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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

)	No. 09 CECG 02906 AMS
	)	Dept. 97 C
PEOPLE of the STATE OF CALIFORNIA,	)	ORDER GRANTING CITY OF FRESNO'S APPLICATION FOR PRELIMINARY INJUNCTION
Plaintiff,)	
	)	Consolidated with:
CITY OF FRESNO,)	
	)	09 CECG 03058
Real Party in Interest,	)	09 CECG 03059
	)	09 CECG 03060
vs.	)	09 CECG 03061
	)	09 CECG 03096
	)	09 CECG 03097
MAREJG PROPERTIES, LLC, et al.	)	09 CECG 03098
	)	09 CECG 03099
Defendants.)	

This matter involves 9 consolidated cases. The court notes that this case has been properly styled. It was brought by the City of Fresno, as Real Party in Interest, on behalf of the People of the State of California, pursuant to CCP 731.

On October 9, 2009, the court issued a Temporary Restraining Order prohibiting certain Defendants from selling or distributing marijuana from storefront dispensaries in Fresno. On October 22,

1 2009, the court held a hearing on the Order to Show Cause re:
2 Preliminary Injunction. After reviewing all of the moving and
3 opposing papers and after considering oral argument, the court
4 GRANTS the City of Fresno's request to issue a Preliminary
5 Injunction pending bench trial of this matter. The trial date is
6 set for Tuesday, January 19, 2010 at 9:00 a.m. in Department 97 C.
7
8 **(CCP 527 (e).)**¹

9 As the City of Fresno is a governmental entity, there is no
10 requirement that the City post a bond or undertaking. **(CCP 529**
11 **(b); City of South San Francisco v. Cypress Lawn Cemetery Ass'n**
12 **(1992) 11 Cal.App.4th 916, 921-922.)**

13 At the 10/22/09 hearing, it was noted that two parties have
14 appealed the TRO to the Fifth District Court of Appeal. The
15 question arose whether the appeal automatically stayed enforcement
16 of the TRO. The court finds that the TRO was not automatically
17 stayed. The TRO has remained in effect, continuously, from the
18 time it was issued through the time of issuance of this
19 Preliminary Injunction. This is because the TRO was a PROHIBITORY
20 order that prohibited Defendants from selling or distributing
21 marijuana from certain storefront dispensaries. An appeal from a
22 TRO or a Preliminary Injunction automatically stays a MANDATORY
23 injunction, but not a PROHIBITORY injunction. **(6 Witkin,**
24
25
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27 ¹ **CCP 527 (e)** provides, in relevant part: "When the cause is at issue it shall
28 be set for trial at the earliest possible date and shall take precedence over
all other cases, except older matters of the same character, and matters to
which special precedence may be given by law."
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1 **California Procedure** (5th ed. 2008) Provisional Remedies, sections
2 278 - 281, pp. 220 -223.)

3 Similarly, because this Preliminary Injunction is a
4 PROHIBITORY injunction, it will remain in full force and effect
5 pending trial on this matter. The Preliminary Injunction, like
6 the TRO that it replaces, cannot be stayed except by an order of
7 this court or by an order or writ issued by the Fifth District
8 Court of Appeal.

9
10 Although the OSC hearing was "evidentiary", it was not a
11 "trial" within the meaning of CCP 632. So a statement of decision
12 is not required in granting or denying an application for a
13 preliminary injunction. (**People v. Landlords Professional Services**
14 **Inc.** (1986) 178 Cal.App.3d 68, 70-71.) Nevertheless, the court
15 will set forth the legal basis of its ruling.

16
17 For all of the reasons set forth in its prior Order of
18 10/9/09, and for the additional reasons discussed below, the court
19 finds that the City of Fresno has met its burden to show a
20 reasonable probability of success on the merits and to show a risk
21 of irreparable injury. Although an OSC directs the Defendants to
22 show cause why a preliminary injunction should not issue, the
23 burden is on Plaintiff, as the moving party, to show all elements
24 necessary to support a preliminary injunction. (**O'Connell v.**
25 **Superior Court** (141 Cal.App.4th 1452, 1481.)

26
27 The City of Fresno argues correctly that a violation of local
28 land use regulations constitutes a nuisance per se. (**City and**

1 **County of San Francisco v. Padilla** (1972) 23 Cal.App.3d 388.401.)
2 Fresno Municipal Code section 10-605 (j) expressly provides that a
3 violation of a zoning ordinance is a public nuisance. In its
4 Supplemental Reply of 10/16/09, the City of Fresno correctly notes
5 that once the City has shown the existence of a nuisance per se,
6 no proof of actual harm need be shown. (**City of Claremont v.**
7 **Kruse** (2009) 177 Cal.App.4th 1153, 1166, citing **McClatchy v.**
8 **Laguna Lands Ltd.** (1917) 32 Cal.App. 718, 725.)

10 Under California law, this court may issue a preliminary
11 injunction to enjoin operation of a medical marijuana dispensary
12 based on violation of a municipal zoning ordinance. (**City of**
13 **Corona v. Nauls** (2008) 166 Cal.App.4th 418; **City of Claremont v.**
14 **Kruse** (2009) 177 Cal.App.4th 1153 [even where parties stipulated
15 that defendant medical marijuana dispensary was operating within
16 the Compassionate Use Act (CUA) and the Medical Marijuana Program
17 Act (MMPA), court of appeal held that state law did not preempt
18 City from enforcing zoning ordinance or imposing lengthy
19 moratorium on issuance of operating permit].)

21 A. Federal Law

22 The City argues correctly that federal law (the **Controlled**
23 **Substances Act, 21 USC 801 et seq.**) prohibits the sale and
24 distribution of marijuana and the possession of marijuana for sale
25 and distribution. (**United States v. Oakland Cannabis Buyers'**
26 **Cooperative** (2001) 532 U.S. 483; **Gonzales v. Raich** (2005) 545
27 U.S. 1.) Therefore the operation of the Fresno dispensaries
28

1 violates federal law. And this violation of federal law
2 constitutes a violation of the local zoning ordinance, which only
3 permits operation of medical marijuana dispensaries or collectives
4 consistent with federal law.

5 Therefore, the trial court is compelled by law to follow the
6 appellate precedent established in **City of Corona v. Nauls** and in
7 **City of Claremont v. Kruse**. This court finds that the marijuana
8 dispensaries are being operated in violation of Fresno Municipal
9 Code section 12-306-N-56 and in violation of Civil Code section
10 3479.
11

12 Accordingly, the request for relief on this ground must be
13 GRANTED.

14 1. Department of Justice Memorandum

15 At the 10/22/09 hearing, counsel for Defendants noted that
16 Deputy Attorney General David W. Ogden, on behalf of the United
17 States Department of Justice, had issued a Memorandum to selected
18 United States Attorneys. The Memorandum was dated 10/19/09. And
19 its stated purpose was to provide clarification and guidance to
20 federal prosecutors in states that have enacted laws authorizing
21 the use of medical marijuana. The Memorandum reaffirms that,
22 under the Obama administration, it is the general policy of the
23 Department of Justice to discourage federal prosecutors from
24 pursuing federal criminal drug charges against "individuals whose
25 actions are in CLEAR and UNAMBIGUOUS COMPLIANCE with existing
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1 state laws providing for the medical use of marijuana." (Emphasis
2 added.)

3 While this was an interesting political development, its
4 impact was strictly limited to prosecutorial discretion in
5 enforcement of federal marijuana laws. As the Memorandum
6 expressly states, it does not in any way represent a change in
7 federal marijuana laws, and indeed, such a change could only be
8 accomplished by an act of Congress, which the Memorandum is most
9 assuredly not. And the Memorandum certainly effects no change in
10 the interpretation or enforcement of state marijuana laws relevant
11 to this case.
12

13 The Memorandum expressly states that "This guidance regarding
14 resource allocation does not 'legalize' marijuana or provide a
15 legal defense to a violation of federal law, nor is it intended to
16 create any privileges, benefits, or rights, substantive or
17 procedural, enforceable by any individual, party or witness IN ANY
18 ADMINISTRATIVE, CIVIL, or CRIMINAL matter. Nor does clear and
19 unambiguous compliance with state law or the absence of one or all
20 of the above factors create a legal defense to a violation of the
21 Controlled Substances Act." (Emphasis added.)
22

23 Finally, the Memorandum still reserves the right to bring
24 federal charges even if a valid medical marijuana defense exists
25 under state law. "Nor does this guidance preclude investigation
26 or prosecution, even where there is clear and unambiguous
27 compliance with existing state law, in particular circumstances
28

1 where investigation or prosecution otherwise serves important
2 federal interests."

3 Therefore, the issuance of the DOJ Memorandum, despite its
4 broad media appeal, has no formal bearing on the legal analysis of
5 this case.

6
7 2. Freedom of Association

8 The court finds that Defendants have not successfully
9 challenged the validity or constitutionality of the Fresno zoning
10 ordinance itself. The McPike Defendants, in their 10/20/09
11 Opposition, assert that the Fresno zoning ordinance is
12 unconstitutional because it violates Defendants' freedom of
13 association, implicitly guaranteed by the First Amendment to the
14 United States Constitution.

15
16 But the First Amendment does not protect associations of any
17 and all kinds. On the contrary, the First Amendment only protects
18 two particular kinds of associations -- those with an "intrinsic"
19 or "intimate" value, and those that are "instrumental" to forms of
20 religious and political expression and activity. The first kind
21 of association has been characterized by the United States Supreme
22 Court as central to any concept of liberty. It is exemplified by
23 personal affiliations that create and sustain a family - the
24 institution of marriage, the upbringing and education of children,
25 and cohabitation with relatives. Such affiliations "involve deep
26 attachments and commitments to the necessarily few other
27 individuals with whom one shares not only a special community of
28

1 thoughts, experiences, and beliefs but also distinctively personal
2 aspects of one's life. Among other things . . . they are
3 distinguished by such attributes as relative smallness, a high
4 degree of selectivity in decisions to begin and maintain the
5 affiliation, and seclusion from others in critical aspects of the
6 relationship." (**People v. Acuna** (1997) 14 Cal.4th 1090, 1110-1112
7 [criminal street gang's associative activity was not entitled to
8 First Amendment protection but constituted a public nuisance which
9 could be circumscribed by civil injunction], cert. denied, (1997)
10 521 U.S. 1121, citing **Roberts v. United States Jaycees** (1984) 468
11 U.S. 609, 619.)

12
13 The second kind of association that merits First Amendment
14 protection is composed of groups whose members join together for
15 the purpose of pursuing a wide variety of political, social,
16 economic, educational, religious, and cultural ends. This
17 instrumental right of protected association is directly related to
18 the "individual's freedom to speak, to worship, and to petition
19 the government for the redress of grievances" because without it
20 these liberties themselves could scarcely exist, much less thrive.
21 (Ibid.)

22
23 Put another way, the United States Constitution does not
24 provide UNLIMITED protection for a generalized right of social
25 association. Rather, it recognizes and protects only a LIMITED
26 right of association, based on family relationships and political
27 and religious expression. (**Dallas v. Stanglin** (1989) 489 U.S. 19,

1 25.) Here, the dispensaries, their owners, and their operators
2 have failed to carry their burden to show that their associative
3 activity is entitled to First Amendment protection. Based on the
4 evidence presented, the desire to open a storefront marijuana
5 dispensary appears to serve a commercial purpose or quasi-
6 commercial purpose that does not merit First Amendment protection.
7
8 There has been no showing by the dispensaries, their owners, or
9 their operators that their conduct qualifies as a protected form
10 of association.

11 Opening a commercial storefront dispensary clearly does not
12 fall within the first category of intimate family associations.
13 Nor does it qualify, under the second protected category, as an
14 association formed to further expressive speech or religious
15 worship. While it is possible to "find some kernel of expression
16 in almost every activity a person undertakes - for example,
17 walking down the street or meeting one's friends at a shopping
18 mall . . . such a kernel is not sufficient to bring the activity
19 within the protection of the First Amendment." (**Dallas v.**
20 **Stanglin** (1989) 489 U.S. at 25.)

21
22 Freedom of association, in the sense protected by the First
23 Amendment, does not extend to joining with others for the purpose
24 of depriving third parties of their lawful rights. (**People v.**
25 **Acuna** (1997) 14 Cal.4th at 1112, citing **Madsen v. Women's Health**
26 **Center Inc.** (1994) 512 U.S. 753, 776.) In this case, the
27 residents of the City of Fresno have a sovereign and lawful right
28

1 to enforce zoning ordinances duly enacted by their democratically
2 elected local representatives. As discussed in subsection C
3 below, consistent with state law, Fresno zoning ordinances
4 regulate property uses and activities at the community level,
5 thereby broadly and directly shaping the character of local
6 neighborhoods and the quality of local lives. Pursuant to the
7 plain language of the currently enacted statutes, neither this
8 court, nor the federal government, nor the state of California may
9 arbitrarily dictate a different outcome. Under the current
10 statutory scheme, whether the operation of a medical marijuana
11 dispensary constitutes a public nuisance per se, would appear to
12 be a purely local decision, left entirely to the discretion of the
13 Fresno City Council.

14
15
16 Defendants' desire to associate to distribute medical
17 marijuana through storefront dispensaries, if permitted to
18 continue, would violate local zoning. Defendants' intended form
19 of association is not a protected activity which would justify
20 permitting Defendants to violate a valid City of Fresno zoning
21 ordinance lawfully designed to regulate storefront distribution of
22 medical marijuana in this community.

23
24 In their Opposition, at page 3, the McPike Defendants² assert
25 that the City of Fresno's ordinance is unconstitutional and
26

27 ² Defendants California Herbal Relief Center, Sean Dwyer, California
28 Naturopathic Agricultural Association Inc., William R. McPike, Fresno
Compassion, George Byadijian, Nu-Life Association Inc., and Mitchell Danekas
(hereinafter "McPike Defendants")
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1 overbroad because it effectively bans the operation of medical
2 marijuana dispensaries anywhere in the City of Fresno. But neither
3 the United States Constitution nor the California Constitution
4 guarantees citizens the right to purchase medical marijuana from
5 commercial storefronts. It is immaterial whether those storefronts
6 are dispensaries, collectives or cooperatives, or whether those
7 storefronts are operated by qualified collectives or cooperatives.
8

9 Under state law, the CUA and MMPA appear to create a
10 statutory right for individuals to associate to form qualified
11 cooperatives, but the CUA and MMPA do not appear to establish any
12 statutory right for qualified cooperatives or their members to run
13 commercial storefront dispensaries. As a matter of public policy,
14 it appears to be well within the police powers of the Fresno City
15 Council to make the finding, whether express or implied, that the
16 operation of a storefront medical marijuana dispensary presents a
17 substantial risk of generating improper commercial sales to
18 customers who are not members of qualified cooperatives. And the
19 City Council may therefore limit or ban the operation of such
20 commercial storefronts. (Cf. **City of Corona** and **City of**
21 **Claremont.**)
22

23 The Fresno zoning ordinance appears to bear a reasonable
24 relationship to the general welfare and appears to be a proper
25 exercise of the City of Fresno's police powers under California
26 Constitution, article XI, section 7. Pursuant to well-established
27 legal precedents, California cities are afforded broad discretion
28

1 under the California Constitution to make urban planning decisions
2 that shape the landscape of commercial retail offerings available
3 to consumers. (**Wal-Mart Stores Inc. v. City of Turlock** (2006) 138
4 Cal.App.4th 273; **Hernandez v. City of Hanford** (2007) 41 Cal.4th 279
5 There has been no adequate showing here that the ordinance
6 infringes on a constitutionally-protected right. (Cf. **Sebago Inc.**
7 **v. City of Alameda** (1989) 211 Cal.App.3d 1372.)
8

9 Even assuming, for the sake of argument, that California law
10 does establish a statutory right to operate medical marijuana
11 collectives or cooperatives, Defendants have nevertheless failed
12 to offer any proof that they are in fact operating QUALIFIED
13 collectives or cooperatives under state law. Absent such proof,
14 Defendants cannot argue that they are somehow "exempt" from
15 compliance with the Fresno zoning ordinance.
16

17 At the 10/22/09 hearing, Defendant McPike argued that the
18 zoning ordinance is overbroad in that it applies to mobile
19 marijuana dispensaries. The court need not consider that argument
20 as there appears to be no evidence before the court that any of
21 the dispensaries, owners, or operators is operating a mobile
22 medical marijuana delivery service. And the court may not issue
23 advisory opinions as to the constitutionality or enforceability of
24 the zoning ordinance if it were to be applied to a hypothetical
25 defendant.
26

27 However, there does appear to be legal authority for the
28 proposition that a city may enact an ordinance which regulates

1 mobile, portable, or temporary vending establishments. (**Melton v.**
2 **City of San Pablo** (1967) 252 Cal.App.2d 794, 798.) "Municipal
3 ordinances are presumed to be constitutional if any rational
4 consideration supports their enactment. If any rational motive
5 exists for the exercise of the police power, the motive for its
6 exercise becomes immaterial and not a proper subject of inquiry
7 and the court will not substitute its judgment for that of the
8 legislative body. Whether the regulation is arbitrary or
9 unreasonable must be determined under the established rules
10 governing judicial review of exercises of the police power. That
11 power is elastic, and capable of expansion to meet existing
12 conditions of modern life." (Ibid.)

14 "The determination of the necessity and form of such
15 regulations, as is true with all exercises of the police power, is
16 primarily a legislative and not a judicial function, and is to be
17 tested in the courts not by what the judges individually or
18 collectively may think of the wisdom or necessity of a particular
19 regulation, but solely by the answer to the question -- is there
20 any reasonable basis in fact to support the legislative
21 determination of the regulation's wisdom and necessity?" (Ibid.)

24 "If the necessity or propriety of a zoning regulation is a
25 question upon which reasonable minds might differ or is fairly
26 debatable, the legislative determination will not be disturbed.
27 The courts may differ with the Legislature as to the wisdom and
28 propriety of a particular enactment as a means of accomplishing a

1 particular end, but as long as there are considerations of public
2 health, safety, morals, or general welfare which the legislative
3 body may have had in mind and which would justify the regulation,
4 it must be assumed by the court that the legislative body had
5 those considerations in mind and that those considerations did
6 justify the regulation." (Ibid.)
7

8 3. Vagueness, Overbreadth.

9 At the 10/22/09 hearing, Defendant Richard Morse argued that
10 the zoning ordinance was void for vagueness and overbreadth. But
11 he failed to specify precisely how the language of the zoning
12 ordinance is vague, ambiguous, uncertain, or overbroad.

13 Where a party raises an argument in a purely conclusory
14 manner, the court is not required to act as counsel for him and
15 furnish a legal argument. (Cf. **In re: Marriage of Schroeder** (1987)
16 192 Cal.App.3d 1154, 1664 [where legal argument in appellate brief
17 is not supported by citation of legal authority, reviewing court
18 may pass it without consideration].) Nevertheless, the court
19 finds that the Fresno zoning ordinance is not vague, ambiguous,
20 uncertain, or overbroad.
21

22 B. Does Federal Law Preempt State Law?

23 The City of Fresno argues that the federal Controlled
24 Substances Act preempts state laws decriminalizing the limited
25 personal use of medical marijuana. But this question is moot.
26 The court need not decide this question because the violation of
27 federal law is clear and also constitutes a zoning violation under
28

1 the municipal code and under Civil Code section 3479. The court
2 is not aware of any state or federal appellate cases which hold
3 that federal law preempts the CUA or the MMPA. The parties have
4 cited no cases which find federal preemption, and the court's own
5 research has uncovered no such cases.

6
7 C. Does State Law Preempt the Local Zoning Ordinance?

8 The City of Fresno argues correctly that California state law
9 does not preempt enforcement of the Fresno zoning ordinance. (See
10 generally **City of Claremont v. Kruse** (2009) 177 Cal.App.4th at
11 1168 - 1176.) Whether state law preempts a local ordinance is a
12 question of law. (**Roble Vista Associates v. Bacon** (2002) 97
13 Cal.App.4th 335, 339.) "The party claiming that general state law
14 preempts a local ordinance has the burden of demonstrating
15 preemption." (**Big Creek Lumber Co. v. County of Santa Cruz** (2006)
16 38 Cal.4th 1139, 1149.)

17
18 Under article XI, section 7 of the California Constitution, a
19 "county or city may make and enforce within its limits all local,
20 police, sanitary, and other ordinances and regulations not in
21 conflict with general laws." "'If otherwise valid local
22 legislation conflicts with state law, it is preempted by such law
23 and is void.'" (**Sherwin-Williams Co. v. City of Los Angeles** (1993)
24 4 Cal.4th 893, 897, quoting **Candid Enterprises Inc. v. Grossmont**
25 **Union High School Dist.** (1985) 39 Cal.3d 878, 885.) There are
26 three types of conflict that give rise to preemption: A conflict
27 exists if the local legislation "duplicates, contradicts, or
28

1 enters an area fully occupied by general law, either expressly or
2 by legislative implication." (**Action Apartment Assn. Inc. v. City**
3 **of Santa Monica** (2007) 41 Cal.4th 1232, 1242.)

4 Absent a clear indication of legislative intent to preempt
5 local zoning, this court must presume that state law DOES NOT
6 preempt the City of Fresno's zoning ordinance. "[W]hen local
7 government regulates in an area over which it traditionally
8 exercised control, such as the location of particular land uses,
9 California courts will presume, absent a clear indication of
10 preemptive intent from the Legislature, that such regulation is
11 not preempted by state statute." (**Big Creek Lumber, supra**, 38
12 Cal.4th at p. 1149.)

13
14 Defendants have failed to cite any language from the state or
15 federal Constitutions that would establish a CONSTITUTIONAL right
16 to maintain commercial-storefront dispensaries for sale or
17 distribution of medical marijuana. Nor have Defendants carried
18 their burden to present evidence, to cite statutory language, or
19 to cite legislative history to prove that the CUA or MMPA created
20 a STATUTORY right to obtain marijuana through commercial-
21 storefront dispensaries.
22

23
24 Even assuming, purely for the sake of argument, that the CUA
25 and MMPA give individual California citizens a statutory right to
26 form qualified medical marijuana collectives or cooperatives,
27 Defendants have made no showing that those qualified collectives
28 or cooperatives have a statutory right to operate a commercial

1 storefront for sale or distribution of medical marijuana. And
2 indeed, the City of Fresno argues correctly that any such
3 evidentiary showing or "defense" would appear to be immaterial
4 under **City of Claremont**, wherein the City stipulated that the
5 medical marijuana dispensary had complied with all applicable
6 medical marijuana statutes, but the court of appeal nevertheless
7 found the moratorium enforceable.
8

9 Based on the evidence presented, this court finds that the
10 City of Fresno's zoning ordinance does not conflict with state
11 law. The Fresno ordinance does not duplicate, contradict, or
12 enter an area fully occupied by state law, either expressly or by
13 legislative implication.
14

15 This court notes that enforcing the Fresno zoning ordinance
16 does not prevent qualified medical marijuana patients or their
17 qualified caregivers, as individuals, from exercising their rights
18 under the CUA and MMPA to grow, use, or possess medical marijuana.
19 Furthermore, enforcement of the Fresno zoning ordinance does not
20 prevent individuals from associating to form qualified collectives
21 or cooperatives under state law. Nor does the zoning ordinance
22 necessarily prevent individuals from operating qualified medical
23 marijuana collectives and cooperatives, or from cultivating
24 marijuana, or from performing other activities associated with
25 qualified medical marijuana collectives or cooperatives.
26 Effectively, the zoning ordinance merely prohibits the sale or
27 distribution of medical marijuana from commercial-storefront
28

1 dispensaries, without circumscribing the limited personal use and
2 collective cultivation of medical marijuana intended by the CUA
3 and MMPA. Thus, the zoning ordinance does not conflict with state
4 law.

5 Accordingly, the court finds that state law does not preempt
6 enforcement of the City of Fresno's zoning ordinance.
7

8 D. Dispensaries vs. Collectives and Cooperatives

9 The City of Fresno argued for the first time, at the hearing
10 on 9/27/09, that commercial medical marijuana dispensaries are not
11 permitted to operate unless they qualify as collectives or
12 cooperatives under the MMPA and the CUA. As a matter of due
13 process, the court may not address a legal argument that was not
14 properly noticed and raised in the moving papers. Furthermore,
15 even if the City of Fresno had timely raised this legal argument,
16 the City of Fresno has not cited any statutory or case law
17 explaining how such qualified collectives and cooperatives are
18 legally defined. Nor has the City submitted any evidence to show
19 conclusively whether Defendants have complied or failed to comply
20 with the laws regarding sale of marijuana by qualified collectives
21 and cooperatives.
22

23 By the same token, Defendants have failed to establish that
24 they are qualified collectives or cooperatives within the meaning
25 of **Health and Safety Code section 11362.775**. Therefore Defendants
26 have not shown that they are subject to the protections of the
27 MMPA or the CUA.
28

1 Furthermore, Defendants have failed to show that they meet
2 the non-profit requirement of **Health and Safety Code section**
3 **11362.765 (a)**³. Defendants merely assert they are operating
4 qualified nonprofit cooperatives and collectives, but fail to
5 present any evidence to support this assertion. The declarations,
6 filed on 10/20/09 and 10/22/09, by Defendants William McPike,
7 Mitchell Danekas, George Boyadjian, and Sean Dwyer, make
8 assertions about the status, operation, and profitability of their
9 respective dispensaries. But those conclusory assertions lack
10 supporting facts and supporting documentation. Such conclusory
11 assertions are therefore insufficient to establish that the
12 dispensaries qualify as nonprofit cooperatives or collectives.
13

14
15 None of the dispensaries have submitted any original receipts
16 or accounting statements to prove that their medical marijuana is
17 actually being sold at or near cost. There is no specific
18 evidence to show how much marijuana they have grown and at what
19 cost. There is no detailed information about employee salaries,
20 commercial rents, number of employees, packaging costs,
21 transportation costs, etc. There is no specific information about
22 how many members comprise each collective or who those members
23 are. And no documents have been submitted to prove that each
24 collective member possesses a medical marijuana certificate from a
25 licensed California physician.
26

27
28 ³ **Health & Safety Code section 11362.765 (a)** provides, in relevant part: "nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit."

1 There is no information concerning who has purchased the
2 medical marijuana, in what quantities, and at what cost. So the
3 court is unable to verify the conclusory assertion that the
4 dispensaries are qualified collectives or cooperatives under state
5 law. Defendants have submitted no official filings to establish
6 the existence and legal status of their respective corporations,
7 collectives, partnerships, or mutual-benefit associations.
8 Defendants have submitted no detailed proof that they are
9 currently paying all applicable local, state, and federal taxes.

11 On 10/26/09, some 4 calendar days (2 court days) after the
12 OSC hearing, the City of Fresno filed an objection to the
13 Declaration of Sean Dwyer. The City notes correctly that the
14 Dwyer declaration should have been filed at least two days before
15 the hearing. (CCP 527 (e).) The City argues that the declaration
16 should not be considered because it was untimely filed on
17 10/22/09, the date of the hearing.

19 The City does not state whether it was ever served with a
20 copy of the declaration, and if so, when it was served. So it is
21 unclear whether the City had an opportunity to object to the late
22 filing and request a continuance of the hearing. The court need
23 not rule on the City's objection to the untimely filing of the
24 Dwyer Declaration, because even if the court were to admit the
25 evidence, the declaration fails to present evidence sufficient to
26 carry Defendants' burden of proof. The City's hearsay objection
27
28

1 appears on its face to be untimely. The City makes no showing of
2 when it first became aware of the Dwyer Declaration, so there is
3 no way for this court to determine if the hearsay objection was
4 timely lodged. The passage of two court days would appear to
5 constitute a waiver of any hearsay objection.

6
7 Where, as here, the City of Fresno has made a prima facie
8 showing that the Defendant dispensaries and their owners are
9 operating a nuisance per se in violation of a facially valid
10 zoning ordinance, it would appear that the burden of proof shifts
11 to Defendants to show that they are operating qualified
12 collectives or cooperatives within the meaning of the CUA, the
13 MMPA, and/or the August 2008 guidelines of the California Attorney
14 General. It is not the City of Fresno's burden to show that
15 Defendants are NOT qualified collectives or cooperatives under
16 state law. In addition, the burden also shifts to Defendants to
17 show that state law preempts the zoning ordinance or that the
18 zoning ordinance is somehow unconstitutional or invalid as applied
19 to the dispensaries, their owners, and their operators. But as
20 noted in subdivisions A and C above, Defendants have failed to
21 carry their burden.
22

23
24 Accordingly, the City of Fresno's request for relief on this
25 ground is DENIED WITHOUT PREJUDICE. And the Defendants' legal
26 challenge to the zoning ordinance on this ground is DENIED WITHOUT
27 PREJUDICE.

28 E. Liability of Defendant Landlords

1 Defendant Landlord Marejg Properties LLC argues correctly
2 that the City of Fresno has failed to make a prima facie factual
3 showing that the Landlord has somehow participated in the zoning
4 violation. Similarly, in the consolidated cases, there appears to
5 be no evidence before the court demonstrating that the Landlords
6 knew or should have known of the zoning violations, or that the
7 City of Fresno notified the Landlords of the zoning violations and
8 formally requested that the Landlords take some kind action.
9

10 Furthermore, in its initial moving papers, the City of Fresno
11 failed to cite any statutory authority or case law demonstrating
12 that the Landlords bore any legal responsibility to discover or
13 halt the zoning violations, or that by permitting operation of the
14 dispensaries the Landlords committed per se violations of the
15 zoning ordinance. In its initial moving papers, the City of Fresno
16 made no evidentiary or legal showing that the Landlords had any
17 statutory or legal duty to act in this situation.
18

19 At oral argument on 9/2/09, the City of Fresno alluded to
20 certain unspecified ordinances that hold the Landlords
21 responsible, but the moving papers do not appear to address the
22 question of the Landlords' liability. In its Supplemental Reply
23 filed on 10/16/09, the City of Fresno cited Fresno Municipal Code
24 section 10-605, for the first time, as the zoning provision that
25 renders a landlord strictly liable for owning a property on which
26 a tenant has created a public nuisance. Section 10-605 states
27 that "It is unlawful for any person, corporation or other entity
28

1 owning, leasing, occupying, directly controlling or having charge
2 of any property in this city to keep, maintain or deposit on said
3 property any public nuisances. The City Council, by adoption of
4 this ordinance, declares the keeping, maintaining or depositing of
5 any of the following to be a public nuisance . . . (j) Violation
6 of a zoning ordinance.” (Underscoring added.)
7

8 The City of Fresno also cites a 95-year-old case, **People v.**
9 **Barbieri** (1914) 33 Cal.App. 770, 778-779, for the proposition that
10 a modern property owner may be held strictly liable for a zoning
11 violation on his property, even where he has no actual or
12 constructive knowledge of illegal activity occurring on his
13 property, because the public nuisance action is in rem against the
14 property itself and because the owner may properly and fairly be
15 “presumed to know the business conducted thereon.” (Id. at p.
16 779.)
17

18 But **Barbieri** is distinguishable on its facts because therein
19 the evidence suggested that the landowners, who were husband and
20 wife, both knew or should have known that an illegal brothel was
21 operating on their property. (See generally, Id. at pp. 779-781
22 [recitation of evidence].) “In the instant case, however, we are
23 justified in saying that a fair and reasonable inference arises
24 from the evidence that both Barbieri and Moreau knew at all times
25 of the immoral uses to which the condemned buildings were being
26 put.” (**People v. Barbieri** (1914) 33 Cal.App. at 779.)
27
28

1 Modern cases cast doubt on the legality and constitutionality
2 of holding landlords strictly liable for the apparent misconduct
3 of tenants, particularly in the absence of actual notice, actual
4 knowledge, or a court finding that criminal activity or a public
5 nuisance is being actively maintained or knowingly tolerated.
6 (**Cook v. City of Buena Park** (2005) 126 Cal.App.4th 1; **Garrett v.**
7 **City of Escondido** (S.D. Cal. 2006) 465 F. Supp.2d 1043.)
8

9 In any event, at the TRO hearing on 10/8/09, the City of
10 Fresno failed to carry its initial burden to establish the civil
11 liability of Defendant Landlords. The court, therefore, issued no
12 formal notice to the Landlords to appear at the 10/22/09 hearing,
13 and now consequently, no preliminary injunction may issue as to
14 Defendant Landlords. As a matter of due process, the legal
15 authority advanced by the City of Fresno, in its 10/16/09
16 Supplemental Reply, came too late to alter this court's prior
17 ruling.
18

19 Accordingly, the City of Fresno's request for relief as
20 against Defendant Landlords is DENIED WITHOUT PREJUDICE.

21 F. Laches

22 At the 10/8/09 hearing, defense counsel argued that too much
23 time had passed before the City of Fresno finally undertook to
24 enforce its zoning ordinance, so that the doctrine of laches bars
25 issuance of a Preliminary Injunction. In its 10/16/09
26 Supplemental Reply, the City of Fresno argues that the doctrine of
27 laches simply does not apply to a public nuisance. (**Civil Code**
28

1 **3490.**) But this is incorrect. In an action to abate a public
2 nuisance, equitable defenses, including laches, are not absolutely
3 barred. When the defense of laches is properly raised, the court
4 must conduct a balancing test, weighing the injustice to be
5 avoided against the effect of the defense upon the public
6 interest. (**City and County of Fresno v. Pacello** (1978) 85
7 Cal.App.3d 637.)
8

9 Here, Defendants have failed to carry their burden to present
10 evidence to show that there was an unreasonably lengthy delay in
11 enforcement of the zoning ordinance. Even assuming the delay was
12 substantial, Defendants have failed to present evidence to show
13 that the passage of time has prejudiced them. In this regard,
14 Defendants have failed to show precisely what damages they have
15 suffered and the extent of those damages. "Delay alone will not
16 constitute laches, rather, it must also appear that some prejudice
17 to the defendant was caused by the delay." (Ibid.)
18

19 CONCLUSION

20 The court finds that the City of Fresno has carried its
21 burden to show a reasonable probability that the City will prevail
22 on the merits at trial, that there is a risk of irreparable harm
23 to the City, and that the harm the City will likely suffer if
24 relief is denied exceeds the harm Defendants will likely suffer if
25 relief is granted.
26

27 Therefore, the court issues this Preliminary Injunction
28 enjoining the Defendant dispensaries listed below, their owners

1 and/or operators, and their agents and/or employees, from selling
2 or distributing marijuana from the dispensaries named below and at
3 the addresses listed below, pending the bench trial on this
4 matter. The Preliminary Injunction does not apply to Defendant
5 Landlords.

6
7 Consistent with the laws governing provisional remedies in
8 the State of California, the issuance of this Preliminary
9 Injunction does not determine the merits of the underlying
10 controversies. Rather, until the time of trial, the issuance of
11 this order merely maintains the status quo that existed before the
12 various dispensaries started selling and/or distributing marijuana
13 in violation of the City of Fresno's zoning ordinance.

14
15 The following named Defendants are subject to the Preliminary
16 Injunction:

17 **1. City of Fresno v. Marejg Properties LLC, et al.**
18 **09 CECG 02906**

19 Genesis 1:29 Inc. (dispensary) dba Medmar Clinic, dba
20 Synergistic Cannabinoids
21 210 E. Olive, Fresno, CA 93728
22 Richard W. Morse (owner and/or operator)
23 Weston B. Fox (owner and/or operator)

24 **2. City of Fresno v. California Herbal Relief Center, et al.**
25 **09 CECG 03058**

26 California Herbal Relief Center (dispensary)
27 609 B East Olive, Fresno CA 93728
28 Sean K. Dwyer (owner and/or operator)

3. City of Fresno v. Compassionate Outreach, et al.
09 CECG 03059

Compassionate Outreach
Compassionate Outreach II
6368 Fig Garden Drive, Fresno CA 93722

- 1 Mark Frankel (owner and/or operator)
- 2 **4. City of Fresno v. Sierra Natural Healing Collective, et al.**
3 **09 CECG 03060**
- 4 Sierra Natural Healing Collective (dispensary)
5 5030 West Shaw Avenue, Fresno CA 93722
6 Jessica Styre (owner and/or operator)
7 Michael Parks (owner and/or operator)
- 8 **5. City of Fresno v. California Naturopathic Agricultural**
9 **Association**
10 **09 CECG 03061**
- 11 California Naturopathic Agricultural Association (dispensary)
12 1021 N. Abby, Fresno CA 93701
13 William R. McPike (owner and/or operator)
- 14 **6. City of Fresno v. Earthsource, et al.**
15 **09 CECG 03096**
- 16 Earthsource (dispensary)
17 2815 North Blackstone Avenue, Fresno CA 93703
18 John Kinsfather (owner and/or operator)
19 Charles Erickson (owner and/or operator)
- 20 **7. City of Fresno v. Fresno Compassion Association, et al.**
21 **09 CECG 03097**
- 22 Fresno Compassion Association (dispensary)
23 2506 North Fruit Avenue, Fresno CA 93705
24 George Boyadjian (owner and/or operator)
- 25 **8. City of Fresno v. Central Valley Collective, et al.**
26 **09 CECG 03098**
- 27 Central Valley Collective (dispensary)
28 6463 North Blackstone Avenue, Fresno CA 93710
Linda Nebeker (owner and/or operator)
Dennis Nebeker (owner and/or operator)
9. **City of Fresno v. Nu-Life Association, et al.**
09 CECG 03099
- Nu-Life Association (dispensary)
3742 North First St., Fresno CA 93726
Mitchell Danekas (owner and/or operator)

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DATED this __28__ day of OCTOBER 2009.

_____A.M. Simpson_____

Alan M. Simpson

Judge of the Superior Court