoning and Land Uses:** The site is within the General Commercial (C2) General Plan Land Use designation and zone district (Attachment 2). The site is currently developed with a car wash and automotive repair facility and the site is surrounded by vacant properties to the north and east. The properties to the south contain single family residences and the property to the west is commercially developed (Attachment 3).

### ISSUES/ANALYSIS:

**Land Use:** The site contains two buildings, one housing the car wash and the other the automotive repair facility and vacuum area for the existing car wash. The project proposes to fully enclose the vacuum area and expand the automotive repair approximately 1,287 square feet within the existing building footprint. In addition, the proposed 900 square foot vacuum area canopy is proposed along the rear of the property behind the car wash building (Attachment 1). A significant amount of the work proposed under this application has been done. The canopy encroaches 10 feet into the 20-foot setback. The project site contains a 10-foot public utility easement (PUE) along the southern property line, which does not allow any buildings or structures. The proposed canopy does not encroach within this PUE. The site is adjacent to residential properties to the south, and the nearest residential structure is approximately 78 feet from the proposed canopy. The properties to the south also have a 10-foot PUE, thus restricting any proposed structures 10 feet on either side of the property line. This ensures a minimum 20-foot buffer. Only a portion of the proposed patio structure will encroach into the setback. In

addition, a block wall currently exists between this development and the residential properties to the south.

Noise is the significant issue, as the existing vacuums are proposed to be relocated 30 feet closer to the residential properties. A noise study indicates that the vacuums will not exceed the 55 dB restriction at the southern property line as long as the vacuum motor is fully enclosed. Finally, the hours of operations for the carwash will be between 8:00 a.m. and 6:00 p.m., therefore the carwash will be closed well before the 10:00 p.m. Noise Ordinance nighttime standard.

**Parking:** The changes proposed as part of this project will require 25 parking stalls. This includes the parking requirement for the additional three bays proposed with expansion of the automotive repair facility and elimination of one parking stall to provide adequate vehicular access to the new vacuum area. The site currently has 32 spaces, which provides an eight space surplus.

**Environmental:** This project is exempt from the California Environmental Quality Act (CEQA), per Section 15301, Existing Facilities.

**Conclusion:** Staff's recommendation is based on the noise study which ensures that any noise created by the vacuums will not exceed the 55dB daytime noise limitation. The project's conditions of approval include restrictions on hours of operation by limiting the use of vacuums to the hours between 8:00 a.m and 6:00 p.m. and enclosing the vacuum motor.

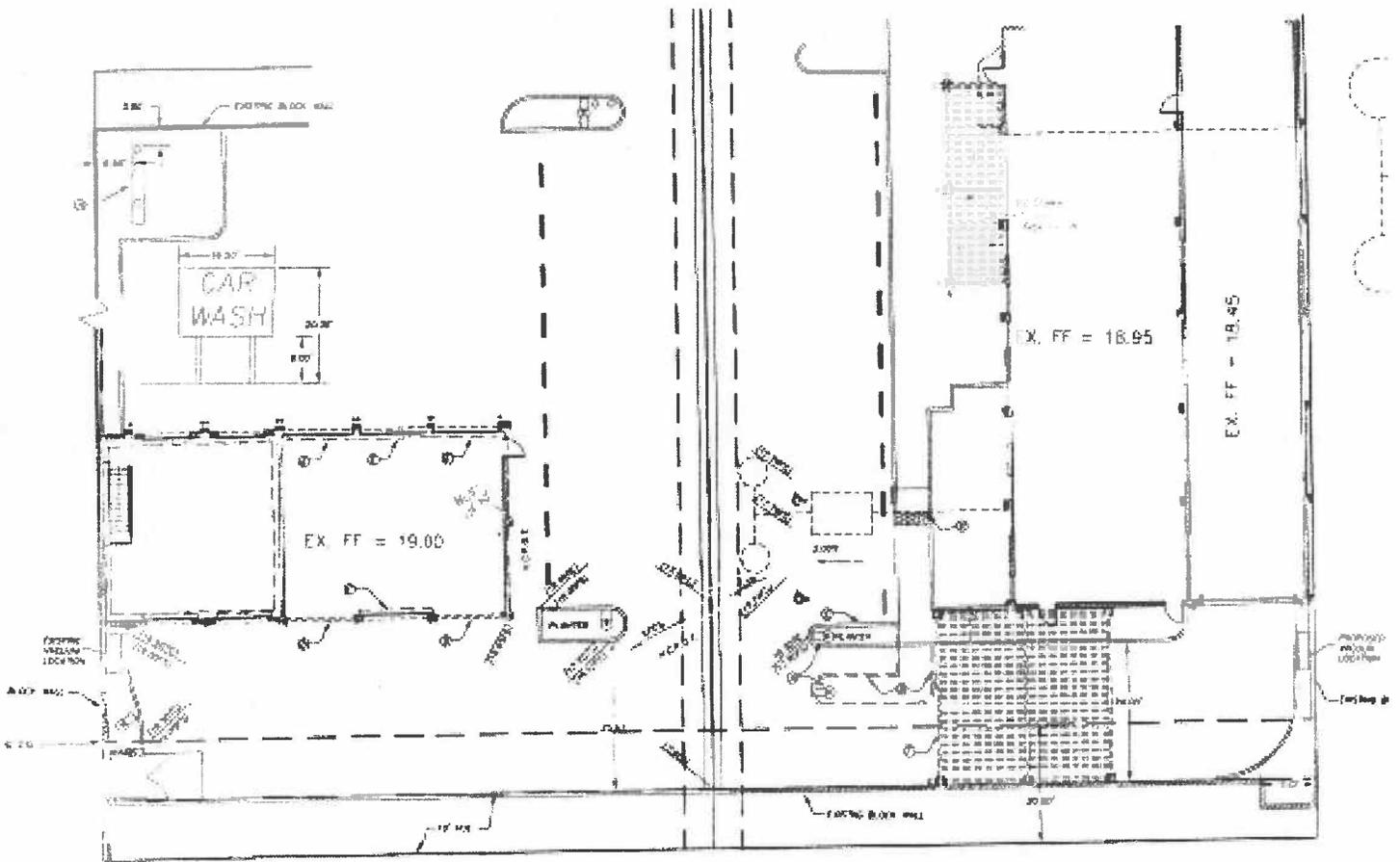
#### **ALTERNATIVE**

1. Provide alternative direction to staff.

#### **ATTACHMENTS**

1. Site Plan
2. General Plan/Zoning Map
3. Aerial photo
4. Resolution Nos. PC-2011-28 and PC-2011-30, with list of conditions

# ATTACHMENT 1



**APPLICANT(S):**  
 HESPERIA CAR WASH LLC.

**FILE NO(S):**  
 VAR11-10208 & SPR11-10182

**LOCATION:**  
 17985 BEAR VALLEY ROAD

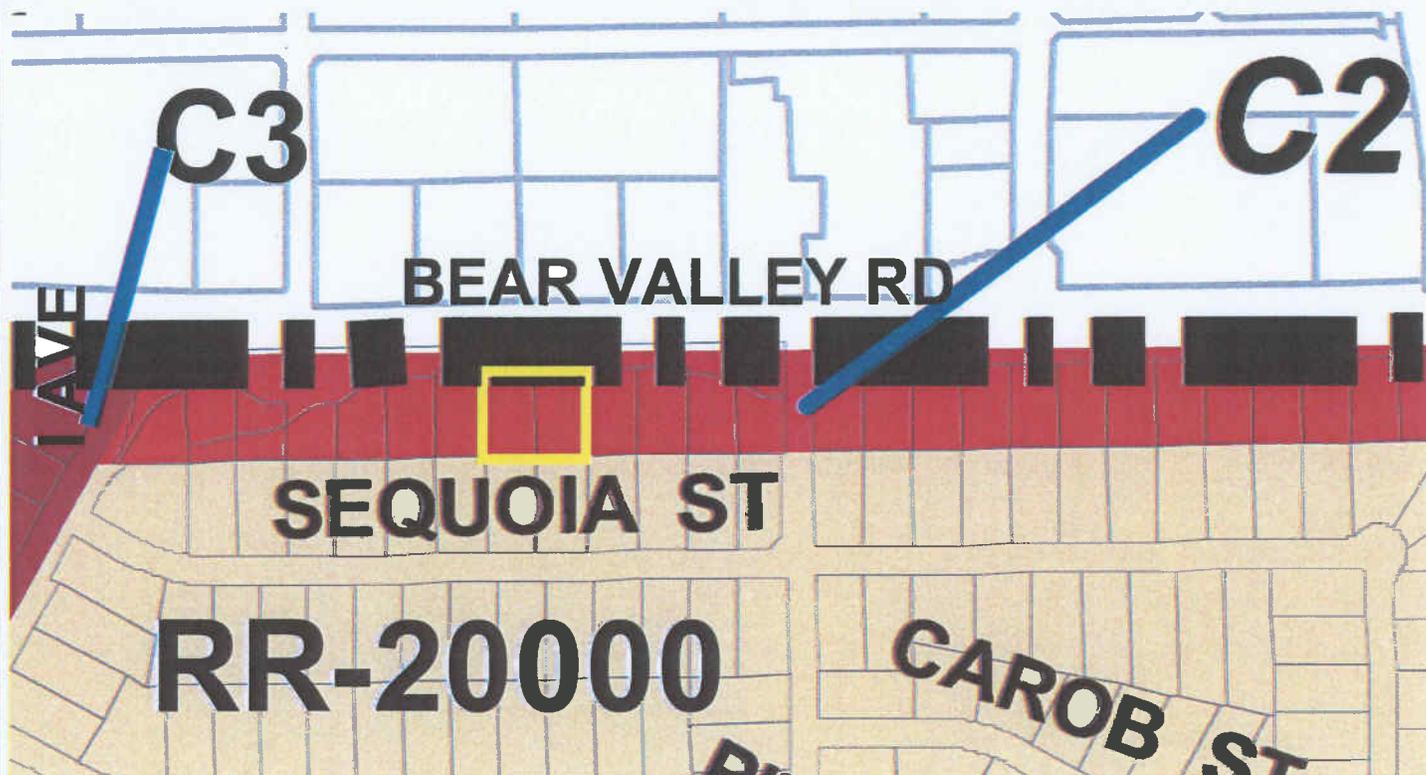
**APN(S):**  
 0399-132-31

**PROPOSAL:**  
 CONSIDERATION OF A REVISED SITE PLAN REVIEW TO EXPAND AN AUTOMOTIVE REPAIR FACILITY AND RECONFIGURE THE VACUUM AREA AND A VARIANCE TO ALLOW THE VACUUM AREA CANOPY TO ENCROACH 10 FEET INTO THE MINIMUM 20-FOOT REAR YARD SETBACK



## SITE PLAN

# ATTACHMENT 2



**APPLICANT(S):**  
HESPERIA CAR WASH, LLC.

**FILE NO(S):**  
VAR11-10208 & SPR11-10182

**LOCATION:**  
17985 BEAR VALLEY ROAD

**APN(S):**  
0399-132-31

**PROPOSAL:**  
CONSIDERATION OF A REVISED SITE PLAN REVIEW TO EXPAND AN AUTOMOTIVE REPAIR FACILITY AND RECONFIGURE THE VACUUM AREA AND A VARIANCE TO ALLOW THE VACUUM AREA CANOPY TO ENCROACH 10 FEET INTO THE MINIMUM 20-FOOT REAR YARD SETBACK



## GENERAL PLAN/ZONING MAP

# ATTACHMENT 3



**APPLICANT(S):**  
HESPERIA CAR WASH, LLC.

**FILE NO(S):**  
VAR11-10208 & SPR11-10182

**LOCATION:**  
17985 BEAR VALLEY ROAD

**APN(S):**  
0399-132-31

**PROPOSAL:**  
CONSIDERATION OF A REVISED SITE PLAN REVIEW TO EXPAND AN AUTOMOTIVE REPAIR FACILITY AND RECONFIGURE THE VACUUM AREA AND A VARIANCE TO ALLOW THE VACUUM AREA CANOPY TO ENCROACH 10 FEET INTO THE MINIMUM 20-FOOT REAR YARD SETBACK



## AERIAL PHOTO

**RESOLUTION NO. PC-2011-28**

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF HESPERIA, CALIFORNIA, APPROVING A VARIANCE TO ALLOW THE VACUUM AREA CANOPY TO ENCROACH 10 FEET INTO THE 20-FOOT REAR YARD SETBACK AT 17985 BEAR VALLEY ROAD (VAR11-10208)**

**WHEREAS**, Hesperia Car Wash LLC. has filed an application requesting approval of Variance VAR11-10208 described herein (hereinafter referred to as "Application"); and

**WHEREAS**, the Application applies to a two-acre parcel within the General Commercial (C-2) General Plan Land Use Designation, located at 17985 Bear Valley Road and consists of Assessor's Parcel Number 0399-132-31; and

**WHEREAS**, Hesperia Car Wash LLC has also filed an application requesting approval of revised Site Plan Review SPR11-10182, to expand an existing automotive repair facility and reconfigure the vacuum area for an existing car wash facility; and

**WHEREAS**, the subject site contains a commercial development and is surrounded by vacant properties to the north and east. The property to the west also contains commercial development and the properties to the south contain single family residences.

**WHEREAS**, the project is exempt from the California Environmental Quality Act (CEQA), per Section 15301, Existing Facilities; and

**WHEREAS**, on August 11, 2011, the Planning Commission of the City of Hesperia conducted a hearing on the Application and concluded said hearing on that date; and

**WHEREAS**, all legal prerequisites to the adoption of this resolution have occurred.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY OF HESPERIA PLANNING COMMISSION AS FOLLOWS:**

Section 1. The Planning Commission hereby specifically finds that all of the facts set forth in this Resolution are true and correct.

Section 2. Based upon substantial evidence presented to the Planning Commission during the above-referenced August 11, 2011, hearing, including public testimony and written and oral staff reports, this Commission specifically finds as follows:

- (a) The strict or literal interpretation and enforcement of the specified regulations would result in practical difficulties or unnecessary physical hardships because the operation of a car wash likely includes covered areas for drying and vacuuming vehicles. The site design does not contain another location for this purpose outside the required rear yard setback.

- (b) There are exceptional circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to other properties in the same zone because the car wash has a unique need for covered areas for vacuuming and other services.
- (c) The strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges enjoyed by the owners of other properties in the same zone because other car washes have been equipped with covered areas. Without approval of this variance, the car wash will be deprived of having a shaded area for vacuuming and other services.
- (d) The granting of the variance would not constitute a grant of a special privilege inconsistent with the limitations on other properties classified in the same zone because other car washes have constructed structures similar to the one proposed in order to provide shaded areas to conduct services similar to those being conducted on the project site.
- (e) The granting of the variance will not be detrimental to the public health, safety, or welfare, and will not be materially injurious to properties or improvements in the vicinity, as the facility is required to comply with the City's Development Code and the 2010 California Building Code.

Section 3. Based on the findings and conclusions set forth in this Resolution, this Commission hereby approves Variance VAR11-10208.

Section 4. The Secretary shall certify to the adoption of this Resolution.

**ADOPTED AND APPROVED** this 11<sup>th</sup> day of August, 2011.

\_\_\_\_\_  
Chris Elvert, Chair, Planning Commission

ATTEST:

\_\_\_\_\_  
Kathy Stine, Secretary, Planning Commission

**RESOLUTION NO. PC-2011-30**

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF HESPERIA, CALIFORNIA, APPROVING A REVISED SITE PLAN REVIEW TO EXPAND THE EXISTING AUTOMOTIVE REPAIR FACILITY AND RECONFIGURE THE VACUUM AREA AT 17985 BEAR VALLEY ROAD (SPR11-10182)**

**WHEREAS**, Hesperia Car Wash LLC. has filed an application requesting approval of Revised Site Plan Review SPR11-10182 described herein (hereinafter referred to as "Application"); and

**WHEREAS**, the Application applies to a two-acre parcel within the General Commercial (C-2) General Plan Land Use Designation at 17985 Bear Valley Road and consists of Assessor's Parcel Number 0399-132-31; and

**WHEREAS**, Hesperia Car Wash LLC has also filed an application requesting approval of Variance VAR11-10208, to allow the proposed vacuum area canopy to encroach 10 feet into the minimum 20-foot rear yard setback; and

**WHEREAS**, the subject site contains a commercial development and is surrounded by vacant properties to the north and east. The property to the west also contains commercial development and the properties to the south contain single family residences.

**WHEREAS**, the project is exempt from the California Environmental Quality Act (CEQA), per Section 15301, Existing Facilities; and

**WHEREAS**, on August 11, 2011, the Planning Commission of the City of Hesperia conducted a hearing on the Application and concluded said hearing on that date; and

**WHEREAS**, all legal prerequisites to the adoption of this resolution have occurred.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY OF HESPERIA PLANNING COMMISSION AS FOLLOWS:**

Section 1. The Planning Commission hereby specifically finds that all of the facts set forth in this Resolution are true and correct.

Section 2. Based upon substantial evidence presented to this Commission during the above-referenced August 11, 2011 hearing, including public testimony and written and oral staff reports, this Commission specifically finds as follows:

- (a) The site for the proposed use is adequate in size and shape to accommodate all yards, open spaces, setbacks, walls and fences, parking areas, fire and building code considerations, and other features pertaining to the application. The proposed use is allowed within, and would not impair the integrity and character of the General Commercial (C2) Zone District and complies with all applicable provisions of the development code, specifically Section 16.12.120. The site is suitable for the type and intensity of use that is proposed, with approval of Variance VAR11-10208.

- (b) The proposed use will not have a substantial adverse effect on abutting property or the permitted use thereof, and will not generate excessive noise, vibration, traffic, or other disturbances, nuisances or hazards. The proposal to expand the automotive repair facility and relocate the vacuum area will not have a detrimental impact on adjacent properties based on the noise study submitted as part of this application and the conditions of approval.
- (c) The proposed use is consistent with the goals, policies, and maps of the development code, General Plan and other applicable codes and ordinances adopted by the city.
- (d) The site for the proposed use has adequate access, meaning that the site design incorporates street and highway limitations. There are adequate provisions for sanitation, water, and public utilities and services to ensure the public convenience, health, safety and general welfare. The proposed use will occur in an existing automotive repair facility and car wash with adequate infrastructure. The existing transportation infrastructure is adequate to support the type and quantity of traffic that will be generated by the proposed use. The expansion of the automotive repair facility and relocation of the vacuum area will not have any impacts on traffic or parking on- or off-site.

Section 3. Based on the findings and conclusions set forth in this Resolution, this Commission hereby approves Revised Site Plan SPR11-10182, subject to the conditions of approval as shown in Attachment 'A'.

Section 4. The Secretary shall certify to the adoption of this Resolution.

**ADOPTED AND APPROVED** this 11<sup>th</sup> day of August, 2011.

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Chris Elvert, Chair, Planning Commission

ATTEST:

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Kathy Stine, Secretary, Planning Commission

ATTACHMENT 'A'

List of Conditions for Site Plan Review SPR11-10182

Approval Date: August 11, 2011
Effective Date: August 23, 2011
Expiration Date: August 23, 2014

This list of conditions applies to a revised Site Plan Review to expand an existing automotive repair facility and reconfigure the vacuum area for a car wash. Any change of use or expansion of area may require approval of another revised site plan review application (Applicant: Hesperia Car Wash LLC.; APN: 0399-132-31).

The use shall not be established until all conditions of this revised Site Plan Review application have been met. This approved revised Site Plan Review shall become null and void if all conditions have not been completed within three (3) years of the effective date. Extensions of time of up to twelve (12) months may be granted upon submittal of the required application and fee prior to the expiration date.

(Note: The "Init" and "Date" spaces are for internal city use only).
Init Date

CONDITIONS REQUIRED PRIOR TO BUILDING PERMIT ISSUANCE:

Variance. These conditions are concurrent with Variance VAR11-10208 becoming effective. (P)

- 1. Building Construction Plans. Five complete sets of construction plans, prepared and wet stamped by a California licensed Civil or Structural Engineer or Architect, shall be submitted to the Building Division with the required application fees for review. (B)
2. Specialty Plans. The following additional plans/reports shall be required for businesses with special environmental concerns: (B)
A. The vacuum motor must be fully enclosed, as specified in the noise study.
3. Design for Required Improvements. Improvement plans for on-site improvements shall be consistent with the plans and the noise study approved as part of this site plan review application. (P)
4. Indemnification. As a further condition of approval, the Applicant agrees to and shall indemnify, defend, and hold the City and its officials, officers, employees, agents, servants, and contractors harmless from and against any claim, action or proceeding (whether legal or administrative), arbitration, mediation, or alternative dispute resolution process), order, or judgment and from and against any liability, loss, damage, or costs and expenses (including, but not limited to, attorney's fees, expert fees, and court costs), which arise out of, or are in any way related to, the approval issued by the City (whether by the City Council, the Planning Commission, or other City reviewing authority), and/or any acts and omissions of the Applicant or its

employees, agents, and contractors, in utilizing the approval or otherwise carrying out and performing work on Applicant's project. This provision shall not apply to the sole negligence, active negligence, or willful misconduct of the City, or its officials, officers, employees, agents, and contractors. The Applicant shall defend the City with counsel reasonably acceptable to the City. The City's election to defend itself, whether at the cost of the Applicant or at the City's own cost, shall not relieve or release the Applicant from any of its obligations under this Condition. (P)

**CONDITIONS REQUIRED PRIOR TO CERTIFICATE OF OCCUPANCY:**

- \_\_\_\_\_ 5. **Utility Clearance(s)/Certificate of Occupancy.** The Building Division will provide utility clearances on the interior tenant improvement and the vacuum equipment after required permits and inspections. Utility meters shall be permanently labeled. Uses in existing buildings currently served by utilities shall require issuance of a Certificate of Occupancy prior to establishment of the use. (B)
- \_\_\_\_\_ 6. **On-Site Improvements.** All on-site improvements as recorded in these conditions, and as shown on the approved site plan shall be completed in accordance with all applicable Title 16 requirements. Any exceptions shall be approved by the Development Services Director. (P)

**ONGOING CONDITIONS:**

- \_\_\_\_\_ 7. **Noise.** The maximum noise level at the southern property line, adjacent to the residential properties, shall not exceed 55dB. (P)
- \_\_\_\_\_ 8. **Operating Hours.** The carwash vacuums shall be in operation only between the hours of 8 a.m. and 6:00 p.m. (P)

**IF YOU NEED ADDITIONAL INFORMATION OR ASSISTANCE REGARDING THESE CONDITIONS, PLEASE CALL THE APPROPRIATE DIVISION LISTED BELOW:**

(P)	Planning Division	947-1200
(B)	Building Division	947-1300
(E)	Engineering Division	947-1414
(F)	Fire Prevention Division	947-1012
(RPD)	Hesperia Recreation and Park District	244-5488



**DATE:** August 11, 2011  
**TO:** Planning Commission  
**FROM:** Dave Reno, AICP, Principal Planner  
**BY:** Daniel S. Alcayaga, AICP, Senior Planner  
**SUBJECT:** Conditional Use Permit CUP11-10195; Applicant: Team Trucking Dismantling;  
APN: 0415-011-12

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### RECOMMENDED ACTION

It is recommended that the Planning Commission adopt Resolution No. PC-2011-29, approving CUP11-10195.

### BACKGROUND

**Proposal:** A revised Conditional Use Permit (CUP) to establish a car sales/auction facility on 6 acres zoned I-1 (Attachment 1).

**Location:** On the west side of "I" Avenue, 625 feet north of Eucalyptus Street.

**Current General Plan and Land Uses:** The site is currently vacant and within the Limited Manufacturing (I-1) General Plan Land Use designation. The surrounding land is designated as noted on Attachment 2. The properties to the north include light industrial uses and a card lock gas station (Goodspeed) exists to the south (Attachment 3). The property to the west includes a large salvage and wrecking yard (Pick-A-Part). On the opposite side of "I" Avenue to the east is a residential neighborhood.

In 2004, a Conditional Use Permit was approved for Pick-A-Part and included the property in question. At the time, the property currently proposed as a car sales/auction facility was shown as vacant, and therefore, does not have an approved land use. Originally, the property was 48 acres in size and subsequently subdivided into three parcels, including 35 acres for Pick-A-Part, 3.5 acres for Goodspeed, and 9.5 acres that remained vacant. The applicant owns the 9.5 acre vacant parcel and intends to use the west 6 acres for the proposed use.

### ISSUES/ANALYSIS

The land use application states that the proposed use is for "vehicle storage for car auction." The site plan indicates that the 6 acres will be covered with gravel and not include asphalt or landscaping. The applicant intends customer parking to be on the Pick-A-Part facility and customers to be transported by golf cart to the proposed facility. Approximately, two employees are expected to operate the car sales/auction facility. The area between the car sales/auction facility and "I" Avenue is proposed to remain vacant.

Based on staff's review of similar facilities, vehicles on the premises are generally from police impounds and bank repos. Vehicles are purchased in person and over-the-internet by used car dealerships for resale and individuals for personal use. Staff estimates a maximum of 1,120 vehicles can be parked on the property.

Due to the nature of the proposed use, staff agrees that no building or landscaping is required. Unlike a retail establishment, the facility will be hidden away from public view and any landscaping would not be visible to the public. As a condition of approval, the site is required to have portable restrooms and must be regularly maintained.

On July 6, 2011, the revised CUP was scheduled to be approved by the Development Review Committee (DRC). However, the applicant stated that they would appeal Condition No. 18 pertaining to paving requirements to the Planning Commission. Since Section 16.12.085(B)(5) of the Development Code allows staff to forward projects to the Planning Commission when public opposition or uncertainty exist, staff agreed to forward the project for consideration by the Commission.

The applicant is appealing Condition No. 18 requiring all areas that are occupied by vehicles to be paved. Staff has determined that the condition is required by code. Section 16.20.085 of the Development Code states:

T. Parking and loading facilities shall be surfaced and maintained with asphaltic, concrete, or other permanent, impervious surfacing material. Alternate surface material may be considered by the reviewing authority, if shown that such material will not cause adverse effects and that it will remain in a usable condition.

Furthermore, vehicles have the potential to leak hazardous materials, including motor oil, antifreeze, transmission, brake, and gasoline fluids. During storm events, these chemicals can make their way to the groundwater and/or washed away into local washes. Paving the site is one way water run-off pollution is controlled, directed and filtered into approved drainage areas. The Storm Water Management Program (SWMP) for the Mojave Watershed (2005) requires the City to adopt ordinances and policies to require improvements to promote runoff water quality and to implement structural and non-structural Best Management Practices (BMPs). For several years, the City has been enforcing BMPs during the construction phase for projects one acre or larger in size.

The proposed car sales/auction facility is similar to other uses that would require paving. Specifically, the code requires car dealerships, including vehicle display areas, to be paved. Staff also reviewed car auction facilities of similar size in San Bernardino and Riverside Counties and they were found to be entirely paved.

**Drainage:** The existing drainage facility on the Pick-A-Part site is proposed to be used by the car sales/auction facility. If the site is paved, the drainage system will be reviewed to ensure it is sized to accommodate the additional drainage and includes an appropriate filtration system. The Hesperia Plan of Drainage identifies a proposed local facility as part of the I-01 line on the south side of the property. When Pick-A-Part was developed, an underground drainage system was constructed to convey drainage flows through the Goodspeed property and the property in question.

**Water and Sewer:** There are 12-inch diameter water and sewer lines along "I" Avenue. However, the applicant does not intend to utilize sewer or water. The project is not required to connect to sewer or water, as no buildings or structures are proposed.

**Traffic/Street Improvements:** The frontage of the property has partial street improvements and no additional improvements will be required along "I" Avenue. The rest of the street improvements will be constructed when the vacant area between car sales/auction facility and "I" Avenue is developed.

The facility is not expected to generate a substantial amount of traffic, nor generate traffic in excess of what is expected in the General Plan at build-out. Vehicle trips will be generated by customers, employees and delivery trucks. Similar to Pick-A-Part, the facility will be open every day from 7:30 am to 6:00 pm. Vehicles are also sold over-the-internet reducing the number of vehicle trips generated.

"G" Avenue will be used by the facility for delivering vehicles. There is an existing access easement on Goodspeed's property allowing the property access from "G" Avenue. Although primary access will be from Santa Fe Avenue, travelers will also utilize Catalpa Street, Eucalyptus Street and "I" Avenue to access the facility. These roads are currently paved and will be improved, at build-out, to provide adequate access to this area.

**Environmental:** Approval of this development requires adoption of a mitigated negative declaration pursuant to the California Environmental Quality Act (CEQA). The mitigated negative declaration and initial study (Attachment 4) prepared for the development conclude that there are no significant adverse impacts resulting from the project. Prior to issuance of a grading permit, a pre-construction survey conducted by an approved biologist shall be performed to determine whether the site contains burrowing owls.

**Conclusion:** The project conforms to the goals and policies of the City's General Plan. The project meets the standards of Development Code with approval of the proposed condition use permit and project conditions of approval.

#### **FISCAL IMPACT**

None.

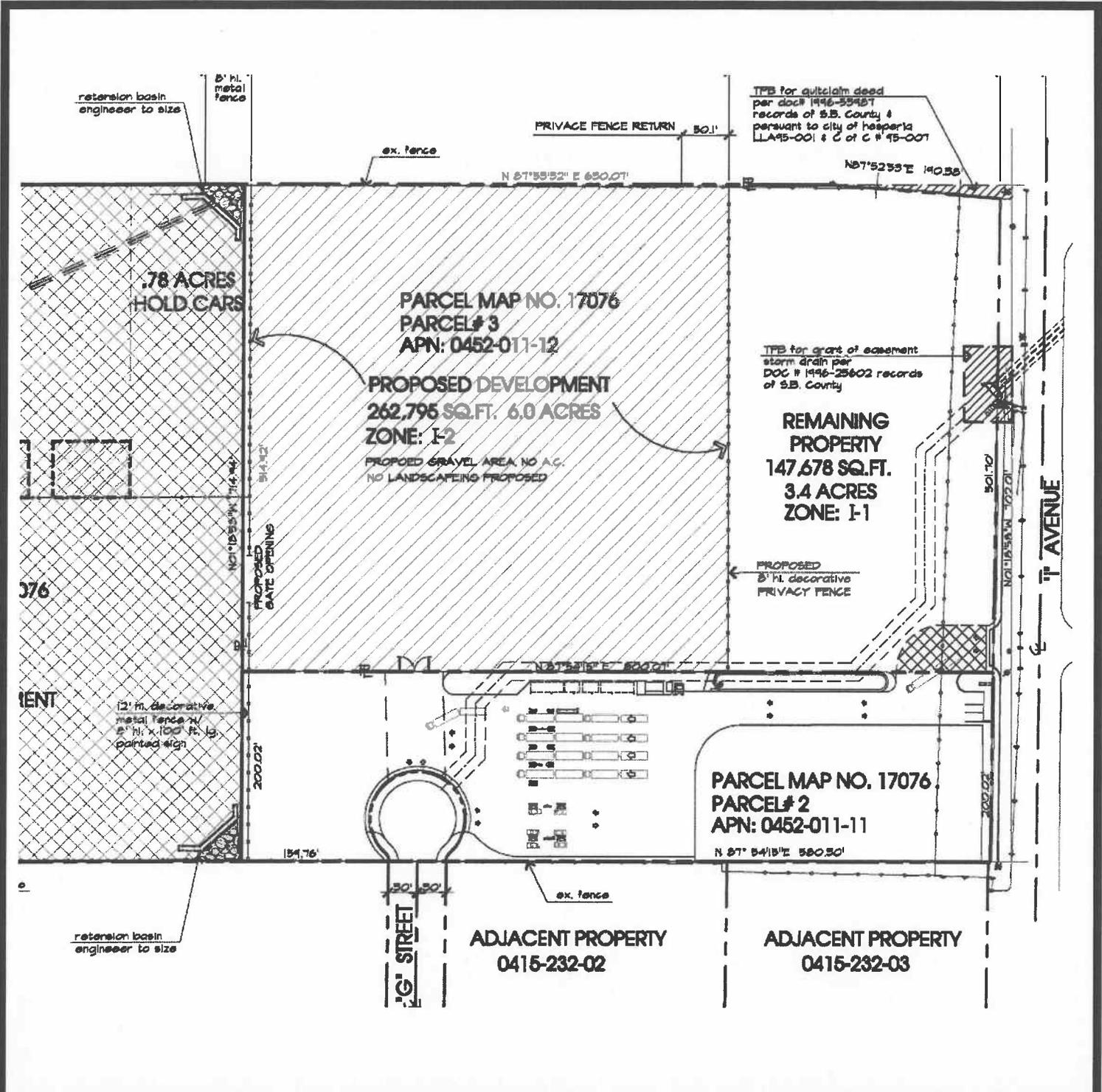
#### **ALTERNATIVE(S)**

1. The Planning Commission may approve CUP11-10195 and eliminate Condition No. 18 requiring areas of the site occupied by vehicles to be paved. This alternative would not require paving of the site. Staff does not recommend this alternative since the code requires all parking and loading areas to be paved. Additionally, pavement will help collect and direct stormwater run-off to an approved drainage system.
2. Provide alternative direction to staff.

#### **ATTACHMENTS**

1. Site plan
2. General Plan Land Use map
3. Aerial Photo
4. Negative Declaration ND-2011-04 with Initial Study
5. Resolution No. PC-2011-29, with list of conditions (CUP)

# ATTACHMENT 1



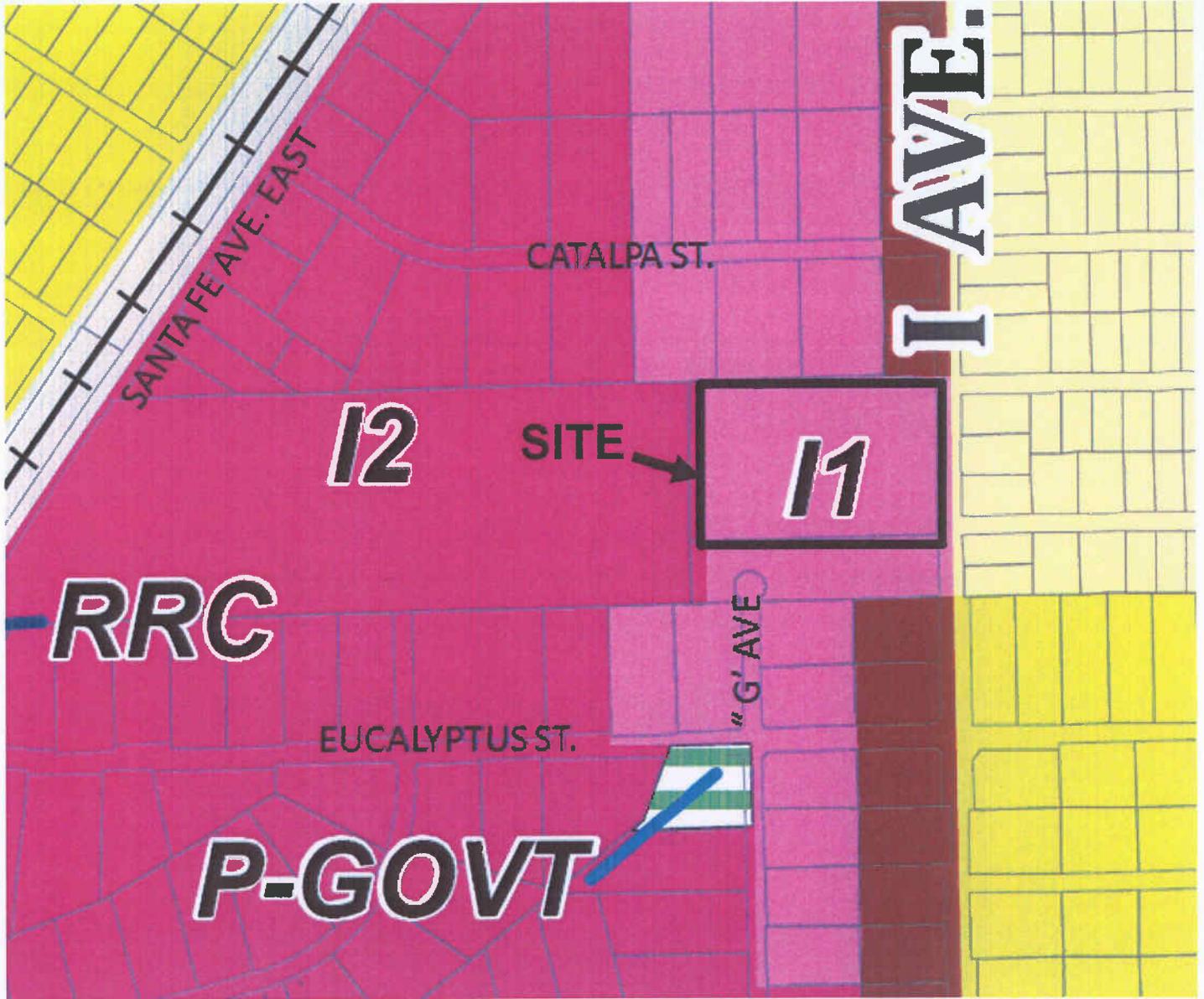
<b>APPLICANT(S):</b> TEAM TRUCKING DISMANTLING	<b>FILE NO(S):</b> CUP11-10195
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<b>LOCATION:</b> ON THE WEST SIDE OF I AVENUE, 625 FEET NORTH OF EUCALYPTUS STREET	<b>APN(S):</b> 0415-011-12
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<b>PROPOSAL:</b> A CONDITIONAL USE PERMIT TO ESTABLISH A CAR SALES/AUCTION FACILITY ON 6 ACRES ZONED I-1	N ↑ 2-4
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## SITE PLAN

# ATTACHMENT 2



**APPLICANT(S):**  
TEAM TRUCKING DISMANTLING

**FILE NO(S):**  
CUP11-10195

**LOCATION:**  
ON THE WEST SIDE OF I AVENUE, 625 FEET NORTH OF EUCALYPTUS STREET

**APN(S):**  
0415-011-12

**PROPOSAL:**  
A CONDITIONAL USE PERMIT TO ESTABLISH A CAR SALES/AUCTION FACILITY ON 6 ACRES  
ZONED I-1



## GENERAL PLAN LAND USE MAP

# ATTACHMENT 3



**APPLICANT(S):**  
TEAM TRUCKING DISMANTLING

**FILE NO(S):**  
CUP11-10195

**LOCATION:**  
ON THE WEST SIDE OF I AVENUE, 625 FEET NORTH OF EUCALYPTUS STREET

**APN(S):**  
0415-011-12

**PROPOSAL:**  
A CONDITIONAL USE PERMIT TO ESTABLISH A CAR SALES/AUCTION FACILITY ON 6 ACRES  
ZONED I-1



**AERIAL PHOTO**

# ATTACHMENT 4

PLANNING DIVISION  
9700 Seventh Avenue, Hesperia, California 92345  
(760) 947-1224 FAX (760) 947-1221

MITIGATED NEGATIVE DECLARATION ND-2011-04  
Preparation Date: July 19, 2011

Name or Title of Project: Conditional Use Permit CUP11-10195.

Location: On the west side of "I" Avenue, 625 feet north of Eucalyptus (APN: 0415-011-12).

Entity or Person Undertaking Project: Team Truck Dismantling

Description of Project: Consideration of a conditional use permit to establish a car sales/auction facility on 6 acres zoned I-1.

Statement of Findings: The Planning Commission has reviewed the Initial Study for this proposed project and has found that there are no significant adverse environmental impacts to either the man-made or physical environmental setting with inclusion of the following mitigation measures and does hereby direct staff to file a Notice of Determination, pursuant to the California Environmental Quality Act (CEQA).

Mitigation Measures:

1. A pre-construction survey for the burrowing owl shall be conducted by a City approved, licensed biologist, no more than 30 days prior to commencement of grading.

A copy of the Initial Study and other applicable documents used to support the proposed Mitigated Negative Declaration is available for review at the City of Hesperia Planning Department.

Public Review Period: July 21, 2011 until August 10, 2011

Adopted the Planning Commission: August 11, 2011

Attest:

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DAVE RENO, AICP, PRINCIPAL PLANNER

**CITY OF HESPERIA INITIAL STUDY  
ENVIRONMENTAL CHECKLIST FORM**

**PROJECT DESCRIPTION**

1. **Project Title:** Conditional Use Permit CUP11-10195.
2. **Lead Agency Name:** City of Hesperia Planning Division  
**Address:** 9700 Seventh Avenue, Hesperia, CA 92345.
3. **Contact Person:** Daniel S. Alcayaga, AICP, Senior Planner  
**Phone number:** (760) 947-1330.
4. **Project Location:** On the west side of "I" Avenue, 625 feet north of Eucalyptus Street as shown on Attachment "A" (APN: 0415-011-12).
5. **Project Sponsor:** Team Truck Dismantling  
**Address:** 3760 Pyrite Street - Riverside, CA 92509
6. **General Plan & zoning:** The site is within the Limited Manufacturing (I-1) General Plan Land Use District.
7. **Description of project:**

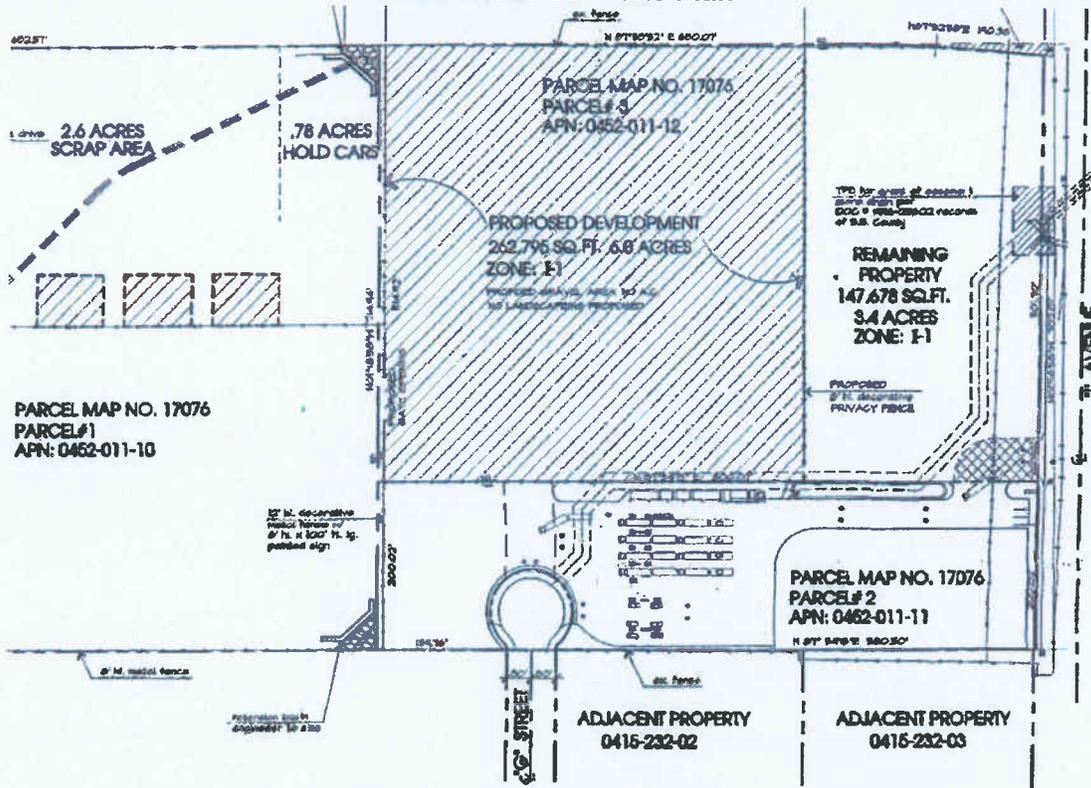
A conditional use permit to establish a car sales/auction facility on 6 acres. The site is located approximately 290 feet west of the "I" Avenue. The facility is proposed on the west 6 acres of a 10 acre property. The 3.4 acres between the auction yard and the right-of-way will remain vacant. The site plan indicates that the 6 acres will be covered with gravel and no landscaping is proposed. The application states that the proposed use is for "vehicle storage for car auction." Vehicles will be stored at ground level and will not exceed eight feet in height. Therefore, the site can be adequately screened by eight-foot high decorative fencing. The owners of the property also own the adjacent Pick-A-Part dismantling and wrecking yard to the west and will access the facility from a gate to the west. "G" Avenue will also provide access from the south.

8. **Surrounding land uses and setting:** (Briefly describe the project's surroundings.)

The site is currently vacant and is surrounded by existing developments. The properties to the north and south include light industrial and service related uses and are designated Service Commercial (C-3) and Limited Manufacturing (I-1) by the General Plan Land Use map. The card lock gas station exists to the south. The property to the west, which includes a large salvage and wrecking yard, is designated General Manufacturing (I-2). On the opposite side of "I" Avenue to the east is a residential neighborhood designated Rural Residential (RR-20000).

9. **Other public agency whose approval is required** (e.g., permits, financing approval, or participation agreement.) This project is subject to review and approval by the Mojave Desert Air Quality Management District, the Hesperia Water District, Southern California Edison, and Southwest Gas.

Attachment "A" - Site Plan



Attachment "B" - Aerial Photo



**ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:**

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a "Potentially Significant Impact" as indicated by the checklist on the following pages.

<input type="checkbox"/>	Aesthetics	<input type="checkbox"/>	Agriculture & Forestry Resources	<input type="checkbox"/>	Air Quality
<input type="checkbox"/>	Biological Resources	<input type="checkbox"/>	Cultural Resources	<input type="checkbox"/>	Geology / Soils
<input type="checkbox"/>	Greenhouse Gas Emissions	<input type="checkbox"/>	Hazards & Hazardous Materials	<input type="checkbox"/>	Hydrology / Water Quality
<input type="checkbox"/>	Land Use / Planning	<input type="checkbox"/>	Mineral Resources	<input type="checkbox"/>	Noise
<input type="checkbox"/>	Population / Housing	<input type="checkbox"/>	Public Services	<input type="checkbox"/>	Recreation
<input type="checkbox"/>	Transportation / Traffic	<input type="checkbox"/>	Utilities / Service Systems	<input type="checkbox"/>	Mandatory Findings of Significance

**DETERMINATION:** (Completed by the Lead Agency)

On the basis of this initial evaluation:

<input type="checkbox"/>	I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.	"De minimis"
<input checked="" type="checkbox"/>	I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.	
<input type="checkbox"/>	I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.	
<input type="checkbox"/>	I find that the proposed project MAY have a "potentially significant impact" or "potentially significant unless mitigated" impact on the environment, but at least one effect 1) has been adequately analyzed in an earlier document pursuant to applicable legal standards, and 2) has been addressed by mitigation measures based on the earlier analysis as described on the attached sheets. An ENVIRONMENTAL IMPACT REPORT is required, but it must analyze only the effects that remain to be addressed.	
<input type="checkbox"/>	I find that although the proposed project could have a significant effect on the environment, because all potentially significant effects (a) have been analyzed adequately in an earlier EIR or NEGATIVE DECLARATION pursuant to applicable standards, and (b) have been avoided or mitigated pursuant to that earlier EIR or NEGATIVE DECLARATION, including revisions or mitigation measures that are imposed upon the project, nothing further is required.	

  
 \_\_\_\_\_  
 Signature  
 Daniel S. Alcaayaga, AICP, Senior Planner, Hesperia Planning Division

\_\_\_\_\_  
 Date  
 7-19-11

**EVALUATION OF ENVIRONMENTAL IMPACTS:**

1. A brief explanation is provided for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites in the parentheses following each question. A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g., the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g., the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).
2. All answers must take account of the whole action involved, including off-site as well as on-site, cumulative as well as project-level, indirect as well as direct, and construction as well as operational impacts.
3. Once the lead agency has determined that a particular physical impact may occur, then the checklist answers must indicate whether the impact is potentially significant, less than significant with mitigation, or less than significant. "Potentially Significant Impact" is appropriate if there is substantial evidence that an effect may be significant. If there are one or more "Potentially Significant Impact" entries when the determination is made, an EIR is required.
4. "Negative Declaration: Less Than Significant With Mitigation Incorporated" applies where the incorporation of mitigation measures has reduced an effect from "Potentially Significant Impact" to a "Less Significant Impact." The lead agency must describe the mitigation measures, and briefly explain how they reduce the effect to a less than significant level (mitigation measures from Section XVII, "Earlier Analyses," may be cross-referenced).
5. Earlier analyses may be used where, pursuant to the tiering, program EIR, or other CEQA process, an effect has been adequately analyzed in an earlier EIR or negative declaration. Section 15063(c)(3)(D). In this case, a brief discussion should identify the following:
  - a. Earlier Analysis Used. Identify and state where they are available for review.
  - b. Impacts Adequately Addressed. Identify which effects from the above checklist were within the scope of and adequately analyzed in an earlier document pursuant to applicable legal standards, and state whether such effects were addressed by mitigation measures based on the earlier analysis.
  - c. Mitigation Measures. For effects that are "Less than Significant with Mitigation Measures Incorporated," describe the mitigation measures which were incorporated or refined from the earlier document and the extent to which they address site-specific conditions for the project.
6. Lead agencies are encouraged to incorporate into the checklist references to information sources for potential impacts (e.g., general plans, zoning ordinances). Reference to a previously prepared or outside document should, where appropriate, include a reference to the page or pages where the statement is substantiated.
7. Supporting information sources: A source list should be attached, and other sources used or individuals contacted should be cited in the discussion.
8. This is only a suggested form, and lead agencies are free to use different formats; however, lead agencies should normally address the questions from this checklist that are relevant to a project's environmental effects in whatever format is selected.
9. The explanation of each issue should identify:
  - a. The significance criteria or threshold, if any, used to evaluate each question; and
  - b. The mitigation measure identified, if any, to reduce the impact to less than significance.

I. AESTHETICS. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Have a substantial adverse effect on a scenic vista (1)?				X
b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway (1 & 2)?				X
c) Substantially degrade the existing visual character or quality of the site and its surroundings (1 & 4)?				X
d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area (7)?			X	

**Comments.**

The site is currently vacant and is surrounded by existing developments. The site was previously disturbed when the adjacent developments to the west and south were graded. These parcels, including the project parcel, were originally on one property (1). In addition, the area surrounding the site is developed and the site is not considered a scenic resource (3). The site contains a frontage on "I" Avenue. This roadway is not a scenic highway or is the site in close proximity to any scenic resources or historic buildings (3 & 7). Therefore, the site does not constitute a scenic resource (1).

Development of the site will not have an adverse impact to the aesthetics of the area. The development is subject to the Development Code building setback regulations and outdoor storage fencing standards (5), which limit the building height and provide for minimum yard, maximum floor area ratio and architectural standards as well as outdoor storage screening as implemented through the conditional use permit review process. Consequently, development of the proposed car sales/auction facility will not have a significant negative impact upon the visual character or quality of the area (4).

The proposed use is consistent with the Limited Manufacturing (I-1) General Plan Land Use designation, which allows similar uses with approval of a conditional use permit (6). The Environmental Impact Report (EIR) for the 2010 General Plan Update addressed development to the maximum build-out of the General Plan (7). This project is consistent with the General Plan and the project site is not adjacent to sensitive land uses. Further, any light which faces a residentially designated area shall be hooded and directed downward. Based upon these regulations, the use will not adversely affect day or nighttime views in the area. Therefore, approval of the proposed use will not have a negative impact upon aesthetics.

II. AGRICULTURE AND FOREST RESOURCES. In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and State Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. In determining whether impacts to forest resources, including timberland, are significant environmental effects, lead agencies may refer to information compiled by the California Department of Forestry and Fire Protection regarding the state's inventory of forest land, including the Forest Range Assessment Project and the Forest Legacy Assessment Project; and forest carbon measurement methodology provided in Forest Protocols adopted by the California Air Resources Board. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact

a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use (8)?				X
b) Conflict with existing zoning for agricultural use, or a Williamson Act contract (9)?				X
c) Conflict with existing zoning for, or cause rezoning of forest land (as defined in Public Resources Code Section 12220(g)), timberland (as defined by Public Resources Code Section 4526), or timberland zoned Timberland Production (as defined by Government Code Section 51104(g)) (9 & 10)?				X
d) Result in the loss of forest land or conversion of forest land to non-forest use (1 & 10)?				X
e) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use or conversion of forest land to non-forest use (8 & 10)?				X

**Comments.**

The project site has been partially disturbed, and is not presently, nor does it have the appearance of previous agricultural uses. Additionally, the site does not contain any known unique agricultural soils. Based on the lack of neither past agricultural uses nor designated agricultural soils on the project site, it is concluded that the project will not result in significant adverse impacts to agriculture or significant agricultural soils.

The soil at this location is classified by the U.S. Soil Conservation Service as *Bryman Loamy Fine Sand, five to nine percent slopes*. This soil is limited by high soil blowing hazard, high water intake rate, and moderate to high available water capacity (8). The proximity of industrial uses is further evidence that the site is not viable for agriculture. The U.S. Department of Agriculture, Soil Conservation Service (SCS) Soil Survey of San Bernardino County California Mojave River Area states that "Urban and built-up land and water areas cannot be considered prime farmland..." The project is located within an urbanized area which, according to the SCS, is not considered prime farmland. The site is also not within the area designated by the State of California as "unique farmland (8)."

The City of Hesperia General Plan does not designate the site for agricultural use nor is the land within a Williamson Act contract. In fact, the project site is General Plan designated Limited Manufacturing (I-1) (9). Therefore, this project has no potential to be used for agriculture.

The City and its Sphere Of Influence (SOI) is located within the Mojave bioregion, primarily within the urban and desert land use classes (10). The southernmost portions of the City and SOI contain a narrow distribution of land within the shrub and conifer woodland bioregions. These bioregions do not contain sufficient forest land for viable timber production and are ranked as low priority landscapes (11). The project site is located in a central portion of the City in the urban area and is substantially surrounded by urban development (1). Since the site is not forested, this project will not have an impact upon forest land or timberland.

<b>III. AIR QUALITY.</b> Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Conflict with or obstruct implementation of the applicable air quality plan (12, 13 & 14)?				X

b) Violate any air quality standard or contribute substantially to an existing or projected air quality violation (12, 13 & 14)?			X	
c) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors) (12, 13 & 14)?		X		
d) Expose sensitive receptors to substandard pollutant concentrations (4, 12 & 13)?		X		
e) Create objectionable odors affecting a substantial number of people (1, 4, 12 & 13)?			X	

**Comments.**

The proposed car sales/auction facility is consistent with the General Plan. Since the Mojave Desert Air Quality Management District (MDAQMD) basis its plan on the of local jurisdictions’ land use plans, the use is consistent with the MDAQMD plan (14). In addition, the applicant proposes the site to be covered with gravel. Staff is recommending a condition of approval require the site to be fully paved (61). The applicant is appealing this condition, stating that paving the entire site is not required by law. Nevertheless, either paving or graveling the site will limit dust issues from occurring. There are no odors that will be generated by the proposed use. Inasmuch as this project is consistent with the General Plan Land Use Plan, no additional impact upon air resources beyond that previously analyzed would occur. Consequently, the proposed development will not have a significant negative impact upon air quality, with imposition of mitigation measures.

The General Plan Update and its Environmental Impact Report (EIR) addresses the impact of build-out in accordance with the Land Use Plan, with emphasis upon the impact upon sensitive receptors (12 & 13). Sensitive receptors refer to land uses and/or activities that are especially sensitive to poor air quality. Sensitive receptors typically include homes, schools, playgrounds, hospitals, convalescent homes, and other facilities where children or the elderly may congregate. These population groups are generally more sensitive to poor air quality. The closest sensitive receptors are the occupants of the single-family residential area located approximately 300 feet to the east, across I Avenue. Project emissions will be limited to the vehicles operated by employees, customers, and the delivery trucks (4). The proposed use is located of sufficient distance not to expose residents to substandard pollutant concentrations.

Ozone (national and state) and PM<sub>10</sub> (national) are air pollutants in a nonattainment status. The Mojave Desert Air Quality Management District (MDAQMD) has published a number of studies that demonstrate that the Mojave Desert Air Basin (MDAB) can be brought into attainment for particulate matter and ozone, if the South Coast Air Basin (SCAB) achieves attainment under its adopted Air Quality Management Plan. The High Desert and most of the remainder of the desert has been in compliance with the federal particulate standards for the past 15 years (13). The ability of MDAQMD to comply with ozone ambient air quality standards will depend upon the ability of SCAQMD to bring the ozone concentrations and precursor emissions into compliance with ambient air quality standards (12 & 13). All uses identified within the Hesperia General Plan are classified as area sources by the MDAQMD (14). Programs have been established in the Air Quality Attainment Plan which addresses emissions caused by area sources.

The General Plan Update identifies large areas where future residential, commercial, industrial, and institutional development will occur. The GPUEIR analyzed the impact to air quality upon build-out of the General Plan. Based upon this analysis, the City Council adopted a finding of a Statement of Overriding Considerations dealing with air quality impacts (15). As part of the General Plan Update Environmental Impact Report (GPUEIR), the impact of industrial development to the maximum allowable intensity permitted by the Land Use Plan was analyzed.

IV. BIOLOGICAL RESOURCES. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U. S. Fish and Wildlife Service (16)?				X
b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, and regulations or by the California Department of Fish and Game or U. S. Fish and Wildlife Service (1 & 16)?				X
c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means (1 & 16)?				X
d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites (1 & 16)?		X		
e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance (1, 16 & 17)?		X		
f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan (16 & 18)?				X

**Comments.**

As the site is disturbed, it does not support the Mohave ground squirrel especially, given the very low population levels of the species in the region and proximity to existing development. Further, the project site is outside the area considered suitable habitat for the species (16 & 19).

According to the City’s General Plan, the City does not overlap the 2002 desert tortoise range map and is included in the “no desert tortoise survey area” as mapped in the West Mojave Plan (16). The City does overlap the desert tortoise habitat area mapped in the San Bernardino County General Plan, but is not within any Critical Habitat as designated by the U.S. Fish and Wildlife Service. According to the San Bernardino County General Plan Desert Tortoise Habitat Classifications, the property is designated “Low” and the desert tortoise is not likely to occur in the City, which has been confirmed by over 70 negative project-related surveys that have been completed for the City of Hesperia. None of these surveys resulted in the observation of desert tortoise or desert tortoise sign. Therefore, it is unlikely that desert tortoise exist in the City.

The San Bernardino County General Plan Mojave Ground Squirrel (MGS) layer overlaps the northern portion of the City, but does not include the project property (16). This information is part of the Biotic Resources Overlay Map. The General Plan map layers are provided to give planning guidance for areas that may potentially contain sensitive biological resources. MGS was confirmed in 2005 in the “Oak Hills” wash just north of the City. The project is not within areas designated for the MGS habitat.

The site is also outside the range of the arroyo toad, which has been documented to inhabit a portion of the Rancho Las Flores Specific Plan and adjacent areas (16 & 19). There are not protected plants on

the property, since they were previously removed when grading occurred for adjacent projects originally part of the same site (17). Since the burrowing owl is not sensitive to development and may occupy the site at any time, a mitigation measure requiring another biological survey to determine their presence shall be submitted no more than 30 days prior commencement of grading activities.

The project site is not within the boundary of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan (16). The General Plan Background Technical Report identifies two sensitive vegetation communities (18). These vegetation communities, the Southern Sycamore Alder Woodland and Mojave Riparian Forest communities, exist within the Rancho Las Flores Specific Plan and vicinity (18). The project site is located approximately five miles to the north within the developed portion of the City. Consequently, approval of the conditional use permit will not have an impact upon biological resources, subject to the enclosed mitigation measures.

V. CULTURAL RESOURCES. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Cause a substantial adverse change in the significance of a historical resource as defined in Section 15064.5 (21)?				X
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to Section 15064.5 (21)?		X		
c) Directly or indirectly destroy a unique paleontological resource or site or unique geological feature (21 & 23)?		X		
d) Disturb any human remains, including those interred outside of formal cemeteries (21& 24)?			X	

**Comments.**

The cultural resource sensitivity maps define areas of the City that contain cultural resource sites. These maps designate the project property as “Low” which exhibit 0 to 1 recorded sites per 160 acres exhibited by modern development (21 & 23). The site was previously analyzed and deemed to have no impact for cultural resources. In addition, the site was disturbed when the adjacent developments to the south and west were developed, as they were originally on the same parcel.

The site is not on the list of previously recorded cultural resources (22). This list, which was compiled as part of the 2010 General Plan Update, was compiled from the inventory of the National Register of Historic Properties, the California Historic Landmarks list, the California Points of Historic Interest list, and the California State Resources Inventory for San Bernardino County. Past records of paleontological resources were also evaluated as part of the General Plan. This research was compiled from records at the Archaeological Information Center located at the San Bernardino County Museum. Based upon this review, paleontological resources are not expected to exist on the project site.

In the event that human remains are discovered during grading activities, grading shall cease until the County Coroner has made the necessary findings in accordance with the California Environmental Quality Act (CEQA) (24). Should the Coroner determine that the remains are Native American, the Native American Heritage Commission (NAHC) shall be contacted and the remains shall be handled in accordance with Public Resources Code Section 5097.98. The NAHC has indicated that the City and Sphere of Influence does not contain any sacred lands (25). Consequently, approval of the conditional use permit will not have an impact upon cultural resources subject to this mitigation.

VI. GEOLOGY AND SOILS. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:				
i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42 (26 & 27).				X
ii) Strong seismic ground shaking (26 & 28)?			X	
iii) Seismic-related ground failure, including liquefaction (8 & 26)?				X
iv) Landslides (26)?				X
b) Result in substantial soil erosion or the loss of topsoil (8)?		X		
c) Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse (8 & 26)?				X
d) Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial risks to life or property (8 & 27)?				X
e) Have soils incapable of adequately supporting the use of septic tanks or alternative wastewater disposal systems where sewers are not available for the disposal of wastewater (8 & 27)?				X

**Comments.**

The City and Sphere of Influence (SOI) is near several major faults, including the San Andreas, North Frontal, Cleghorn, Cucamonga, Helendale, and San Jacinto faults (28). The nearest fault to the site is the North Frontal fault, located approximately five miles to the east of the City. The Alquist-Priolo Earthquake Fault Zoning Act prohibits structures designed for human occupancy within 500 feet of a major active fault and 200 to 300 feet from minor active faults (29). The project site is not located within an Alquist-Priolo Earthquake Fault Zone (26, 27 & 28). Further, the site is not in an area which has the potential for landslides, lateral spreading, subsidence, liquefaction, or collapse (27).

The soil at this location is classified by the U.S. Soil Conservation Service as *Bryman Loamy Fine Sand, five to nine percent slopes*. This soil is limited by high soil blowing hazard, high water intake rate, and moderate to high available water capacity (8). During construction, soil erosion will be limited through compliance with an approved erosion control plan in accordance with National Pollution Discharge Elimination System (NPDES) and Storm Water Prevention Plan (SWPP) regulations. Although disturbance of the soil will result in significant soil loss due to wind erosion, the site will be covered with gravel or paved (4 & 61). Grading and compaction will ensure that soil disturbance will not result in significant soil erosion.

The project does not propose any buildings or structures, and therefore, no permanent restroom facilities will be constructed, nor is sewer required (30). The applicant states that no water is needed for this project. A condition of approval requires the site to provide portable restroom facilities and they must be regularly maintained. Waste from the portable restrooms will be required to be removed on a regular basis to prevent waste from contacting the soil. Consequently, approval of the conditional use permit will not have an impact upon geology or soils.

VII. GREENHOUSE GAS EMISSIONS. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment (31)?			X	
b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emission of greenhouse gases (31, 32 & 33)?			X	

**Comments.**

Assembly Bill 32 requires the California Air Resources Board (CARB) to develop regulations and market mechanisms that will ultimately reduce California's greenhouse gas emissions to 1990 levels by 2020. In addition, Senate Bill 97 requires that all local agencies analyze the impact of greenhouse gases under CEQA and task the Office of Planning and Research (OPR) to develop CEQA guidelines "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions..."

On April 13, 2009, OPR submitted to the Secretary for Natural Resources its proposed amendments to the state CEQA Guidelines for greenhouse gas emissions, as required by Senate Bill 97 (Chapter 185, 2007). The Natural Resources Agency forwarded the adopted amendments and the entire rulemaking file to the Office of Administrative Law (OAL) on December 31, 2009. On February 16, 2010, OAL approved the Amendments, which became effective on March 18, 2010 (73). This initial study has incorporated these March 18, 2010 Amendments.

Lead agencies may use the environmental documentation of a previously adopted Plan to determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements of the Plan or mitigation program under specified circumstances. As part of the General Plan Update, the City adopted a Climate Action Plan (CAP) (31). The CAP provides policies along with implementation and monitoring which will enable the City of Hesperia to reduce greenhouse emissions 29 percent below business as usual by 2020, consistent with AB 32 (32).

Development of the proposed car auction facility will result in lower greenhouse gas (GHG) emissions than the industrial uses analyzed by the General Plan Update Environmental Impact Report (GPUEIR) (32 & 33). No buildings will be constructed, reducing the amount of energy which would have been used. Job creation in the City will reduce the number of residents commuting to other communities for work, reducing vehicle miles traveled and resulting in additional GHG reductions. Providing more opportunities for consumers to purchase automobiles locally and by internet will also result in additional reductions.

The proposed use will also result in a substantially reduced number of vehicle trips than was analyzed by the GPUEIR as identified in the Transportation/Traffic Section. Consequently, the impact upon GHG emissions associated with the proposed project is less than significant.

VIII. HAZARDS AND HAZARDOUS MATERIALS. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials (4 & 34)?			X	

b) Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment (4 & 34)?			X	
c) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school (4)?			X	
d) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would create a significant hazard to the public or the environment (1)?				X
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in the project area (18)?				X
f) For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area (36)?				X
g) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan (37)?				X
h) Expose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands (4)?				X

**Comments.**

A conditional use permit will establish a car sales/auction facility on 6 acres. The application states that the proposed use is for “vehicle storage for car auction” and the site plan indicates that the 6 acres will be covered with gravel and no landscaping is proposed. The project site is not listed in any of the following hazardous sites database systems, so it is unlikely that hazardous materials exist on-site:

- National Priorities List [www.epa.gov/superfund/sites/query/basic.htm](http://www.epa.gov/superfund/sites/query/basic.htm). List of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. There are no known National Priorities List sites in the City of Hesperia.
- Site Mitigation and Brownfields Reuse Program Database [www.dtsc.ca.gov/database/Calsites/Index.cfm](http://www.dtsc.ca.gov/database/Calsites/Index.cfm). This database (also known as CalSites) identifies sites that have known contamination or sites that may have reason for further investigation. There are no known Site Mitigation and Brownfields Reuse Program sites in the City of Hesperia.
- Resource Conservation and Recovery Information System [www.epa.gov/enviro/html/rcris/rcris\\_query\\_java.html](http://www.epa.gov/enviro/html/rcris/rcris_query_java.html). Resource Conservation and Recovery Information System is a national program management and inventory system of hazardous waste handlers. There are 53 Resource Conservation and Recovery Act facilities in the City of Hesperia, however, the project site is not a listed site.
- Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS) (<http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm>). This database contains information on hazardous waste sites, potentially hazardous waste sites, and remedial activities across the nation. There is one Superfund site in the City of Hesperia, however, the project site is not located within or adjacent to the Superfund site.
- Solid Waste Information System (SWIS) (<http://www.ciwmb.ca.gov/SWIS/Search.asp>). The SWIS database contains information on solid waste facilities, operations, and disposal sites throughout the State of California. There are three solid waste facilities in the City of Hesperia, however the project site is not listed.
- Leaking Underground Fuel Tanks (LUFT)/ Spills, Leaks, Investigations and Cleanups (SLIC) (<http://geotracker.waterboards.ca.gov/search/>). This site tracks regulatory data about

underground fuel tanks, fuel pipelines, and public drinking water supplies. There are fourteen LUFT sites in the City of Hesperia, six of which are closed cases. The project site is not listed as a LUFT site and there are no SLIC sites in the City of Hesperia.

- There are no known Formerly Used Defense Sites within the limits of the City of Hesperia.  
Formerly Used Defense Sites

<http://hq.environmental.usace.army.mil/programs/fuds/fudsinv/fudsinv.html>.

The site is approximately 1 mile from the nearest school (Encore Academy) at 16955 Lemon Street (1). Any use which includes hazardous waste as part of its operations is prohibited within 500 feet of a school (62). Since the facility is limited in size to 6 acres and the acreage would be used primarily for vehicle auction sales, the project impacts will not pose a significant health threat.

The proposed facility will not conflict with air traffic nor emergency evacuation plans. The site is approximately five miles from the Hesperia Airport to the south and is therefore not within a restricted use zone associated with air operations (36). Consequently, implementation of the project will not cause safety hazards to air operations. The site is also not along an emergency evacuation route or near a potential emergency shelter (37). Consequently, the project will not interfere with emergency evacuation plans.

The project's potential for exposing people and property to fire and other hazards was also examined. The site is located within an urbanized area and is not in an area susceptible to wildland fires. The southernmost and westernmost portions of the City are at risk, due primarily to proximity to the San Bernardino National Forest (38 & 43). No buildings are proposed and vehicle fluids will be handled or stored on the property (34). Therefore, the project creates no impact.

IX. HYDROLOGY AND WATER QUALITY. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Violate any water quality standards or waste discharge requirements (39)?			X	
b) Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted) (41 & 42)?			X	
c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which would result in substantial erosion or siltation on- or off-site (44)?			X	
d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site (44)?			X	
e) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff (44)?			X	
f) Otherwise substantially degrade water quality (44)?			X	

g) Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary of Flood Insurance Rate Map or other flood hazard delineation map <b>(4 &amp; 45)</b> ?				X
h) Place within a 100-year flood hazard area structures which would impede or redirect flood flows <b>(4, 45 &amp; 54)</b> ?				X
i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam <b>(44 &amp; 53)</b> ?				X
j) Inundation by seiche, tsunami, or mudflow <b>(46)</b> ?				X

#### Comments.

Development of the site will disturb more than one-acre of land area. Consequently, the project will be required to file a Notice of Intent (NOI) and obtain a general construction National Pollution Discharge Elimination System (NPDES) permit prior to land disturbance **(39)**. Issuance of a Storm Water Pollution Prevention Plan (SWPPP) will also be required, which specifies the Best Management Practices (BMP) that will be implemented to prevent construction pollutants from contacting storm water **(40)**. Obtaining the NPDES and implementing the SWPPP is required by the State Water Resources Control Board (WRCB) and the California Regional Water Quality Control Board (RWQCB). These are mandatory and NPDES and SWPPP have been deemed adequate by these agencies to mitigate potential impacts to water quality during project construction.

The drainage issues were addressed previously when the properties to the west and south were constructed. There is a local facility that runs along the south portion of the property. However, drainage improvements currently exist to convey drainage flows through the property and into "I" Avenue. The site plan indicates that the 6 acres will be covered with gravel and no landscaping is proposed. As a condition of approval, staff is requesting the site be fully paved in order to help capture and filter car fluids from storm water run-off **(61)**. The applicant is appealing this condition to the Planning Commission stating that the facility does not generate any additional storm water run-off and site is not required to be paved by law. The applicant has stated that drainage issues were previously addressed when developing the project to the west. If paving is required, however, the applicant is required to provide a drainage system and retention facilities to ensure that no additional storm water runoff is created. Consequently, the development may change absorption rates and potential drainage patterns, as well as affect the amount of surface water runoff **(4)**. Therefore, the project shall retain the drainage created on-site beyond that which has occurred historically within an approved drainage system in accordance with City of Hesperia Resolution 89-16 **(44)**.

The site is not within a Flood Zone, based upon the latest Flood Insurance Rate Map **(54)**. The City is downstream of three dams. These are the Mojave Forks, Cedar Springs, and Lake Arrowhead Dams. In the event of a catastrophic failure of one or more of the dams, the project site would not be inundated by floodwater **(44 & 53)**. The areas most affected by a dam failure are located in the low lying areas of southern Rancho Las Flores, most of the Antelope Valley Wash, and properties near the Mojave River.

The City of Hesperia is located just north of the Cajon Pass at an elevation of over 2,500 feet above sea level, which is over 60 miles from the Pacific Ocean. As such, the City is not under threat of a tsunami, otherwise known as a seismic sea wave **(46)**. Similarly, the potential for a seiche to occur is remote, given the limited number of large water bodies within the City and its sphere. A seiche would potentially occur only in proximity to Silverwood Lake, Hesperia Lake and at recharge basins **(46)**. In addition, the water table is significantly more than 50 feet from the surface. Therefore, the mechanisms necessary to create a mudflow; a steep hillside with groundwater near the surface, does not exist at this location **(8)**.

The Mojave Water Agency (MWA) has adopted a regional water management plan for the Mojave River basin. The Plan references a physical solution that forms part of the Judgment in City of Barstow, et. al. vs. City of Adelanto, et. al., Riverside Superior Court Case No. 208548, an adjudication of water rights in the Mojave River Basin Area (Judgment). Pursuant to the Judgment and its physical solution, the overdraft in the Mojave River Basin is addressed, in part, by creating financial mechanisms to import necessary supplemental water supplies. The MWA has obligated itself under the Judgment “to secure supplemental water as necessary to fully implement the provisions of this Judgment.” Based upon this information the project will not have a significant impact on water resources not already addressed in the Judgment or the City’s Urban Water Management Plan (UWMP) adopted in 1998. Furthermore, a letter dated May 21, 1997 from the MWA’s legal counsel confirmed for the City that the physical solution stipulated to by the Hesperia Water District provides the mechanism to import additional water supplies into the basin **(41)**.

The Hesperia Water District (HWD) is the water purveyor for the City and much of its Sphere Of Influence (SOI). The UWMP indicates that the City is currently using less than half of its available water supply and that supply is projected to exceed demand beyond the year 2030 **(42)**. The HWD has maintained a water surplus through purchase of water transfers, allocations carried over from previous years, and recharge efforts. Therefore, the impact upon hydrology and water quality associated with the conditional use permit is considered less than significant.

<b>X. LAND USE AND PLANNING.</b> Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Physically divide an established community <b>(1)</b> ?				X
b) Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect <b>(47)</b> ?				X
c) Conflict with any applicable habitat conservation plan or natural community conservation plan <b>(18)</b> ?				X

**Comments.**

The site is currently vacant and within an industrial area **(1)**. Therefore, the use will not physically divide an established community. The proposed vehicle auction sales/storage facility is consistent with the existing General Plan, but requires approval of a conditional use permit **(47)**. The project site is not within the boundary of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan. The General Plan Background Technical Report identifies two sensitive vegetation communities **(18)**. These vegetation communities, the Southern Sycamore Alder Woodland and Mojave Riparian Forest community, exist within the Rancho Las Flores Specific Plan and vicinity **(18)**. The project site is located approximately five miles north of this specific plan within the developed portion of the City. Therefore, development of the project would have a less than significant impact upon land use and planning.

XI. MINERAL RESOURCES. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state (48)?				X
b) Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan (48)?				X

**Comments.**

According to data in the Conservation Element of the City’s General Plan, no naturally occurring important mineral resources occur within the project site (48). Known mineral resources within the City and sphere include sand and gravel, which are prevalent within wash areas and active stream channels. Sand and gravel is common within the Victor Valley. Although the project contains a wash, which contains sand and gravel, the mineral resources within the property are not unique locally or regionally and need not be preserved. Consequently, the proposed conditional use permit would not have an impact upon mineral resources.

XII. NOISE. Would the project result in:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies (1, 4 & 49)?			X	
b) Exposure of persons to or generation of excessive groundborne vibration or groundborne noise levels (50 & 51)?			X	
c) A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project (52)?			X	
d) A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project (52)?			X	
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels (36)?				X
f) For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels (36)?				X

**Comments.**

Approval of the proposed conditional use permit will result in construction and operational noise, mostly associated with trucks and vehicular traffic to and from the site. According to the General Plan, the majority of noise sources within the City are mobile sources, which include motor vehicles and aircraft (49). Freeways, major arterials, railroads, airports, industrial, commercial, and other human activities contribute to noise levels. Noises associated with this type of project will be mostly from traffic caused by arriving and departing vehicles (employees, customers, vehicle service, and deliveries).

There will be construction vehicle on-site during grading activities. Construction noise levels associated with any future construction activities will be slightly higher than the existing ambient noise levels in the vicinity of the project site. Noise generated by construction equipment, including trucks, graders, and backhoes can reach high levels and is typically one of the sources for the highest potential noise impact of a project. However, the construction noise would subside once construction is completed. The proposed project must adhere to the requirements of the City of Hesperia Noise Ordinance (50). The Noise Ordinance contains an exemption from the noise level regulations during grading and construction activities occurring between 7:00 A.M. and 7:00 P.M., Monday through Saturday, except federal holidays.

Certain activities particularly sensitive to noise include sleeping, studying, reading, leisure, and other activities requiring relaxation or concentration, which will not be impacted. Hospitals and convalescent homes, churches, libraries, and childcare facilities are also considered noise-sensitive uses as are residential and school uses. The nearest sensitive uses to the site are the single-family residences located 300 feet to the east. Due to the size of the project and distance from the nearest residential area, the project will not create impacts to sensitive receptors.

Operation of the vehicle auction sales/storage facility will create additional noise associated with vehicular traffic to and from the yard by trucks as well as by the passenger vehicles operated by employees and customers. The General Plan Update Environmental Impact Report (GPUEIR) accounts for the usual truck traffic in this area caused by industrial activities. The limited number of vehicle and truck trips will result in a minor increase in traffic (57). Staff reviewed the existing noise level and noise level at build-out of the City consistent with the General Plan (52) to make an assumption regarding the potential noise increase along "I" Avenue adjacent to the project site. It is expected that the existing and projected noise level at this location at build-out will be lower than build-out. Since the use will not create a significant increase in vehicular traffic, it is expected that noise from the street will not exceed 70 dB (A). Therefore, noise mitigation is unnecessary.

The project site is approximately five miles north of the Hesperia Airport. At this distance, the project is not impacted by any safety zones associated with this private airport (36). The project site is even farther from the Southern California Logistics Airport (SCLA) and the Apple Valley Airport and will not be affected by any safety zones for these airports.

The General Plan Update identifies areas where future residential, commercial, industrial, and institutional development will occur. The GPUEIR analyzed the noise impact upon build-out of the General Plan to the maximum allowable intensity permitted by the Land Use Plan. Based upon the analysis, the City Council adopted a finding of a Statement of Overriding Considerations dealing with noise impacts (15). Inasmuch as this project is consistent with the General Plan Land Use Plan, no additional noise impact beyond that previously analyzed would occur.

XIII. POPULATION AND HOUSING. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure) (4)?			X	
b) Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere (1)?				X

c) Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere (1 & 9)?				X
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**Comments.**

The proposed project is consistent with the current Limited Manufacturing (I-1) General Plan Land Use designation, with approval of a conditional use permit (6 & 9). Establishment of the proposed auction sales/storage facility will not create a direct increase in the demand for housing. The projects indirect impact upon population growth is very small. Further, the site is in close proximity to water and other utility systems (30). As a result, development of the project would not require significant extension of major improvements to existing public facilities. The site is vacant and is identified for development of industrial land uses (1 & 9). Therefore, the project will not displace any existing housing, necessitating the construction of replacement housing elsewhere.

The population in Hesperia has increased mainly because of the availability of affordable housing in the high desert and its proximity to the job-rich areas of the Inland Empire. There is currently more demand for commercial services and jobs than there are services and jobs available in Hesperia. As a result, the proposed development will not induce substantial population growth as the development will provide much needed services and jobs for the current population in the High Desert. Based upon the limited size and specialization of the use proposed, development of the project would have a less than significant impact upon population and housing.

<b>XIV. PUBLIC SERVICES.</b>	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public services (1 & 2):			X	
Fire protection? (1 & 2)			X	
Police protection? (1 & 2)			X	
Schools? (1 & 2)			X	
Parks? (1 & 2)			X	
Other public facilities? (1 & 2)			X	

**Comments.**

The proposed project will create a very slight increase in demand for public services (2). "I" Avenue has a 12-inch diameter water line, which will provide adequate water pressure for domestic and fire flow (30). A 12-inch diameter sewer line exist along "I" Avenue and the project is not required to connect to sewer as no buildings are proposed. The applicant states the project does necessitate access to City water (60). The 6 acre car auction facility is located 260 feet east of I Avenue. Since the 3.4 acres between the auction yard and the right-of-way will remain vacant, no street improvements are required along "I" Avenue.

No building or structure is proposed at this time, and therefore, no payment of development impact fees is required. If a building is proposed, development impact fees will be assessed at the time that building permits are issued for construction of the site (59). These fees are designed to ensure that appropriate levels of capital resources will be available to serve any future development. Consequently, satisfactory levels of public services will be maintained. Therefore, the proposed conditional use permit will not have a significant impact upon public services.

XV. RECREATION.	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated (9)?				X
b) Does the project include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment (4)?				X

**Comments.**

As evaluated previously, approval of the conditional use permit will induce population growth indirectly, as evidenced by the limited vehicle traffic to be generated by the use identified within the Transportation/Traffic Section. The proposed vehicle auction sales/storage facility will not include any recreational facilities (4). Therefore, the proposed conditional use permit will have a small indirect impact upon recreation.

XVI. TRANSPORTATION / TRAFFIC. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Conflict with an applicable plan, ordinance or policy establishing measures of effectiveness for the performance of the circulation system, taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit (63)?				X
b) Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways (64)?				X
c) Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks (36)?				X
d) Substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment) (1 & 61)?				X
e) Result in inadequate emergency access (4)?				X

f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities (64 & 65)?				X
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**Comments.**

The proposed car auction/sales facility can accommodate approximately 1,120 vehicles. Staff's estimate is based on area of 9' by 18' for each vehicle; and three, 26-foot wide drive aisles in each direction on the 6 acre site. Vehicles displayed and stored on the premises are generally from police impounds or bank repos. These vehicles will be purchased by used car sales dealerships and individuals for personal use.

The facility is not expected to generate a substantial amount of traffic; and not generate traffic more than expected in the General Plan at build-out. Vehicle trips will be generated by customers, employees, and delivery trucks. Similar to Pick-A-Parts, the facility will be open every day from 7:30 am to 6 pm. Generally, auctions are held on limited days and hours; and customer vehicle trips for auctions are generated during off-peak hours. Vehicles are also sold and auctioned by internet, which reduces the number of trips generated. The operators of Pick-A-Part will operate the facility with approximately 2 persons employed by the proposed facility.

Parking is proposed on the Pick-A-Part site located to the west. Customers will be transported by golf cart from the parking lot near Santa Fe Avenue to the proposed facility. Although primary access will be from Santa Fe Avenue, travelers will also utilize Catalpa Street, Eucalyptus Street and "I" Avenue to access the facility (63 &64). In addition, G Avenue will be used by the facility for dropping off vehicles. These streets are currently paved and will be improved, at build-out, to provide adequate access to this area.

The 6 acre car auction facility is located 260 feet east of "I" Avenue. Since the 3.4 acres between the auction yard and the right-of-way will remain vacant, no street improvements will be required along "I" Avenue, although, the frontage of the property presently has partial street improvements. The rest of "I" Avenue will be improved along the property frontage when the 3.4 acres is developed.

The site design has been evaluated by both the City and the San Bernardino County Fire Department. The applicant has stated that emergency access can be provided from the Pick-A-Part site to the west (4). The site can also be accessed from "G" Avenue through a possible easement on Goodspeed's property to the south. Both of these access points are feasible provided the site has an approved turn-around. Therefore, the proposed project's impact upon traffic and transportation systems will be less than significant.

The project site is located approximately 5 miles from the Hesperia Airport and is not within an airport safety zone (36). Consequently, the project will not cause a change in air traffic patterns nor an increase in traffic levels or location. The project site will also not impact the air traffic patterns for the Southern California Logistics Airport, nor the Apple Valley Airport.

The General Plan Update identifies areas where future residential, commercial, industrial, and institutional development will occur. The GPUEIR analyzed the impact upon transportation at build-out of the General Plan to the maximum allowable density permitted by the Land Use Plan. Based upon the analysis, the City Council adopted a finding of a Statement of Overriding Considerations dealing with transportation impacts (15). As a result, the impact of the proposed conditional use permit upon transportation facilities is considered to be less than significant.

XVII. UTILITIES AND SERVICE SYSTEMS. Would the project:	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board (66)?				X
b) Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects (67 & 68)?			X	
c) Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects (69)?			X	
d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed (41 & 42)?			X	
e) Result in a determination by the wastewater treatment provider which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments (67 & 68)?				X
f) Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs (70 & 72)?			X	
g) Comply with federal, state, and local statutes and regulations related to solid waste (71)?			X	

**Comments.**

The proposed project will not include restroom facilities that are connected to sewer. As a condition of approval, the project is required to have at least one portable restroom and it must be maintained regularly. There are water lines in "G" and "I" Avenues. However, the application states that the proposed use is for "vehicle storage for car auction." The site plan indicates that the 6 acres will be covered with gravel and no landscaping is proposed. If water is used, however, it is expected to be minimal and the project would need to comply with the requirements of Lahontan Regional Water Quality Control Board (67). The project will not result in any substantial wastewater to be treated by the Victor Valley Wastewater Reclamation Authority.

As part of construction of the project and if the site is paved, the City requires installation of an on-site retention facility which will retain any additional storm water created by the impervious surfaces developed as part of the project (69). Consequently, based upon a 100-year storm event, development of this project will not increase the amount of drainage impacting downstream properties beyond that which would occur prior to its development. Additionally, the retention facility will contain a filtration system preventing contamination of the environment.

The Mojave Water Agency (MWA) has adopted a regional water management plan for the Mojave River basin. The Plan references a physical solution that forms part of the Judgment in City of Barstow, et. al. vs. City of Adelanto, et. al., Riverside Superior Court Case No. 208548, an adjudication of water rights in the Mojave River Basin Area (Judgment). Pursuant to the Judgment and its physical solution, the overdraft in the Mojave River Basin is addressed, in part, by creating financial mechanisms to import necessary supplemental water supplies. The MWA has obligated itself under the Judgment "to secure supplemental water as necessary to fully implement the provisions of this Judgment." Based upon this information the project will not have a significant impact on water resources not already addressed in the Judgment or the City's Urban Water Management Plan (UWMP) adopted in 1998. Furthermore, in a letter

dated May 21, 1997 from the MWA’s legal counsel confirmed for the City that the physical solution stipulated to by the Hesperia Water District provides the mechanism to import additional water supplies into the basin (41).

The Hesperia Water District (HWD) is the water purveyor for the City and much of its Sphere Of Influence (SOI). The UWMP evidences that the City is currently using less than half of its available water supply and that supply is projected to exceed demand beyond the year 2030 (42). The HWD has maintained a surplus water supply through purchase of water transfers, allocations carried over from previous years, and recharge efforts.

The City is in compliance with the California Integrated Waste Management Act of 1989, which requires that 50 percent of the solid waste within the City be recycled. Currently, approximately 69 percent of the solid waste within the City is being recycled (70 & 72). About 168 tons of solid waste is disposed at the landfill and 243 tons are recycled of the total solid waste produced by the City per day. The waste disposal hauler for the City has increased the capacity of its Materials Recovery Facility (MRF) to 600 tons per day in order to accommodate future development. Therefore, the project will not cause a significant impact upon utilities and service systems.

<b>VIII. MANDATORY FINDINGS OF SIGNIFICANCE.</b>	Potentially Significant Impact	Less Than Significant With Mitigation	Less Than Significant Impact	No Impact
a) Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?		X		
b) Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.)			X	
c) Does the project have environmental effects which will cause substantial adverse affects on human beings, either directly or indirectly?		X		

**Comments.**

Based upon the analysis in this initial study, a Negative Declaration may be adopted. Development of this project will have a minor effect upon the environment. These impacts are only significant to the degree that mitigation measures are necessary.

<b>XIV. EARLIER ANALYSES.</b>
<p>Earlier analyses may be used where, pursuant to the tiering, program EIR, or other CEQA process, one or more effects have been adequately analyzed in an earlier EIR or negative declaration. Section 15063 (c)(3)(D). In this case a discussion identifies the following:</p> <p>The Certified General Plan Environmental Impact Report.</p>

a) <b>Earlier analyses used.</b> Earlier analyses are identified and stated where they are available for review.
b) <b>Impacts adequately addressed.</b> Effects from the above checklist that were identified to be within the scope of and adequately analyzed in an earlier document pursuant to applicable legal standards are noted with a statement whether such effects were addressed by mitigation measures based on the earlier analysis.
a) <b>Mitigation measures.</b> For effects that are "Less than Significant with Mitigation Incorporated," describe the mitigation measures which are incorporated or refined from the earlier document and the extent to which they address site-specific conditions for the project are described.

**The following mitigation measures are recommended as a function of this project.**

1. A pre-construction survey for the burrowing owl shall be conducted by a City approved, licensed biologist, no more than 30 days prior to commencement of grading.

**Authority:** Public Resources Code Sections 21103 and 21107.

**REFERENCES**

- (1) Aerial photos of the City of Hesperia flown taken February, 2010 and on-site field investigations conducted in July 2011.
- (2) Section 3.13 (Public Services) of the 2010 City of Hesperia General Plan Update Environmental Impact Report (GPUEIR), pages 3.13-1 thru 13-16.
- (3) Section 3.0 of the 2010 City of Hesperia General Plan Open Space Element, pages OS-13 thru OS-27.
- (4) Application and related materials for Conditional Use Permit CUP11-10195.
- (5) Sections 16.16.550 and 16.16.555 of the Hesperia Municipal Code.
- (6) Table 1 of Section 16.16.465 of the Hesperia Municipal Code.
- (7) Section 3.1.4 of the 2010 City of Hesperia General Plan Update Environmental Impact Report (GPUEIR), page 3.1-6.
- (8) United States Soil Conservation Service Soil Survey of San Bernardino County, California, Mojave River Area, Pages 23 thru 24 and Map Sheet No. 31.
- (9) 2010 Official Map showing the General Plan Land Use of the City of Hesperia and its sphere of influence.
- (10) 2010 Fire and Resource Assessment Program (FRAP), prepared by the California Department of Forestry and Fire Protection, Figure 1.5.
- (11) 2010 Fire and Resource Assessment Program (FRAP), prepared by the California Department of Forestry and Fire Protection, Figure 1.1.4.
- (12) Air Quality Section of the 2010 City of Hesperia General Plan Conservation Element, pages CN-47 thru CN-51.
- (13) Section 3.3 (Air Quality) of the 2010 City of Hesperia General Plan Update Environmental Impact Report (GPUEIR), pages 3.3-1 thru 3.3-30.
- (14) Mojave Desert Air Quality Management District, Federal Particulate Matter (PM10) Attainment Plan, July 31, 1995.
- (15) Statement of overriding considerations for the 2010 City of Hesperia General Plan Update Environmental Impact Report (GPUEIR).

- (16) Biological Resources Assessment, Technical Report for the Hesperia General Plan. Prepared by: Michael Brandman Associates. February 25, 2010
- (17) Chapter 16.24 of the City of Hesperia Municipal Code, Article II. Desert Native Plant Protection.
- (18) Section 3.2 of the 2010 City of Hesperia General Plan Update Conservation Element background technical report, pages 8 and 9.
- (19) Section 3.3.2 of the 2010 City of Hesperia General Plan Update Conservation Element background technical report, pages 14 thru 25.
- (20) 1988 United States Bureau of Land Management California Desert Conservation Area map.
- (21) Technical Background Report in Support of the Cultural Resource Element: Hesperia General Plan Update. Prepared by: Michael Brandman Associates. March 19, 2010
- (22) Section 5 of the 2010 City of Hesperia General Plan Update Cultural Resource Element background technical report, pages 21 thru 53.
- (23) Cultural Resource Sensitivity Map Exhibit 5b of the 2010 City of Hesperia General Plan Update Cultural Resource Element background technical report.
- (24) Section 6 of the 2010 City of Hesperia General Plan Update Cultural Resource Element background technical report, pages 62.
- (25) Letter dated September 25, 2006 from Dave Singleton of the Native American Heritage Commission within Appendix B of the 2010 City of Hesperia General Plan Update Cultural Resource Element background technical report.
- (26) Section 3.0 of the 2010 City of Hesperia General Plan Safety Element, pages SF-5 thru SF-8.
- (27) Exhibit SF-1 of Section 3.0 of the 2010 City of Hesperia General Plan Safety Element, page SF-9.
- (28) Figure 1-2 of Section 1.2 of the 2010 City of Hesperia General Plan Update Safety Element background technical report, page 1-5.
- (29) Chapter 1 of the 2010 City of Hesperia General Plan Update Safety Element background technical report, page 1-12.
- (30) Current Hesperia water and sewer line atlas, page K-13S.
- (31) Section 1 of the 2010 City of Hesperia General Plan Update Climate Action Plan, page 1.
- (32) 2010 City of Hesperia General Plan Update Climate Action Plan.
- (33) Table 5 of Section 3 of the 2010 City of Hesperia General Plan Update Climate Action Plan, page 20 and 21.
- (34) Hazardous Materials Section of the 2010 Hesperia General Plan Safety Element, page SF-32.
- (35) Section 5 of the 2010 City of Hesperia General Plan Update Safety Element background technical report, pages 5-4 and 5-5.
- (36) 2010 City of Hesperia General Plan Update Land Use Element, pages LU-71 and LU-72.
- (37) Disaster Preparedness, Response, and Recovery Section of the 2010 Hesperia General Plan Safety Element, pages SF-37 thru SF-48.
- (38) Fire Hazard Section of the 2010 Hesperia General Plan Update Environmental Impact Report (GPUEIR), page 3.7-9.
- (39) Section 3.8.3 of the 2010 Hesperia General Plan Update Environmental Impact Report (GPUEIR), page 3.8-13.
- (40) Section 3.8.3 of the 2010 Hesperia General Plan Update Environmental Impact Report (GPUEIR), page 3.8-15.

- (41) Section 3.0 of the 2010 City of Hesperia General Plan Update Conservation Element, pages CN-7 thru CN-10.
- (42) Mojave Water Agency letter dated March 27, 1996.
- (43) Exhibit SF-3 of the 2010 City of Hesperia General Plan Update Safety Element, page SF-21.
- (44) Flooding Hazards Section of the 2010 City of Hesperia General Plan Update Safety Element, pages SF-16 thru SF-18.
- (45) 1996 Hesperia Master Plan of Drainage Volume III, identifying future improvements for the I-01 drainage facility.
- (46) Section 3.0 of the 2010 City of Hesperia General Plan Update Safety Element, page SF-8.
- (47) Table 1 of Section 16.16.465 of the Hesperia Municipal Code, page 419.
- (48) 2010 City of Hesperia General Plan Update Conservation Element, page CN-20.
- (49) 2010 City of Hesperia General Plan Update Noise Element, page NS-4.
- (50) Section 16.20.125 of the Hesperia Municipal Code, pages 464 thru 467 and Table NS-5 of Section 2.0 of the 2010 City of Hesperia General Plan Update Noise Element, pages NS-11 and NS-12.
- (51) Table 7 of Section 2.2.1 of the 2010 City of Hesperia General Plan Update Noise Element background technical report, page 22.
- (52) Table 3.11-10 of the 2010 Hesperia General Plan Update Environmental Impact Report (GPUEIR), page 3.11-45.
- (53) Dam Inundation Map within Section 3.2 of the 2010 City of Hesperia General Plan Update Safety Element background technical report, page 3-22.
- (54) FEMA Flood Map within Section 3.1 of the 2010 City of Hesperia General Plan Update Safety Element background technical report, page 3-9.
- (55) Table 8 within Section 2.2 of the 2010 City of Hesperia General Plan Update Noise Element background technical report, page 22.
- (56) Section 2.0 of the 2010 City of Hesperia General Plan Update Noise Element, page NS-13.
- (57) 2007 Trip Generation Manual, Volume III, 7<sup>th</sup> Edition, Institute of Transportation Engineers, page 89.
- (58) 2007 Trip Generation Manual, Volume III, 7<sup>th</sup> Edition, Institute of Transportation Engineers, page 1470
- (59) 1991 City of Hesperia Ordinance 180 entitled "An Ordinance of the City Council of the City of Hesperia, California, Establishing a Development Impact Fee for all New Residential, Commercial, and Industrial Structures" and Resolution No. 2007-110 on November 20, 2007.
- (60) 2007 California Plumbing Code Section 713.4, page 137.
- (61) Condition entitled "Pavement" of the proposed conditions of approval for CUP11-10195.
- (62) California Health and Safety Code Section 25232 (b) (1) (A-E).
- (63) Traffic Circulation Plan within the 2010 City of Hesperia General Plan Update Circulation Element, page CI-17.
- (64) Section 2.2 of the 2010 City of Hesperia General Plan Update Circulation Element background technical report, page 4.
- (65) Sections 6.3 and 6.4 of the 2010 City of Hesperia General Plan Update Circulation Element background technical report, pages 74 and 75.

- (66) Section 3.8 of the 2010 City of Hesperia General Plan Update Environmental Impact Report (GPUEIR), pages 3.8-8 thru 3.8-14.
- (67) Environmental policies of the Lahontan Regional Water Quality Control Board regarding use of private wastewater treatment systems.
- (68) 2007 California Plumbing Code, Table 7-3.
- (69) Condition entitled "On-site Retention" of the proposed conditions of approval for CUP11-10195.
- (70) 2009 California Department of Resources, Recycling and Recovery Annual AB939 Report.
- (71) California Integrated Waste Management Act (AB 939).
- (72) Quarterly data of the San Bernardino County Disposal Reporting System for the 2<sup>nd</sup> quarter 2010.
- (73) Section 15183.5 – Tiering and Streamlining the Analysis of Greenhouse Gas Emissions, March 18, 2010 Amendments to the Guidelines for Implementation of the California Environmental Quality Act.

# ATTACHMENT 5

## RESOLUTION NO. PC-2011-29

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF HESPERIA, CALIFORNIA, APPROVING A REVISED CONDITIONAL USE PERMIT TO ESTABLISH A CAR SALES/AUCTION FACILITY ON 6 ACRES ZONED I-1 LOCATED ON THE WEST SIDE OF "I" AVENUE, 625 FEET NORTH OF EUCALYPTUS STREET (CUP11-10195)**

**WHEREAS**, Team Truck Dismantling has filed an application requesting approval of revised Conditional Use Permit CUP11-10123 described herein (hereinafter referred to as "Application"); and

**WHEREAS**, the Application applies to 6 acres within the Light Manufacturing (I-1) designation, located on the west side of "I" Avenue, 625 feet north of Eucalyptus Street and consists of Assessor's Parcel Numbers 0415-011-12; and

**WHEREAS**, the Application, as contemplated, proposes to construct car sales/auction facility on 6 acres; and

**WHEREAS**, the site is currently vacant and is surrounded by existing developments. The properties to the north include light industrial uses. The card lock gas station exists to the south. The property to the west includes a large salvage and wrecking yard. On the opposite side of "I" Avenue to the east is a residential neighborhood; and

**WHEREAS**, the properties to the north and south are designated Service Commercial (C-3) and Limited Manufacturing (I-1) by the General Plan Land Use map. The property to the west is designated General Manufacturing (I-2). The properties to the east are designated Rural Residential (RR-20000); and

**WHEREAS**, an environmental Initial Study for the proposed revised conditional use permit was completed on July 19, 2011, and no significant adverse impacts were identified. Mitigated Negative Declaration ND-2011-04 was subsequently prepared; and

**WHEREAS**, on August 11, 2011, the Planning Commission of the City of Hesperia conducted a hearing on the Application and concluded said hearing on that date; and

**WHEREAS**, all legal prerequisites to the adoption of this Resolution have occurred.

**NOW THEREFORE, BE IT RESOLVED BY THE CITY OF HESPERIA PLANNING COMMISSION AS FOLLOWS:**

Section 1. The Planning Commission hereby specifically finds that all of the facts set forth in this Resolution are true and correct.

Section 2. Based upon substantial evidence presented to this Commission during the above-referenced August 11, 2011 hearing, including public testimony and written and oral staff reports, this Commission specifically finds as follows:

- (a) The site for the proposed use is adequate in size and shape to accommodate the proposed use because the site can accommodate all proposed improvements in conformance with the development code.
- (b) The proposed use will not have a substantial adverse effect on abutting properties or the permitted use thereof because the proposed project is consistent with the City's Limited Manufacturing (I-1) General Plan Land Use designation and the surrounding industrial type uses. "I" Avenue serves as an adequate buffer between the industrial uses and residential uses to the east.
- (c) The proposed project is consistent with the goals, policies, standards and maps of the adopted Zoning, Specific Plan, Development Code and all applicable codes and ordinances adopted by the City of Hesperia because the project is consistent with the regulations allowing car sales/auction use within the I-1 designation. In addition, the development complies with standards for driveway aisles, parking, fire lanes and turn-around, and loading areas.
- (d) The site for the proposed use will have adequate access based upon the site's access from "I" and "G" Avenues.
- (e) The proposed project is consistent with the adopted General Plan of the City of Hesperia. The project site is within the I-1 General Plan Land Use designation. A car sales/auction facility is an allowable use with approval of a conditional use permit.

Section 3. Based on the findings and conclusions set forth in this Resolution, this Commission hereby approves Conditional Use Permit CUP11-10195 subject to the conditions of approval as shown in Attachment "A".

Section 4. The Secretary shall certify to the adoption of this Resolution.

**ADOPTED AND APPROVED** this 11<sup>th</sup> day of August 2011.

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Chris Elvert, Chair, Planning Commission

ATTEST:

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Kathy Stine, Secretary, Planning Commission

ATTACHMENT 'A'

List of Conditions for Site Plan Review CUP11-10195

Approval Date: August 11, 2011  
Effective Date: August 23, 2011  
Expiration Date: August 23, 2014

This list of conditions apply to a revised Conditional Use Permit to construct to establish a car sales/auction facility on 6 acres zoned I-1 on the west side of "I" Avenue, 625 feet north of Eucalyptus Street. Any change of use or expansion of area may require approval of a revised Conditional Use Permit application (Applicant: Team Trucking Dismantling; APN: 0415-011-12).

The use shall not be established until all conditions of this revised Conditional Use Permit application have been met. This approved revised Conditional Use Permit shall become null and void if all conditions have not been completed within three (3) years of the effective date. Extensions of time of up to twelve (12) months may be granted upon submittal of the required application and fee prior to the expiration date.

(Note: The "Init" and "Date" spaces are for internal city use only).  
Init    Date

**SUBMITTAL OF PUBLIC IMPROVEMENT PLANS SHALL INCLUDE THE FOLLOWING:**

- \_\_\_\_\_ 1. **Building Construction Plans.** If a building or structure is proposed, five complete sets of construction plans, prepared and wet stamped by a California licensed Civil or Structural Engineer or Architect, shall be submitted to the Building Division with the required application fees for review. (B)
- \_\_\_\_\_ 2. **Drainage Study.** The Developer shall submit a Final Hydrology / Hydraulic study identifying the method of collection and conveyance of tributary flows from off-site as well as the method of control for increased run-off generated on-site. (E)
- \_\_\_\_\_ 3. **Geotechnical Report.** The Developer shall provide two copies of the soils report with the grading plan. The soils report shall substantiate with all grading, building, and public improvement plans. In addition, a percolation report shall be performed to substantiate the percolation of the on-site drainage retention areas. Include "R" value testing and pavement recommendations for public streets (E, B)
- \_\_\_\_\_ 4. **Title Report.** The Developer shall provide a complete title report 90-days or newer from the date of submittal. (E)
- \_\_\_\_\_ 5. **NPDES.** The Developer shall apply for the required NPDES (National Pollutant Discharge Elimination System) permit with the Regional Water Quality Control Board and pay applicable fees. (E)

- \_\_\_\_\_ 6. **Storm Water Pollution Prevention Plan.** The Developer shall provide a Storm Water Pollution Prevention Plan (SWPPP), which addresses the method of storm water run-off control during construction. (E)
  
- \_\_\_\_\_ 7. **Utility Non-interference / Quitclaim Document(s).** The Developer shall provide non-interference and or quitclaim letter(s) from any applicable utility agencies for any utility easements that affect the proposed project. All documents shall be subject to review and approval by the Engineering Department and the affected utility agencies. The improvement plans will not be accepted without the required documents and approval from the affected agencies. (E)
  
- \_\_\_\_\_ 8. **Plan Check Fees.** Along with improvement plan submittal, the Developer shall pay applicable plan-checking fees. Improvement Plans and requested studies shall be submitted as a package. (E)
  
- \_\_\_\_\_ 9. **Indemnification.** As a further condition of approval, the Applicant agrees to and shall indemnify, defend, and hold the City and its officials, officers, employees, agents, servants, and contractors harmless from and against any claim, action or proceeding (whether legal or administrative), arbitration, mediation, or alternative dispute resolution process), order, or judgment and from and against any liability, loss, damage, or costs and expenses (including, but not limited to, attorney's fees, expert fees, and court costs), which arise out of, or are in any way related to, the approval issued by the City (whether by the City Council, the Planning Commission, or other City reviewing authority), and/or any acts and omissions of the Applicant or its employees, agents, and contractors, in utilizing the approval or otherwise carrying out and performing work on Applicant's project. This provision shall not apply to the sole negligence, active negligence, or willful misconduct of the City, or its officials, officers, employees, agents, and contractors. The Applicant shall defend the City with counsel reasonably acceptable to the City. The City's election to defend itself, whether at the cost of the Applicant or at the City's own cost, shall not relieve or release the Applicant from any of its obligations under this Condition. (P)

**CONDITIONS REQUIRED PRIOR TO GROUND DISTURBING ACTIVITY:**

- \_\_\_\_\_ 10. **Approval of Improvement Plans.** All required improvement plans shall be prepared by a registered Civil Engineer per City standards and per the City's improvement plan checklist to the satisfaction of the City Engineer. Five sets of improvement plans shall be submitted to the Development Services Department and Engineering Department for plan review with the required plan checking fees. All Public Works plans shall be submitted as a complete set. (E)
  
- \_\_\_\_\_ 11. **Utility Non-interference / Quitclaim Document(s).** The Developer shall provide non-interference and or quitclaim letter(s) from any applicable utility agencies for any utility easements that affect the proposed project. All documents shall be subject to review and approval by the Engineering

Department and the affected utility agencies. Grading permits will not be issued until the required documents are reviewed and approved by all applicable agencies. Any fees associated with the required documents are the Developer's responsibility. (E)

- \_\_\_\_\_ 12. **NPDES.** The Developer shall provide a copy of the approved original NPDES (National Pollutant Discharge Elimination System) permit from the Regional Water Quality Control Board and provide a copy of fees paid. The copies shall be provided to the City's Engineering Department. (E)
- \_\_\_\_\_ 13. **Storm Water Pollution Prevention Plan.** All of the requirements of the Storm Water Pollution Prevention Plan shall be incorporated and be in place prior to issuance of a grading permit. (E)
- \_\_\_\_\_ 14. **Grading Plan.** The Developer shall design a Grading Plan with existing contours tied to an acceptable City of Hesperia benchmark. The grading plan shall indicate building "footprints" and proposed development of the retention basins, as a minimum. The site grading and building pad preparation shall include the recommendations provided by the Preliminary Soils Investigation. All proposed walls shall be indicated on the grading plans showing top of wall (tw), top of footing (tf), and the finish grade (fg) elevations. (E)
- \_\_\_\_\_ 15. **Off-Site Grading Letter(s).** It is the Developer's responsibility to obtain signed Off-Site Grading Letters from any adjacent property owner(s) who are affected by any Off-Site Grading that is needed to make site work. The Off-Site Grading letter, along with the latest grant deed, must be submitted to the City's Engineering Department for plan check approval. (E)
- \_\_\_\_\_ 16. **Drainage Acceptance Letter(s).** It is the Developer's responsibility to obtain signed Drainage Acceptance Letters from any adjacent property owner's who are affected by concentrated off-site storm water discharge from any on-site retention basins and storm water runoff. The Acceptance letter, along with the latest grant deed, must be submitted to the City's Engineering Department for plan check approval. (E)
- \_\_\_\_\_ 17. **On-site Retention.** The Developer shall design / construct on-site retention facilities, which have minimum impact to ground water quality. This shall include maximizing the use of horizontal retention systems and minimizing the application of dry wells / injection wells. All dry wells / injection wells shall be 2-phase systems with debris shields and filter elements. All dry wells / injection wells shall have a minimum depth of 30' with a max depth to be determined by soils engineer at time of boring test. Per Resolution 89-16 the Developer shall provide on-site retention at a rate of 13.5 Cu. Ft per every 100 Sq. Ft. of impervious materials. Any proposed facilities, other than a City approved facility that is designed for underground storage for on-site retention will need to be reviewed by the City Engineer. The proposed design shall meet City Standards and design criteria established by the City Engineer. A soils percolation test will be required for alternate underground storage retention systems. (E)

- \_\_\_\_\_ 18. **Pavement.** Based on the proposed use, all areas of the site that will be occupied by vehicles shall be paved. Developer shall propose a structural section adequate for the use. (E)
- \_\_\_\_\_ 19. **Fish & Game Fee.** The applicant shall submit a check to the City in the amount of \$2,094.00 payable to the Clerk of the Board of Supervisors of San Bernardino County to enable the filing of a Notice of Determination. (P)
- \_\_\_\_\_ 20. **Pre-construction Survey.** A pre-construction survey for the burrowing owl shall be conducted by a City approved and licensed biologist, no more than 30 days prior to ground disturbance. (P)
- \_\_\_\_\_ 21. **Pre-construction Meetings.** Pre-construction meetings shall be held between the City, the Developer, grading contractors, and special inspectors to discuss permit requirements, monitoring and other applicable environmental mitigation measures required prior to ground disturbance and prior to development of improvements within the public right-of-way. (B, P)
- \_\_\_\_\_ 22. **Design for Required Improvements.** Improvement plans for off-site and on-site improvements shall be consistent with the plans approved as part of this site plan review application. (E, P)
- \_\_\_\_\_ 23. **Jurisdiction.** Prior to any construction occurring on any parcel, the applicant shall contact the San Bernardino County Fire Department for verification of current fire protection requirements. All new construction shall comply with the current California Fire Code requirements and all applicable statutes, codes, ordinances and standards of the Fire Department. [F-1]
- \_\_\_\_\_ 24. **Access.** The development shall have a minimum of ONE (1) point of vehicular access. These are for fire/emergency equipment access and for evacuation routes.
- \_\_\_\_\_ 25. **Single Story Road Access Width.** The site shall have access provided by approved roads, alleys and private drives with a minimum twenty six (26) foot unobstructed width and vertically to fourteen (14) feet six (6) inches in height. Other recognized standards may be more restrictive by requiring wider access provisions.
- \_\_\_\_\_ 26. **Multi-Story Road Access Width.** If buildings are constructed, buildings three (3) stories in height or more shall have a minimum access of thirty (30) feet unobstructed width and vertically to fourteen (14) feet six (6) inches in height. [F-41]

**CONDITIONS REQUIRED PRIOR TO BUILDING PERMIT ISSUANCE:**

- \_\_\_\_\_ 27. **Fencing.** The Developer shall submit four sets of fencing plans to the Building Division with the required application fees for all proposed fencing. The plans shall provide an 8-foot high decorative metal fence along the perimeter of the facility in accordance with the Development Code. All gates shall be constructed from the same solid decorative metal fence material and match Pick-A-Part fencing. (P)

- \_\_\_\_\_ 28. **Light and Landscape District Annexation.** Developer shall annex property into the lighting and landscape district administered by the Hesperia Recreation and Parks District. The required forms are available from the Building Division and once completed, shall be submitted to the Building Division. (RPD)

**CONDITIONS REQUIRED PRIOR TO CERTIFICATE OF OCCUPANCY:**

- \_\_\_\_\_ 29. **As-Built Plans.** The Developer shall provide as-built plans in AutoCAD 2007 Format. (E)
- \_\_\_\_\_ 30. **Public Improvements.** All public improvements shall be completed by the Developer and approved by the Engineering Department. Existing public improvements determined to be unsuitable by the City Engineer shall be removed and replaced. (E)
- \_\_\_\_\_ 31. **Development Fees.** If any building or structure is proposed, the Developer shall pay required development fees as follows:
- A. Development Impact Fees (B)
  - B. Utility Fees (P)
- \_\_\_\_\_ 32. **Utility Clearance(s)/Certificate of Occupancy.** The Building Division will provide utility clearances on individual buildings after required permits and inspections and after the issuance of a Certificate of Occupancy on each building. Utility meters shall be permanently labeled. Uses in existing buildings currently served by utilities shall require issuance of a Certificate of Occupancy prior to establishment of the use. (B)
- \_\_\_\_\_ 33. **On-Site Improvements.** All on-site improvements as recorded in these conditions, and as shown on the approved site plan shall be completed in accordance with all applicable Title 16 requirements. Any exceptions shall be approved by the Director of Development Services. (P)
- \_\_\_\_\_ 34. **Override Switch.** Where an automatic electric security gate is used, an approved Fire Department override switch (Knox ®) is required. [F86]

**THE FOLLOWING ARE CONTINUING CONDITIONS. FAILURE TO COMPLY WITH THESE CONDITIONS MAY RESULT IN REVOCATION OF THE CONDITIONAL USE PERMIT:**

- \_\_\_\_\_ 35. **Noise and Vibration.** The use shall not exceed the general performance standards for noise and vibration contained within Sections 16.20.125 and 16.20.130 of the Development Code. (P)
- \_\_\_\_\_ 36. **Portable restrooms.** Portable restrooms shall be provided on-site for customers and restrooms shall be maintained on a regular basis. (P)

\_\_\_\_\_ 37. Car washing. No car washing shall occur in unpaved areas.

**IF YOU NEED ADDITIONAL INFORMATION OR ASSISTANCE REGARDING THESE CONDITIONS, PLEASE CALL THE APPROPRIATE DIVISION LISTED BELOW:**

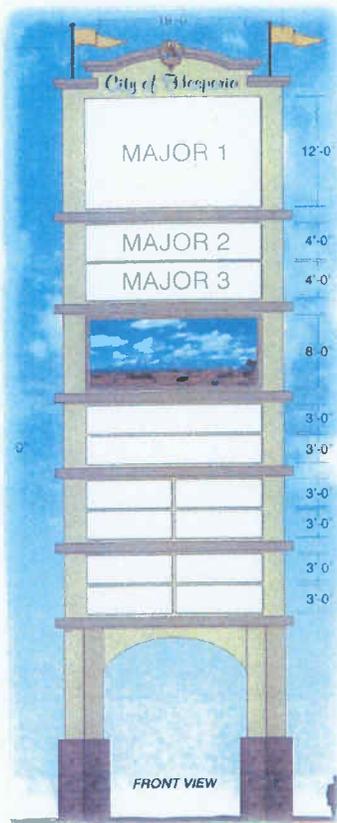
(P)	Planning Division	947-1200
(B)	Building Division	947-1300
(E)	Engineering Division	947-1414
(F)	Fire Prevention Division	947-1012
(RPD)	Hesperia Recreation and Park District	244-5488



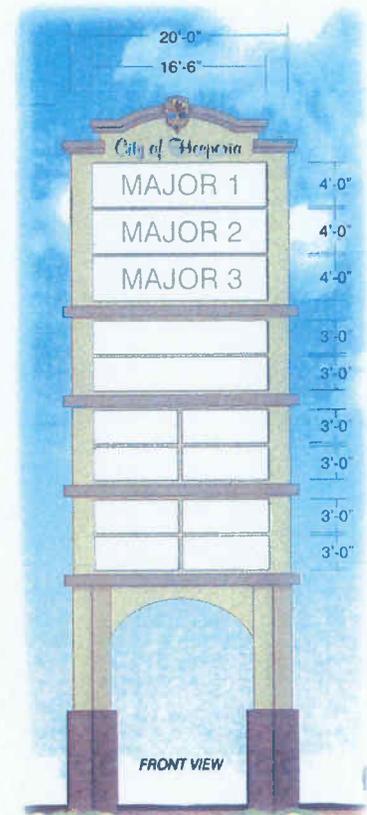
# City of Hesperia

## Planning Commission Workshop City-Freeway Pylon Signs

The purpose of the workshop is to discuss concepts and ideas with the Commission, property owners and the public regarding a possible program to build City-sponsored signs along the freeway. These signs would enhance the City's presence and enable businesses to benefit from additional freeway exposure not otherwise available due to their location within the City.



This workshop will be held during the Hesperia Planning Commission meeting on Thursday, August 11, 2011 at 6:30 p.m. in the City Council Chambers 9700 Seventh Avenue Hesperia, CA 92345



For additional information, please contact Principal Planner Dave Reno, AICP  
760/947-1253 or by e-mail at [dreno@cityofhesperia.us](mailto:dreno@cityofhesperia.us).



**CITY OF HESPERIA  
DEVELOPMENT REVIEW COMMITTEE**

**City Hall Joshua Room  
9700 Seventh Avenue  
Hesperia, CA 92345  
BEGINNING AT 10:00 A.M.  
WEDNESDAY, JULY 20, 2011**

**A. PROPOSALS:**

**1. JOAQUIN CASTELLANOS (SPR11-10218)**

**Proposal:** A revised site plan review to install a street-facing, roof-mounted photovoltaic system.

**Location:** 11484 Fifth Street (APN: 0414-061-22)

**Planner:** Lisette Sanchez-Mendoza

**Action:** Administrative Approval

**2. JOAQUIN CASTELLANOS (SPR11-10219)**

**Proposal:** A revised site plan review to install a street-facing, roof-mounted photovoltaic system.

**Location:** 8155 First Avenue (APN: 0412-054-03)

**Planner:** Lisette Sanchez-Mendoza

**Action:** Administrative Approval

**3. ADVANCE DISPOSAL COMPANY, INC. (CUP11-10217)**

**Proposal:** A conditional use permit to allow for an expansion of the existing material recovery facility.

**Location:** 17105 Mesa Street (APN: 0415-201-06, 07, 10 & 24)

**Planner:** Daniel Alcayaga

**Action:** Continued indefinitely

**4. ERIC HAWKES (ME11-10221)**

**Proposal:** Minor exception to allow a 1,386 square foot detached garage exceeding the allowable accessory building area limitation.

**Location:** 8055 Windsor Avenue (APN: 0398-155-19)

**Planner:** Stan Liudahl

**Action:** Administrative Approval

**5. LOVE'S TRAVEL STOPS AND COUNTRY STORES, INC. (CUP11-10197) & (SPL11-10206)**

**Proposal:** A conditional use permit to construct an 11,805 square foot travel center, including a convenience store and vehicle service center, fuel islands for both semi-trucks and passenger vehicles, a drive-thru restaurant and the sale of beer and wine for off-site consumption on 10.6 gross acres and a specific plan amendment from the Neighborhood Commercial to the Commercial Industrial Business Park District of the Main Street and Freeway Corridor Specific Plan.

**Location:** Southeast corner of Outpost Road and Joshua Street (APN: 3039-361-01)

**Planner:** Stan Liudahl

**Action:** Forwarded to September 8, 2011 Planning Commission.



**CITY OF HESPERIA  
DEVELOPMENT REVIEW COMMITTEE**

**City Hall Joshua Room  
9700 Seventh Avenue  
Hesperia, CA 92345  
BEGINNING AT 10:00 A.M.  
WEDNESDAY, AUGUST 3, 2011**

**A. PROPOSALS:**

**1. JERRY HACKBARTH (CUP11-10225)**

**Proposal:** A conditional use permit to allow the sale of beer within a micro brewery facility zoned CIBP.

**Location:** 12221 Poplar (APN: 3064-641-10)

**Planner:** Lisette Sanchez-Mendoza

**Action:** Forwarded to September 8, 2011 Planning Commission.