



**CITY OF CORNING  
CITY COUNCIL AGENDA**

**TUESDAY, SEPTEMBER 22, 2009  
OLIVE VIEW SCHOOL GYMNASIUM  
1402 FIG STREET, CORNING, CA**

**A. CALL TO ORDER: 7:00 p.m.**

**B. ROLL CALL:**

**Council:**

**Becky Hill  
Ross Turner  
Toni Parkins  
John Leach  
Gary Strack**

**Mayor:**

The **Brown Act** requires that the Council provide the opportunity for persons in the audience to briefly address the Council on the subject(s) scheduled for tonight's closed session. Is there anyone wanting to comment on the subject(s) the Council will be discussing in closed session? If so, please come to the podium, identify yourself and give us your comments.

**C. ADJOURN TO CLOSED SESSION:**

**CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION**

**Pursuant to subdivision (b) of Section 54956.9:**

**2 Issues**

**D. RECONVENE AND REPORT ON CLOSED SESSION: 7:30 p.m.**

**E. INVOCATION AND PLEDGE OF ALLEGIANCE:**

**F. PROCLAMATIONS, RECOGNITION'S, APPOINTMENTS:**

**G. BUSINESS FROM THE FLOOR:**

**H. CONSENT AGENDA: It is recommended that items listed on the Consent Agenda be acted on simultaneously unless a Councilmember or members of the audience requests separate discussion and/or action.**

- 1. Waive reading, except by title, of any Ordinance under consideration at this meeting for either introduction or passage, per Government Code Section 36934.**
- 2. Waive the Reading and Approve the Minutes of the August 25, 2009 Special Study Session between the City Council and Planning Commission, and the August 25, 2009 Regular City Council Meeting with any necessary corrections.**
- 3. September 16, 2009 Claim Warrant - \$161,946.50.**
- 4. Business License Report – September 2009.**
- 5. Approve Agreement with Premier West Bank for Check Fraud Detection Service.**
- 6. Approve Transfer of Municipal Airport Ground Lease to Brian and Carol Carpenter, Rainbow Aviation Services, Inc. for Buildings A & B.**

**I. ITEMS REMOVED FROM THE CONSENT AGENDA:**

**THE CITY OF CORNING IS AN EQUAL OPPORTUNITY EMPLOYER**

J. **PUBLIC HEARINGS AND MEETINGS:** Any person may speak on items scheduled for hearing at the time the Mayor declares the Hearing open. **ALL LEGAL NOTICES PUBLISHED IN ACCORDANCE WITH LAW.**

7. **Consider Extending Interim Ordinance No. 637:** The City Council will consider extending Interim Ordinance No. 637 pursuant to Section 65858 (a) of the California Government Code. If the extension is adopted by a four-fifths vote of the Council it will prohibit the establishment or operation of profit or nonprofit Medical Marijuana Dispensaries, Collectives or Cooperatives within any Zoning District in the City Limits of the City of Corning for 10 months and 15 days.

K. **REGULAR AGENDA:**

8. **Voluntary Reduction in City Council Salaries.**

L. **ITEMS PLACED ON THE AGENDA FROM THE FLOOR:**

M. **COMMUNICATIONS, CORRESPONDENCE AND INFORMATION:**

N. **REPORTS FROM MAYOR AND COUNCIL MEMBERS:**

9. **Hill:**

10. **Turner:**

11. **Parkins:**

12. **Leach:**

13. **Strack:**

O. **ADJOURNMENT!:**



**CITY OF CORNING  
MINUTES**

**SPECIAL STUDY SESSION  
CITY COUNCIL AND PLANNING COMMISSION  
TUESDAY, AUGUST 25, 2009  
CITY COUNCIL CHAMBERS  
794 THIRD STREET**

**A. CALL TO ORDER: 6:00 p.m.**

**B. ROLL CALL:**

<b>Council:</b>	<b>Becky Hill</b>	<b>Planning Commissioners:</b>	<b>Diana Robertson</b>
	<b>Ross Turner</b>		<b>Ryan Reilly</b>
	<b>Toni Parkins</b>		<b>Doug Hatley</b>
	<b>John Leach</b>		<b>Vacant</b>
<b>Mayor:</b>	<b>Gary Strack</b>	<b>Chairman:</b>	<b>Jesse Lopez</b>

All members of the City Council were present except Councilor Parkins.  
All members of the Planning Commission were present.

**PUBLIC COMMENTS:**

Mayor Strack announced that this was not a public hearing; it was a Study Session between the Planning Commissioners, City Council Members and City Staff. He stated that since this is not a public hearing, all public comments would be taken at the beginning of the meeting only. At that time he opened the floor for comments.

Mr. Burg, Attorney for Mr. and Mrs. Prather addressed the Council and Commission outlining some of the legal aspects relating to the issue of Medical Marijuana and regulations for the Cultivation and Distribution of Medical Marijuana.

An audience member started to speak on behalf of Tehama Herbal Collective (THC) and Mayor Strack intervened explaining that this meeting was limited in time due to the scheduled City Council Meeting that follows at 7:30 p.m. Mayor Strack announced that no decisions relating to THC will be made tonight and reiterated that this is not a public hearing, but rather a study session for the Council, Planning Commission and Staff to discuss the issue and obtain information from our Staff.

Some members of the audience stated their rights were being taken from them by not allowing them to speak. Councilor Turner respectfully requested that the Mayor announce that anyone wishing to submit something in writing on this issue may submit it to the City and it will be reviewed and considered by the City Council. Mayor Strack agreed and made this announcement. Two members of the Elementary School Board were present and stated that the City should have received a letter from the School Board regarding this issue and would like to read it. Mayor Strack stated again that no decision would be made tonight and that the City Council would review the letter upon receipt.

**C. REGULAR AGENDA:**

**1. Study Matter: Medical Marijuana, Discuss with Staff Potential Regulations for the Cultivation and Distribution of Medical Marijuana in the City of Corning.**

Mayor Strack introduced this item by title and then turned the floor over to Planning Director John Stoufer for his presentation of information to the Council/Commission.

Issues presented for discussion by Mr. Stoufer were:

**Cultivation:** Mr. Stoufer provided the Planning Commission and City Council with information gathered relating to Conditions/Regulations imposed in other Cities/Counties in regards to the cultivation of marijuana by Dispensories/Cooperatives/Collectives. He also outlined some possible concerns such as:

**Indoor:** Health Issues, Life Safety Issues. **Outdoor:** Nuisance smell to neighbors and security.

Regulations suggested and discussed by the City Council, Planning Commission and City Staff included:

**Indoor Cultivation:** A mandatory distance from School's of 1,000 ft. for cultivation sites, mandatory registration with Police Department, cultivation in a detached structure only, not allowing cultivation in multi-family structures, and a mandatory exterior building "Marijuana Cultivation" plaquard. The property owner must consent for growth, and residence must be occupied.

**Outdoor Cultivation:** Security camera's, no growing in front or side yards, increase backyard fence height to 8 – 10 feet, motion lights, mandatory registration with Police Department. Property owner must consent for growth. Resident must live on site. Primary Caregiver limits.

**Distribution:** Mr. Stoufer provided information gathered related to regulating the distribution of marijuana. He informed the Council, Commission and Staff that currently there are 24 Cities that allow this with zoning regulations applied to use; 39 Cities have adopted Ordinances to ban this within their City.

Distribution Options discussed were:

**BAN** (Many Cities/Counties have cases in legal litigation to establish, protect and/or define their regulatory power in regards to Medical Marijuana Collectives, Dispensaries and Cooperatives. They are also legally attempting to establish their legal right to impose regulations on the cultivation and distribution of Medical Marijuana).

**Zoning** (Numerous Cities only allow in certain zone): Not allow in residential zones, No In-home Occupation, and located in a C-2 zone only.

**Mandatory distance limits:** 500' from Schools, Parks, Churches, Child Care, and 300' from residential zone.

**Dispensary Limit:** A limit of one dispensary in Corning.

**Security Measures:** Security cameras, motion lights, mandatory registration with Police Department, identification cards, and listing of Co-op Members.

Councilor Hill stated that she had definite concerns with indoor growth specifically in relation to the safety of the City's Firefighters.

On the advice of the City Attorney, Councilor Turner moved to add an Emergency Closed session to the Agenda following the meeting to discuss possible litigation. Councilor Leach seconded the motion. **Ayes: Strack, Hill, Turner and Leach. Opposed: None. Absent: Parkins. Abstain: None. Motion was approved by a 4-0 vote with Parkins absent.**

D. **ADJOURN TO EMERGENCY CLOSED SESSION: 7:15 p.m.**

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Lisa M. Linnet, City Clerk



**CITY OF CORNING  
CITY COUNCIL MINUTES**

**TUESDAY, AUGUST 25, 2009  
CITY COUNCIL CHAMBERS  
794 THIRD STREET**

**A. CALL TO ORDER: 7:38 p.m.**

**B. ROLL CALL:**

**Council:     Becky Hill  
                  Ross Turner  
                  Toni Parkins  
                  John Leach  
Mayor:        Gary Strack**

All members of the City Council were present.

**C. INVOCATION AND PLEDGE OF ALLEGIANCE:**

Councilor Leach gave the Invocation and Gene May led the Pledge of Allegiance.

**D. PROCLAMATIONS, RECOGNITION'S, APPOINTMENTS:**

- 1. **Proclamation Designating September 28, 2009 as "Family Day...A Day to Eat Dinner with Your Children" in the City of Corning.** Requested by Nancy Gavilanes of the National Center on Addiction and Substance Abuse at Columbia University.

Mayor Strack introduced this item by title and City Clerk Lisa Linnet read the Proclamation.

**E. BUSINESS FROM THE FLOOR:**

Kristina Miller from the Tehama County Landfill announced an electronic waste event the last Saturday of every month at the Transportation Center 8:00 a.m. to noon through December.

**F. CONSENT AGENDA:** It is recommended that items listed on the Consent Agenda be acted on simultaneously unless a Councilmember or members of the audience requests separate discussion and/or action.

- 2. **Waive reading, except by title, of any Ordinance under consideration at this meeting for either introduction or passage, per Government Code Section 36934.**
- 3. **Waive the Reading and Approve the Minutes of the August 11, 2009 Meeting with any necessary corrections.**
- 4. **August 19, 2009 Claim Warrant - \$130,401.50.**
- 5. **Business License Report – August 2009.**
- 6. **Resolution No. 08-25-09-01; Energy Efficiency Conservation Block Grant Program; Rodger's Theatre HVAC and Technical Assistance from California Energy Commission.**
- 7. **Resolution No. 08-25-09-02, A Resolution of the City Council of the City of Corning Appointing Code Enforcement Officers.**

8. **Resolution No. 08-25-09-03, A Resolution of the City Council of the City of Corning Approving the Department of Forestry & Fire Protection Agreement #7FG90079 and Accepting Associated Grant Funds in the amount of \$7,396.**

9. **Recommend Appointment of Louis Davies and Ed Pitman to the Corning Airport Commission.**

Councilor Hill recognized Mr. Davies and Mr. Pitman for their willingness to serve on the Airport Commission. Councilor Turner stated he was unable to attend the presentation to former Airport Commissioner Mr. Jerry Rindahl, however he later visited Mr. Rindahl and thanked him for his service on the Commission.

With no further discussion, Councilor Turner moved to approve Consent Agenda Items 2-9. Councilor Hill seconded the motion. **Ayes: Strack, Hill, Turner, Parkins and Leach. Opposed: None. Absent/Abstain: None. Motion was approved by a vote of 5-0.**

G. **ITEMS REMOVED FROM THE CONSENT AGENDA:** None.

H. **PUBLIC HEARINGS AND MEETINGS:** Any person may speak on items scheduled for hearing at the time the Mayor declares the Hearing open. **ALL LEGAL NOTICES PUBLISHED IN ACCORDANCE WITH LAW.** None.

I. **REGULAR AGENDA:**

10. **Adopt Resolution No. 08-25-09-04 Authorizing the Tehama County Landfill Agency Submit A Regional Application to the California Integrated Waste Management Board for a Recycled Market Development Zone. (Kristina Miller, Landfill Agency Manager will be present to provide a PowerPoint Presentation).**

Tehama County Landfill Manager Kristina Miller addressed the Council explaining the purpose of the Recycled Market Development Zone. She explained the benefits, how the funding can be used, etc. and stated that it is a win/win proposition. She stated that she is here to request Council approval of an application and the adoption of the Resolution. Councilor Leach asked what was happening with the California Integrated Waste Management Board in Sacramento. Ms. Miller stated that the Governor got rid of the five-member Board. The employees that work for the Waste Management Board will remain and the Board will become a Department and renamed the Department of Resources, Recovery and Recycling.

Mayor Strack asked about a letter received from her regarding decreased funding; Ms. Miller briefed the Council stating that the decrease relates to the beverage container grant fund.

Councilor Turner moved to Adopt Resolution No. 08-25-09-04 authorizing the Tehama County Landfill Agency to submit a Regional Application to the California Integrated Waste Management Board for a Recycled Market Development Zone. Councilor Parkins seconded the motion. **Ayes: Strack, Hill, Turner, Parkins and Leach. Opposed: None. Absent/Abstain: None. Motion was approved by a vote of 5-0.**

11. **Corning Municipal Airport Improvement Project Update Regarding Bid Opening and Schedule for Bid Award.**

Mayor Strack introduced this item by title and Public Works Director John Brewer stated that he had received a verbal from FAA to fund the project to the tune of \$2.25 million dollars. He stated that the City's share would be \$112,500. Mr. Brewer announced that the bids had been opened and the low bidder was Teichert Construction at \$2,187,398.90.

There was then discussion of extending a water line to the Airport. Mr. Brewer announced that FFA declined to add this project and cost to the originally approved expansion project. Mr. Brewer then announced that Staff plans to ask Council to award the Bid at the September 8<sup>th</sup> Council meeting. **No action required at this time.**

**THE CITY OF CORNING IS AN EQUAL OPPORTUNITY EMPLOYER**

**12. Response to Accusations by Mr. Dean Cofer RE: Corning Municipal Airport Fixed Base Operator Lease.**

Mayor Strack introduced this item by title and stated that the Council had received an opinion from the City Attorney Mike Fitzpatrick and that it does meet all the requirements.

Dean Cofer addressed the Council stating he had requested this information and a written legal opinion by the City Attorney related to this issue and received no response to his previous requests.

**J. ITEMS PLACED ON THE AGENDA FROM THE FLOOR: None.**

**K. COMMUNICATIONS, CORRESPONDENCE AND INFORMATION: None.**

**L. REPORTS FROM MAYOR AND COUNCIL MEMBERS:**

**13. Hill:** Nothing

**14. Turner:** Reported on the success of the Olive Festival.

**15. Parkins:** Thanked the Chamber, Chamber Staff and Chip McCoy for their work on the Olive Festival. She also stated that she won a beautiful patio table set after buying tickets.

**16. Leach:** Enjoyed Toni and Becky in the Dunk Tank. He announced that last Thursday he was Chair on the Tripartite Board, no action was taken.

**17. Strack:** Nothing.

**M. ADJOURNMENT!: 8:01 p.m.**

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**Lisa M. Linnet, City Clerk**



# MEMORANDUM

**TO:** HONORABLE MAYOR AND COUNCIL MEMBERS

**FROM:** LORI SIMS  
ACCOUNTING TECHNICIAN

**DATE:** September 16, 2009

**SUBJECT:** Cash Disbursement Detail Report for the  
Tuesday, September 22, 2009 Council Meeting

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PROPOSED CASH DISBURSEMENTS FOR YOUR APPROVAL CONSIST OF THE FOLLOWING:

A.	Cash Disbursements	Ending	09-16-09	\$	116,694.38
B.	Payroll Disbursements	Ending	09-10-09	\$	45,252.12
<b>GRAND TOTAL</b>					<b>\$ <u>161,946.50</u></b>

REPORT.: Sep 16 09 Wednesday  
 RUN....: Sep 16 09 Time: 14:41  
 Run By.: LORI

CITY OF CORNING  
 Cash Disbursement Detail Report  
 Check Listing for 09-09 Bank Account.: 1020

PAGE: 001  
 ID #: PY-DP  
 CTL.: COR

Check Number	Check Date	Vendor Number	Vendor Name	Gross Amount	Discount Amount	Net Amount	Invoice #	Payment Information-Description
009299	09/03/09	BRE01	BREWER, JOHN	54.08	.00	54.08	090903	MAT & SUPPLIES-BLD MAINT
009300	09/03/09	PET03	PETTY CASH	299.94	.00	299.94	090903	PETTY CASH-
009301	09/03/09	THO01	THOMES CREEK ROCK CO	821.26	.00	821.26	090831	Mat/Supplies-
009302	09/08/09	TRI01	TRI COUNTY ECONOMIC DEV	2850.00	.00	2850.00	090908	TRICO EDC-ECO DEV
009303	09/14/09	AIR00	AIRGAS NCN	44.63	.00	44.63	102732368	MAT & SUPPLIES-FIRE
009304	09/14/09	ALL11	ALL SPORTS EQUIPMENT &	168.59	.00	168.59	090904	MAT & SUPPLIES-REC
009305	09/14/09	ARA02	ARAMARK UNIFORM SRV. INC.	28.75	.00	28.75	4232260	Mat/Supplies-
009306	09/14/09	BAS01	BASIC LABORATORY, INC	86.00	.00	86.00	0908301	ProfServices Water Dept
			Check Total.....:	172.00	.00	172.00	0908492	ProfServices Water Dept
009307	09/14/09	CAR12	CARREL'S OFFICE MACHINES	5.80	.00	5.80	084974	MAT & SUPPLIES-LIBRARY
			Check Total.....:	3.18	.00	3.18	085664	MAT & SUPPLIES-LIBRARY
009308	09/14/09	CCM01	CA CITY MANAGEMENT FOUNDA	400.00	.00	400.00	090908	ASSOC DUES-CITY ADMIN
009309	09/14/09	COM01	COMPUTER LOGISTICS, INC	979.18	.00	979.18	46536	Equip.Maint.-POLICE
			Check Total.....:	2000.00	.00	2000.00	46569	COMMUNICATIONS-POLICE
				24.00	.00	24.00	46713	COMMUNICATIONS-
				24.00	.00	24.00	46714	COMMUNICATIONS-FIRE
				27.00	.00	27.00	46715	COMMUNICATIONS-POLICE
				116.67	.00	116.67	46778	COMMUNICATIONS-POLICE
				19.00	.00	19.00	46779	Equip.Maint.-GEN CITY
			Check Total.....:	3189.85	.00	3189.85		
009310	09/14/09	COR11	CORNING SAFE & LOCK	14.02	.00	14.02	2510	MAT & SUPPLIES-PARKS
009311	09/14/09	DEF12	DEPT OF JUSTICE	127.00	.00	127.00	751413	PROF SVCS-
009312	09/14/09	GOL03	GSFM / WFM	418.94	.00	418.94	I-026840	Mat/Supplies-WTR
009313	09/14/09	HOL04	HOLIDAY MARKET #32	3.01	.00	3.01	31942	Mat/Supplies-ACC
			Check Total.....:	11.18	.00	11.18	31944	Mat/Supplies BuildingMain
				14.19	.00	14.19		
009314	09/14/09	JON02	JONES INSURANCE	125.00	.00	125.00	090904	Gen.Insurance General Cit

REPORT.: Sep 16 09 Wednesday  
 RUN...: Sep 16 09 Time: 14:41  
 Run By.: LORI

CITY OF CORNING  
 Cash Disbursement Detail Report  
 Check Listing for 09-09 Bank Account.: 1020

PAGE: 002  
 ID #: PY-DP  
 CTL.: COR

Check Number	Check Date	Vendor Number	Vendor Name	Gross Amount	Discount Amount	Net Amount	Invoice #	Payment Information-Description
009315	09/14/09	LIN02	LINNETS TIRE SHOP	117.95	.00	117.95	49073	Veh Opr/Maint-POLICE
009316	09/14/09	MAY01	MAY, WILLIAM L.	2268.05	.00	2268.05	200991520	EE RELATIONS-LEGAL SVCS
009317	09/14/09	MCC05	MCCURDY'S TRUCK REPAIR	134.78	.00	134.78	5692	VEH OP/MAINT-FIRE
009318	09/14/09	NOR25	NORTHERN LIGHTS ENERGY, INC	3499.01	.00	3499.01	8451	VEH OP/MAINT-
009319	09/14/09	PAC16	PACIFIC TELEMANAGEMENT SE	73.00	.00	73.00	141286	COMMUNICATIONS-GEN CITY
				38.00	.00	38.00	141298	COMMUNICATIONS-GEN CITY
			Check Total.....:	111.00	.00	111.00		
009320	09/14/09	PGE03	PG&E	17.92	.00	17.92	090831	Mat/Supplies PoliceServic
009321	09/14/09	PGE2A	PG&E	80.30	.00	80.30	090831	ELECT-CLELAND PROP
009322	09/14/09	QUI02	QUILL CORPORATION	23.37	.00	23.37	9049137	Office Supplies-FINANCE
				270.82	.00	270.82	9092656	Office Supplies-
			Check Total.....:	294.19	.00	294.19		
009323	09/14/09	RDJ00	RDJ SPECIALTIES, INC.	378.65	.00	378.65	338486	TRAINING/ED-FIRE
009324	09/14/09	RED01	RED BLUFF DAILY NEWS	116.52	.00	116.52	090910	Print/Advert.-POLICE
009325	09/14/09	SCH01	LES SCHWAB TIRE CENTER	68.95	.00	68.95	302690	Veh Opr/Maint-FIRE
009326	09/14/09	SWM00	SMMC SERVICES, INC.	44156.20	.00	44156.20	16853	PROF SVCS-WWTP
				2640.67	.00	2640.67	16854	PRETREATMENT PROG-SWR
				3400.00	.00	3400.00	16879	PROF SVCS-WWTP
				19972.05	.00	19972.05	16883	PROF SVCS-
			Check Total.....:	70168.92	.00	70168.92		
009327	09/14/09	TEH15	TEHAMA CO SHERIFF'S DEPT	49.00	.00	49.00	090902	PROF SVCS-
009328	09/14/09	TRI02	TRI-COUNTY NEWSPAPERS	497.45	.00	497.45	090831	Print/Advert.-
009329	09/14/09	UNI02	UNIFORMS, TUXEDOS & MORE	45.14	.00	45.14	92655	SAFETY ITEMS-POLICE
009330	09/14/09	USA03	USA MOBILITY WIRELESS, INC	32.91	.00	32.91	S01599121	COMMUNICATIONS-POLICE
009331	09/14/09	WAR04	WARREN, GLORIA	256.50	.00	256.50	090908	REC INSTRUCT-REC
009332	09/15/09	ARA02	ARAMARK UNIFORM SRV. INC.	28.75	.00	28.75	4236535	Mat/Supplies-
009333	09/15/09	CHE02	CHEM QUIP, INC.	1235.40	.00	1235.40	2059641IN	MAT & SUPPLIES-WTR

Check Number	Check Date	Vendor Number	Vendor Name	Gross Amount	Discount Amount	Net Amount	Invoice #	Description
009334	09/15/09	CON07	CONEXIS	30.00	.00	30.00	080909348	MEDICAL INS-COBRA
009335	09/15/09	COR22	CORNING MEDICAL ASSOC	65.00	.00	65.00	495	Emp Physicals-PW ADMIN
009336	09/15/09	GRA02	GRAINGER, W.W., INC	921.50	.00	921.50	904179264	MAT & SUPPLIES-PARKS
009337	09/15/09	HOL04	HOLIDAY MARKET #32	194.51	.00	194.51	31946	Mat/Supplies-ACO
009338	09/15/09	JOH06	JOHNSON'S TURBO CLEAN	792.87	.00	792.87	2769	MAT & SUPPLIES-BLD MAINT
009339	09/15/09	LAS03	LASER "RENEW" ZIT	173.15	.00	173.15	14782	OFFICE SUPPLIES-POLICE
009340	09/15/09	NAT12	NATIONAL NOTARY ASSOC.	52.00	.00	52.00	090915	ASSOC DUES-CITY ADMIN
009341	09/15/09	PUR02	PURCHASE POWER	518.99	.00	518.99	090914	COMMUNICATIONS-GEN CITY
009342	09/15/09	SUN01	SUNRISE ENVIRONMENTAL	420.84	.00	420.84	90237	MAT & SUPPLIES-
009343	09/15/09	TLD01	TEDC	208.33	.00	208.33	090915	Economic Devel
009344	09/15/09	WAS01	WASTE MANAGEMENT OF	23630.69	.00	23630.69	090915	WASTE MGMT PYMT-SOLID WA
009345	09/15/09	BRE01	BREWER, JOHN	112.00	.00	112.00	090915	MAT & SUPPLIES-AIRPORT
009346	09/16/09	AIR00	AIRGAS NCN	1.19	.00	1.19	102707942	MAT & SUPPLIES-FIRE
009347	09/16/09	ATT09	AT&T	64.66	.00	64.66	090907	MAT & SUPPLIES-WTR
009348	09/16/09	BUR03	BURTON, MICHELLE	304.00	.00	304.00	090916	REC INSTRUCT-REC
009349	09/16/09	BUT04	BUTTE CTY CREDIT BUREAU	12.00	.00	12.00	10416	PROF SVCS-DISPATCH
009350	09/16/09	DEP01	DEPT OF JUSTICE	52.00	.00	52.00	090915	PROF SVCS-POLICE
009351	09/16/09	LAM03	LAMBETH, TAMMY	336.00	.00	336.00	090916	REC INSTRUCTOR-REC
009352	09/16/09	LIN02	LINNETS TIRE SHOP	117.95	.00	117.95	49136	Veh Opr/Maint-K-9 PROG
009353	09/16/09	LAN01	LN CURTIS & SONS	52.77	.00	52.77	117514900	MAT & SUPPLIES-FIRE
				225.47	.00	225.47	117591900	MAT & SUPPLIES-FIRE
				25.32	.00	25.32	117653801	MAT & SUPPLIES-FIRE
				52.17	.00	52.17	117893800	MAT & SUPPLIES-FIRE
			Check Total.....:	355.73	.00	355.73		
009354	09/16/09	PHI01	PHIL'S AUTOMOTIVE	110.00	.00	110.00	33780	Veh Opr/Maint-POLICE
009355	09/16/09	RED01	RED BLUFF DAILY NEWS	82.35	.00	82.35	090915	Print/Advert. City Clerk
			Cash Account Total.....:	116694.38	.00	116694.38		
			Total Disbursements.....:	116694.38	.00	116694.38		



Check Number	Check Date	Vendor Number	Vendor Name	Gross Amount	Discount Amount	Net Amount	Invoice #	Payment Information-Description
4146	09/10/09	BAN03	POLICE OFFICER ASSOC.	350.00	.00	350.00	A90908	POLICE OFFICER ASSOC
4147	09/10/09	CAL37	CALIFORNIA STATE DISBURSE	138.46	.00	138.46	A90908	WITHHOLDING ORDER
4148	09/10/09	EDD01	EMPLOYMENT DEVELOPMENT	3481.80	.00	3481.80	A90908	STATE INCOME TAX
				1211.41	.00	1211.41	1A90908	SDI
			Check Total.....	4693.21	.00	4693.21		
4149	09/10/09	ICM01	ICMA RETIREMENT TRUST-457	3516.98	.00	3516.98	A90908	ICMA DEF. COMP
4150	09/10/09	OEU03	OPERATING ENGINEERS	800.00	.00	800.00	A90908	CREDIT UNION SAVINGS
4151	09/10/09	PERS1	PUBLIC EMPLOYEES RETIRE	29142.51	.00	29142.51	A90908	PERS PAYROLL REMITTANCE
4152	09/10/09	PERS4	Cal Pers 457 Def. Comp	376.25	.00	376.25	A90908	PERS DEF. COMP.
4153	09/10/09	PRE03	PREMIER WEST BANK	3677.25	.00	3677.25	A90908	HSA DEDUCTIBLE
4154	09/10/09	TEH15	TEHAMA CO SHERIFF'S DEPT	589.71	.00	589.71	A90908	WAGE ASSN # 43462
4155	09/10/09	VAL06	VALIC	1967.75	.00	1967.75	A90908	AIG VALIC P TAX

Cash Account Total.....: 45252.12 .00 45252.12

Total Disbursements.....: 45252.12 .00 45252.12

=====

Date.: Sep 16, 2009  
Time.: 2:56 pm  
Run by: LORI

CITY OF CORNING  
NEW BUSINESSES FOR CITY COUNCIL

Page.: 1  
List.: NEWS  
Group: WIFMB

Business Name	Address	CITY/STATE/ZIP	Contact Name	Business Desc. #1	Business Start Date	Primary Teleph
MS CONCEPTS	807 TEHAWA ST	CORNING, CA 96021	SALAS	JESUS DIRECTORY - NEWS ETC.	09/15/09	(530)838-0065
RAYGOZA, FELIX	1809 SOLANO ST	CORNING, CA 96021	RAYGOZA	FELIX SELLING FRESH FRUITS & VEGETABLES	09/15/09	(530)865-3303
SNYDER & SONS PLUMBI	435 4TH ST	ORLAND, CA 95963	SNYDER	CLYDE CONTRACTOR - PLUMBING	09/15/09	(530)865-7530

ITEM NO: H-5  
APPROVE AGREEMENT WITH PREMIER  
WEST BANK FOR CHECK FRAUD  
DETECTION SERVICE.  
SEPTEMBER 22, 2009

TO: HONORABLE MAYOR AND COUNCIL MEMBERS  
FROM: STEPHEN J. KIMBROUGH, CITY MANAGER



**SUMMARY:**

The City Finance Department has met with Kyle Lauderdale Manager of the Corning branch of Premier West Bank; the Staff wants to install the Bank's "Positive Pay" System on a trial basis with the offer of the first 3 months free as a trial period. Positive Pay helps to prevent check fraud.

**BACKGROUND:**

Business accounts are not covered the same way that personal accounts are when it comes to fraud. Personal accounts have up to 60 days to report fraud and in most cases the loss is completely paid by the Bank. Business accounts have only one day after a fraudulent item clears the account to report it as fraud (this is the standard coverage across all Banks).

Positive Pay is simple. Every day, the Bank compares a copy of the City's check register to the checks the Bank receives on the City account. If anything does not match, an email is waiting for the Finance Department the next morning asking if the item should be paid or returned. The Bank believes we can stop fraud before it ever even hits the account.

The cost of this service is \$40 per month and \$4 per check returned. This covers your account no matter how many checks we write in that month.

**Why is this important?** The Banking Industry notes that at any time an unexpected loss can be a disaster. In this economy, the ramifications could be even worse. According to a January 2009 study by the Association of Financial Professionals, 71% of organizations experienced attempted or actual fraud payments in 2008. Of those organizations, 91% experienced check fraud. Of those experiencing a loss, the average loss was \$15,200.

The Standard Bank Agreement for services is attached for review. The agreement has a thirty day termination clause that releases the City following notice.

**RECOMMENDATION:**

**Mayor and Council authorize the City to enter into an Agreement for "Positive Pay" services with Premier West Bank.**

# POSITIVE PAY SERVICES AGREEMENT

This Positive Pay Services Agreement ("Agreement") is between PremierWest Bank ("Bank") and The City of Corning ("Customer"). Bank and Customer agree that the provision by Bank and the use by Customer of the Positive Pay services described below shall be subject to the terms and conditions set forth in the Agreement. In the event of inconsistency between a provision of this Agreement and Uniform Commercial Code as adopted in Oregon or California to the extent applicable, the provisions of this Agreement shall prevail.

## 1. DEFINITIONS

- 1.1 **Statutory Definitions.** Unless otherwise defined in this Agreement, words or phrases shall have the meanings set forth in Articles 3 and 4 of the Uniform Commercial Code as adopted in Oregon and California, to the extent applicable to the transaction. For purposes of this Agreement, the term "item" shall mean a check.
- 1.2 **Definitions.**
- 1.2.1 **Agreement** means this Positive Pay Services Agreement, including Schedules A through F, as amended from time to time.
- 1.2.2 **Authorized Account** means the account(s) of Customer maintained at Bank to which the Positive Pay services rendered by Bank will apply.
- 1.2.3 **Available Funds** means funds on deposit in an Authorized Account and available for withdrawal pursuant to Federal Reserve Regulation CC (12 CFR 229 et seq.) and Bank's applicable funds availability schedule and policies as described in the current Deposit Account Agreement and Disclosure.
- 1.2.4 **Business Day** means a calendar day other than Saturdays, Sundays, and Federal Reserve holidays.
- 1.2.5 **Exception Item** means a Presented Item that does not match a check included in an Issued Item File.
- 1.2.6 **Exception Item Report** means a record describing Exception Items that is provided by Bank to Customer under Section 2.2.2.
- 1.2.7 **Issued Item File** means a record describing checks issued by Customer on an Authorized Account provided by Customer to Bank under Section 2.1.
- 1.2.8 **Pay Request** means the instructions of Customer to Bank requesting Bank to pay an Exception Item.
- 1.2.9 **Presented Item** means a check drawn on an Authorized Account and presented to Bank for payment through the check collection system.
- 1.2.10 **Return Request** means the instructions of Customer to Bank instructing Bank not to pay an Exception Item.

## 2. POSITIVE PAY SERVICES

- 2.1 **Issued Item File.** Customer shall submit an Issued Item File to Bank in accordance with the schedule established by Bank.
- 2.1.1 The Issued Item File shall accurately state the item number, date and the exact dollar amount of each check drawn on an Authorized Account since the last Issued Item File was submitted. Each Authorized Account shall require an Issued Item File for all checks issued.
- 2.1.2 Customer shall send the Issued Item File to Bank in the format and medium as specified by Bank and agreed to by Customer.
- 2.1.3 In the event of Customer or Bank system failure and the Issued Item File cannot be received by Bank or Bank cannot process the file, the file shall be considered as not received, even if Bank has possession of the file.
- 2.2 **Payment of Presented Items and Reporting of Exception Items.** Bank shall compare each Presented Item by item number and amount against each Issued Item File received by Bank for each Authorized Account. On each business day, Bank:
- 2.2.1 May pay and charge to the Authorized Account each Presented Item that matches by item number and amount an item listed on any Issued Item file.
- 2.2.2 Shall provide Customer with electronic notification of Exception Items presented for payment that do not exactly match to the Issued Item File items and in a form and time as outlined in Schedule C titled "Exception Item Report."
- 2.3 **Pay Request/Return Request.** Customer shall review the Exception Item Report and electronically communicate Pay Requests and Return Requests for all exceptions as outlined in Schedule D titled "Pay Requests and Return Requests."
- 2.4 **Pay Default.** If Customer misses the deadline as outlined in Schedule D or if Bank otherwise does not receive a Return Request, Bank will make final payment of the check(s) and charge the account against which the items are drawn.
- 2.5 **Not Covered.** This Agreement does not cover a check if Bank has cashed or paid the item or is committed to honor or pay the item under applicable laws, regulations, or rules governing checks.

- 2.6 Customer and Bank Communications.** Customer and Bank, in their respective discretion, may each submit to the other party a revision of any communication provided under this Agreement. The revised communication must (i) be sent in its entirety and not in the form of a partial amendment to the communication originally sent, (ii) identify the original communication, and (iii) be sent in the format and medium, by the deadline(s), and at the place(s) established by the receiving party. A properly submitted revised communication serves to revoke the original communication.
- 2.6.1** Bank shall use only Issued Item Files that comply with Section 2.1 and have not been revoked in accordance with Section 2.6 in the preparation of Exception Item Reports under this Agreement.
- 2.6.2** Customer shall use only Exception Item Reports that comply with Section 2.2 and have not been revoked in accordance with Section 2.6 in the preparation of Pay Requests and Return Requests. Bank shall not be obligated to comply with any Pay Request or Return Request received in a non-standard format or medium, after a deadline, or at a place not permitted under this Agreement but may instead treat such a Pay Request or Return Request as though it had not been received.
- 2.6.3** Bank is not responsible for detecting any Customer error contained in any Issued Item File or Pay Request or Return Request sent by Customer to Bank.
- 2.7 Stop Payments.** If Customer wishes to stop payment of a check previously included in an Issued Check File, Customer shall void that check within the Positive Pay system and thereby remove the check from the Issued Check File. If the check has not been paid but Customer is unable to void the check within the Positive Pay system, Customer may request a stop payment on a check by calling the Call Center at 800-708-4378, by calling or visiting any PremierWest Bank branch office, or via the online banking system. In all cases the stop payment request must be received by Bank before the check has been paid. The deadline for placing a stop payment with the Call Center or a branch is 5:00 p.m. (Pacific Time) Monday through Friday except Federal Reserve holidays. The deadline for placing a stop payment via online banking is 5:00 p.m. Stop Payment requests received after 5:00 p.m. will be processed the following business day. If Customer is concerned that the check may be paid before the order is effective, Customer should call Bank. To be effective, a stop payment must be placed in a timely manner and must include the payee's name, the check number, the amount, and the date of the check. Bank may also require Customer to confirm the stop payment order in writing sent by mail or personal delivery.
- 2.8 Software.** Customer shall be solely responsible for purchasing, maintaining, and using adequate software to participate in the Positive Pay program, all at Customer's sole expense.
- 2.9 Presented Items.** The Positive Pay services will not apply to ACH transactions and a separate agreement is required for ACH block/filter services. Customer is solely responsible for making sure Presented Items comply with all of Bank's requirements for the Positive Pay services.

### **3. LIABILITY OF BANK; LIMITATIONS ON LIABILITY**

- 3.1 Uniform Commercial Code Liability.** To the extent applicable, the liability provisions of the applicable state version of chapter 3 and 4 of the Uniform Commercial Code shall govern this Agreement, except as modified below.
- 3.2 Performance of Bank.** Bank shall be responsible only for performing the service it expressly agrees to perform in this Agreement. In no case shall Bank be responsible for any acts or omissions of Customer. Customer is solely responsible for the amount and accuracy of each Presented Item and the timeliness of delivery of Customer authorization of any item or instruction given by Customer. Bank is not responsible for any act or omission of any other person, including without limitation any transmission or communications facility and data processor of Customer. Bank shall not be responsible for any dishonor of any payment order or for the acts, omissions, inaccuracy, interruption, delay, or failures of Customer, any Federal Reserve Bank or other financial institution, any transmission or communications facility, or any other person outside Bank's reasonable control. No such person shall be deemed to be Bank's agent. Except as otherwise set forth specifically in this Agreement, Bank hereby disclaims all warranties express or implied, including without limitation the warranties of MERCHANTABILITY and FITNESS FOR A PARTICULAR PURPOSE.
- 3.3 Limit on Damages.** Bank shall be responsible only if (a) Bank dishonors an Exception Item and Bank has been ordered by Customer to pay pursuant to a proper Pay Request received by Bank by the deadline of 11:00 a.m. (Pacific Time) or (b) Bank pays an Exception Item listed in a timely Exception Item Report and Bank receives proper notification from Customer of its desire to return the item(s) by the deadline of 11:00 a.m. (Pacific Time). In the event of error or omission for which Bank is legally responsible as provided in the foregoing sentence, Bank's responsibility shall not exceed the value of the Presented Item. In no event shall Bank be liable for any consequential, special, punitive, or indirect loss or damage which Customer may incur or suffer in connection with this Agreement, including, without limitation, loss or damage from subsequent wrongful dishonor resulting from Bank's acts or omissions in performing its services under this Agreement. Notwithstanding anything in this section or the Agreement to the contrary, Bank shall have no liability to Customer for wrongful dishonor when Bank, acting in good faith, returns an Exception Item:
- (a) that it reasonably believed was not properly payable; or
  - (b) if there are insufficient Available Funds on deposit in the Authorized Account; or
  - (c) if required to do so by the service of legal process of Bank or the instructions of regulatory or government authorities or courts; or
  - (d) if Customer fails to provide proper and timely notice to pay the item.

- 3.4 **Force Majeure.** Subject to Section 3.2, Bank shall not be responsible for any failure to act or delay in acting if such failure is caused by legal constraint, the interruption of transmission or communication facilities, computer malfunction or equipment failure, war, emergency conditions, or other circumstances beyond Bank's reasonable control. In addition, Bank shall be excused from failing to transmit or delay in transmitting a transaction if the transmittal would result in Bank's having violated any provision of any present or future risk control program of the Federal Reserve or any rule or regulation of any other governmental regulatory authority.
- 3.5 **Interest.** Subject to the foregoing provisions of this Section 3, any liability that Bank may have for loss of interest for an error or delay in performing its services hereunder shall be calculated by using a rate equal to Bank's prevailing money market rate for the period involved, less any applicable reserve requirements.

#### 4. **GOVERNING LAW**

This Agreement and all claims or disputes arising on account of or related in any way to Customer's use of Positive Pay shall be governed (without regard to conflicts of law) by applicable state and federal law. All proceedings shall be heard or enforced by the federal and state courts with jurisdiction in Jackson County, Oregon. The court shall apply the Uniform Commercial Code provisions of the applicable state (Oregon or California) depending on the branch office location at which Bank delivers the services to Customer. If the location cannot be determined, the court shall apply Oregon law.

#### 5. **GENERAL PROVISIONS**

- 5.1 **Fees.** Positive Pay fees are as outlined Schedule F. Customer agrees to pay the fees as set forth in Schedule F. Bank may change the fees for Positive Pay services upon prior notice to Customer.
- 5.2 **Payment for Services.** Bank shall, on a monthly basis, debit an authorized Customer account maintained at Bank for payment of charges due unless Customer arranges another payment procedure acceptable to Bank.
- 5.3 **Indemnification.** Customer shall defend, indemnify, and hold harmless Bank and its officers, directors, agents, and employees from and against any and all actions, costs, claims, losses, damages, or expenses, including attorney fees and expenses at trial and on appeal, resulting from or arising out of (i) any breach of any of the agreements, representations, or warranties of Customer contained in this Agreement, (ii) any act or omission of Customer or any other party acting on Customer's behalf, or (iii) Customer instructions that are not in precise compliance with this Agreement
- 5.4 **Confidentiality.** Customer acknowledges that it will have access to certain confidential information regarding Bank's execution of service(s) contemplated by this Agreement. Customer shall not disclose any confidential information of Bank and shall use the confidential information only in connection with the transactions contemplated by the Agreement.
- 5.5 **Electronic Media.** All electronic data or media and records used by Bank for service(s) contemplated by this Agreement shall be and remain Bank's property. Bank may, in its sole discretion, make available such information upon Customer's request. Any expenses incurred by Bank in making any such information available to Customer shall be paid for by Customer at prevailing Bank rates.
- 5.5.1 Customer is responsible for providing accurate electronic addresses for communication in connection with the transactions contemplated in this Agreement.
- 5.5.2 Bank shall not be liable for any loss or damage on account of Customer's internet service, browser, or email provider blocking (whether on account of "firewall," system failure, or otherwise) or preventing Bank's emails from reaching Customer.
- 5.5.3 Bank utilizes identification technology to verify that the sender and receiver of electronic transmissions can be appropriately identified by each other. Notwithstanding Bank's efforts to ensure that transmissions are secure, Customer acknowledges that the internet is inherently insecure and that all data transfers, including email, occur openly on the Internet and potentially can be monitored and read by others. Bank cannot and does not warrant that all data transfers or email transmitted to and from Bank will not be monitored or read by others, and Customer assumes sole responsibility for any and all losses of confidential information through use of email and any other communication system such as telephone, cellular telephone, or facsimile.
- 5.6 **Severability.** If any court or tribunal of competent jurisdiction determines that any provision of this Agreement is illegal, invalid or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.
- 5.7 **Amendments.** The provisions of the Agreement may be amended only by agreement executed by both parties.
- 5.8 **Assignment.** Customer may not assign or transfer any of its rights or obligations under this Agreement without the prior written consent of Bank. Bank may assign this Agreement to an affiliate or any successor or assign. The provisions of this Agreement shall be binding upon and benefit any legal successor to Bank whether by merger, consolidation, or otherwise.
- 5.9 **Termination.** Bank may terminate this Agreement immediately by notice to Customer, or without notice if Customer breaches any of its obligations under this Agreement. Customer may terminate this Agreement at any time upon thirty business days prior notice to Bank. Termination shall not affect any of Bank's rights or Customer's obligations under this Agreement prior to termination. Upon termination, if requested by Customer, Bank will provide Customer (or its representative) with a report of outstanding items.

- 5.10 Waiver.** The waiver by a party to this Agreement of a breach of any provision of this Agreement by the other party shall not operate or be construed as a waiver of any subsequent breach by the other party.
- 5.11 Entire Agreement.** This Agreement, including attached Schedules A through F, is the entire agreement and understanding between the parties related to the subject matter of this Agreement as of the date hereof and supersedes all prior agreements and understandings between the parties relating to the subject matter of the Agreement. This Agreement supplements and does not otherwise change the terms of any other agreement between Bank and Customer including without limitation the Deposit Account Agreement, except as it relates specifically to Positive Pay services.
- 5.12 Headings.** Headings to sections of this Agreement or any Schedules are included for ease of reference and shall not be deemed to create rights, remedies, claims, or defenses arising under this Agreement.
- 5.13 Beneficiaries.** This Agreement is for the benefit only of the undersigned parties hereto and is not intended to and shall not be construed as granting any rights to or otherwise benefiting any other person.

The parties hereto have entered into this Agreement as of the date set forth below.

Customer Name <u>The City of Corning</u>	PremierWest Bank
Signature _____	Representative Signature _____
Name _____	Representative Name <u>Kyle Lauderdale</u>
Title _____	Title <u>AVP – Branch Manager</u>
Date _____	Branch <u>Corning #71</u>
Mailing Address <u>794 Third St. Corning, Ca 96021</u>	
_____	
Email Address _____	
Phone _____	

**SCHEDULE A**

**Authorized Accounts**

Customer designates the following accounts as "Authorized Accounts":

Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____
Account Number	_____
Account Title	_____

**SCHEDULE B**

**Issued Item File**

The Issued Item File received by Bank from Customer must be submitted electronically in the mutually agreed upon format no later than 5:00 p.m. (Pacific Time) for inclusion in that night's processing.

**SCHEDULE C**

**Exception Item Report**

Bank shall electronically make available Exception Item information by 9:00 a.m. (Pacific Time) each business day allowing Customer sufficient time to review such exceptions and process, if necessary, by the deadline in Schedule D. In the event of system problems and Bank cannot send the Exception Item information in sufficient time for Customer to respond by the deadline, the deadline will be extended accordingly. The extended deadline will be communicated to Customer via email.

## SCHEDULE D

### Pay Requests and Return Requests

Customer shall review and electronically communicate Pay Requests and Return Requests for all exceptions to Bank by 11:00 a.m. (Pacific Time). Bank may, at its sole discretion, extend the deadline. Any such extension of the deadline will be communicated to Customer by email.

## SCHEDULE E

### Authorized Representatives

Customer authorizes the following persons to perform the following functions:

*SAME FOR ALL FUNCTIONS.*

#### Submit Issued Item Files

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

#### Process Exceptions

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

#### View Account/Item Reports

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

#### Add Users

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Email Address \_\_\_\_\_

Phone Number \_\_\_\_\_

## SCHEDULE F

### Fee Schedule

	<b>Set Up</b>	<b>Per Month Per Account</b>	<b>Per Item</b>	<b>Per Returned Item</b>
<b>Fees</b>	<b>N/A</b>	<b>\$40</b>	<b>N/A</b>	<b>\$4</b>

There is no charge for the first three months.

**ITEM NO.: H-6  
APPROVE MUNICIPAL AIRPORT  
GROUND LEASE WITH BRIAN AND  
CAROL CARPENTER, RAINBOW  
AVIATION SERVICES, INC FOR  
BUILDINGS A&B**

**SEPTEMBER 22, 2009**

**TO: HONORABLE MAYOR AND COUNCIL MEMBERS  
CITY OF CORNING**

**FROM: STEPHEN J. KIMBROUGH, CITY MANAGER**



**SUMMARY:**

City Staff has received a letter from Carol Carpenter requesting to take over the existing lease agreement between the City of Corning and James and Sharon Wazny, Ceramic Tile Installers, Inc. In January 2009 the Carpenters purchased Corning Municipal Airport Buildings A&B from the Waznys.

The Carpenters intend to use the building for aircraft storage. City Planning Director John Stoufer has reviewed this matter and has indicated that the Carpenters proposed use of Buildings A&B is a permitted use pursuant to Section 17.34.020 (B) of the Corning Municipal Code.

The proposed agreement between the City of Corning and Brian and Carol Carpenter is attached for Council review. This agreement will be effective January 15, 2009 and will expire on July 31, 2022.

**BACKGROUND:**

Nasir Ali Mubarak and Boris Ricci initiated the original lease agreement on August 1, 1997, which will expire on July 31, 2022. They constructed and maintained an aircraft painting business known as Diamond Aircraft Painting. In May 1998 Mr. Mubarak released Mr. Ricci from all obligations of the lease agreement with the City of Corning and named Shafqat Mubarak and Berta Azevedo to his Agreement with the City.

During August 2002, Stephanie Mubarak the spouse of Nasir Ali Mubarak became the sole Lessee of the Agreement dated August 1, 1997.

Mrs. Mubarak sold Buildings A&B to James Wazny and relinquished the Municipal Airport Agreement to Mr. Wazny on April 29, 2004. James Wazny and his wife Sharon owned and operated a business known as Ceramic Tile Installers, Inc. The "AV" Airport Zone permits industrial operations and uses through the approval of a Conditional Use Permit. Use Permit Application 2004-207 to operate a marble and granite polishing shop was approved at the City of Corning Planning Commission Meeting on April 20, 2004.

James and Sharon Wazny sold Buildings A&B to Brian and Carol Carpenter on January 15, 2009. The Airport Ground Lease Agreement is the City's standard lease agreement developed by the City Attorney and previously approved by the City Council.

**LEASE METHODOLOGY:**

The monthly lease payment was established in 1997; it was based upon a standard formula of 10% of market value. Here is explanation excerpted from the July 8, 1997, City Council Agenda.

*"Using a land value of \$52,000/acre (\$60,000/acre with public improvements)*

$$\frac{\$52,000}{43,560/\text{sq. ft.}} = \$1.20/\text{sq. ft. land value}$$

$$\$0.12/\text{sp. ft./year lease}$$

*Since no real companies exist at Corning Municipal Airport, the methodology previously approved by City Council for the Don McClelland lease took this land value and set the Annual Lease Rate at 10% of Market Value*

Site

$$\text{Building } 55' \times 100' = \text{sq. ft.}$$

$$\frac{5,500 \text{ sq. ft.} \times \$0.12}{12 \text{ mos.}} = \frac{\$660}{12 \text{ mos.}} = \$55.00/\text{monthly}''$$

The acreage value of \$52,000 was understood to be high in 1997 but fair to the City. Later the City purchased the adjacent 32 acres directly east for \$129,550 which is \$4,048 per acre and has 660 feet of street frontage. The most recent acquisition of 40 acres at the north end of the Airport cost \$191,709, or \$4,792 per acre.

**RECOMMENDATION:**

**MAYOR AND COUNCIL APPROVE THE CORNING MUNICIPAL AIRPORT GROUND LEASE WITH BRIAN AND CAROL CARPENTER, RAINBOW AVIATION SERVICES, INC FOR BUILDINGS A&B**



**RAINBOW**  
*Aviation Services*™

N 930 Marguerite Ave., Corning, Ca. 96021, Tel: 530-824-0644 Fax: 530-824-0250  
[www.rainbowaviation.com](http://www.rainbowaviation.com)

January 15, 2009

Steve Kimbrough  
794 Third Street  
Corning, CA 96021

**RECEIVED**

**JAN 16 2009**

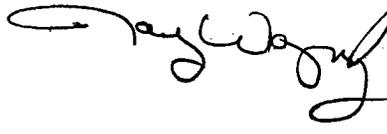
**CORNING CITY CLERK**

Dear Steve,

The purpose of this letter is to notify you that on January 15, 2009 we transferred ownership of our hangar identified as Lot APN 7502012 located at 1010 N Marguerite Ave at the Corning Municipal Airport to Rainbow Aviation Service. Additionally, Rainbow Aviation Services will be taking over our existing lease.

Sincerely,

Jay and Sharon Wazny  
P.O. Box 2166  
Flournoy, CA 96029

 01/15/09  
 01/15/09



**RAINBOW**  
*Aviation Services*™

N 930 Marguerite Ave., Corning, Ca. 96021, Tel: 530-824-0644 Fax: 530-824-0250  
[www.rainbowaviation.com](http://www.rainbowaviation.com)

January 15, 2009

Steve Kimbrough  
794 Third Street  
Corning, CA 96021

Dear Steve,

The purpose of this letter is notify you that on January 15, 2009 we purchased hangar identified as Lot APN 7502012 located at 1010 N Marguerite Ave at the Corning Municipal Airport to Rainbow Aviation Service. We want to take over the existing lease.

Sincerely,

Carol Carpenter  
930 N Marguerite Ave  
Corning CA 96021

*John*  
*Down contract file*  
*- need wonder: need Council*  
*approval?*  
*- draw up new lease document*  
*showing transfer with remaining time*  
*on lease*

**RECEIVED**

JAN 16 2009

**CORNING CITY CLERK**

*Steve*

Chapter 17.34AV AIRPORT DISTRICTSections:

- 17.34.010 Generally.
- 17.34.020 Permitted uses.
- 17.34.030 Uses requiring use permits.
- 17.34.040 Maximum height limit.

17.34.010 Generally. This district classification is intended to be applied on properties used, or planned to be used, as airports, and where special regulations are necessary for the protection of life and property. The following specific regulations and the general rules set forth in Section 17.04.060 and 17.04.070 and Chapter 17.50 of this title shall apply in all AV districts. (Ord. 153 §15B.01, 1959).

17.34.020 Permitted uses. In AV districts, permitted uses shall be as follows:

- A. Paved runways, taxiways, landing strips and aprons;
- B. Aircraft storage, service and repair hangars;
- C. Aircraft fueling facilities;
- D. Passenger and freight terminal facilities;
- E. Lighting, radio and radar facilities;
- F. Accessory structures and facilities including aircraft and aviation accessory sales. (Ord. 153 §15-B.02, 1959).

17.34.030 Uses requiring use permits. In AV districts, the following uses require use permits:

- A. Industrial plants, operations and uses;
- B. Commercial and service structures and uses;
- C. A dwelling. (Ord. 460 §1, 1987; Ord. 153 §15-B.03, 1959).

17.34.040 Maximum height limit. In AV districts, the maximum height limit shall be thirty-five feet. (Ord. 153 §15-B.04, 1959).

**AIRPORT GROUND LEASE  
FOR PRIVATELY-OWNED HANGARS  
BUILDINGS A & B  
August 1, 1997 to July 31, 2022**

THIS LEASE is made this fifteenth day of January, 2009, by and between the **CITY OF CORNING**, a Municipal Corporation and General Law City, hereinafter referred to as "**Lessor**," and **RAINBOW AVIATION SERVICES**, a corporation, hereinafter referred to as "**Lessee**". **Lessee** has purchased this existing lease and all terms remain in place.

WITNESSETH:

**IT IS MUTUALLY AGREED** by and between the parties hereto as follows:

1. Description of Premises. The parties acknowledge that Lessor owns, maintains, and operates the Corning Municipal Airport, and that Lessee desires to use the Buildings designated as A & B Aircraft Painting buildings at said Airport for the purpose of aircraft storage and associated aviation business. Therefore, Lessor hereby leases to Lessee and Lessee hires from Lessor, on the terms and conditions hereinafter set forth, that part of the Corning Municipal Airport described in Exhibit "A" attached hereto (hereinafter called "premises") and incorporated herein by reference.

2. Term. The original term of this Lease shall remain the period commencing August 1, 1997 to and including July 31, 2022 as entered into by previous building owners. Between six months and one year prior to the expiration of the term of this Lease, Lessee may exercise an option to renew this Lease for an additional period of ten (10) additional years on the same terms and conditions in effect at the time the option is exercised but subject to a review of the monthly rental charges for reasonableness at that time. This option may only be exercised by written notice provided to Lessor within the time period specified and only if Lessee is not in default under the terms of this Lease.

3. Rent and Other Charges.

(a) The rent to be paid by Lessee to Lessor under this Lease Agreement, including any renewal term, shall be the sum of fifty-five dollars

(\$55.00) per month. Said rent shall be payable in monthly installments in advance on the first day of each and every month **with a two percent (2%) automatic annual increase on January 1<sup>st</sup> of each year** during the term of this Lease.

(b) Utilities. The cost of providing lights, sewer service, water service, and other utility services for the premises shall be paid by Lessee or his tenants, and Lessor shall not be required to furnish or pay for any of such services.

4. Taxes.

(a) Lessee shall pay promptly any taxes assessed against his personal property and any possessory interest tax levied by reason of his occupancy of the subject premises, and the improvements constructed thereon.

(b) Lessee covenants and agrees to pay any and all taxes which may be levied and assessed against the leased premises, in addition to the rental payments herein provided.

5. Use. The premises are leased to Lessee for the sole purpose of constructing and maintaining a building thereon for the purposes described above. Lessee may use a fenced forty-foot by forty-foot area located south of his building area for purposes related to the business conducted in the buildings subject to approval by the City of any required permits. Any other commercial activity that Lessee may wish to carry on at said Airport, in connection with the foregoing or independently, shall first require the written permission of Lessor, which shall not be unreasonably withheld. Notwithstanding the foregoing enumeration of permitted uses of the premises, Lessee shall conduct no activities on the premises inconsistent with the terms and conditions of any use permit required for such activities.

6. Airport Facilities. Nothing contained herein shall be construed as entitling Lessee to the exclusive use of any services, facilities, or property rights at said Airport, except the use of the premises described herein for the purposes set forth above.

7. Lessor's Representations. Lessor does hereby represent and warrant that:

(a) There are no laws, regulations, rules, or policies adopted or approved, or under consideration for adoption or approval, by the City of Corning which would prohibit Lessee's intended use and business activities on the premises.

(b) To the best of Lessor's knowledge, there are no laws, regulations, rules, or policies adopted and in effect, or under consideration for adoption, by any other federal, state, county, city, or other governmental body which would prohibit Lessee's intended use and business activities on the premises.

(c) The premises are free and clear of all liens and encumbrances of whatever kind or nature, and there are no claims, suits, or actions, whether actual or threatened, as of the date hereof which will or could result in any such liens or encumbrances or other impairments, restrictions, or prohibitions on Lessee's use of the premises.

(d) Lessor has the full power and authority to enter into this Lease agreement and to fully comply with all of its terms and provisions, and this Agreement will be valid and binding against Lessor upon City Council approval and execution by the City Manager of the City of Corning.

8. Construction Specifications. Any construction on the premises shall conform to all of the Code requirements of the City of Corning and of any other governmental entities having jurisdiction thereon.

9. Mechanics' Liens. Lessee shall keep the demised premises free from any liens arising out of any work performed, material furnished, or obligations incurred by Lessee.

10. Waste, Quiet Conduct. Lessee shall not commit or suffer to be committed any waste upon said premises, or any nuisance or other act or thing which may disturb the quiet enjoyment of any other occupant of or use of Lessor's adjoining property.

11. Storage. No machinery, equipment, or property of any kind shall be stored or kept outside of the buildings on the premises. Any wrecked, permanently disabled, or otherwise unsightly vehicles and equipment shall not be kept on the premises unless

housed. The storage of any hazardous materials by Lessee shall be done in accordance with any applicable laws or regulations. Lessee shall be responsible for any charges associated with the storage of hazardous materials occurring during the term of this Lease, or any renewal thereof.

12. Rules and Regulations. Lessee agrees to observe and obey all rules and regulations promulgated and enforced by Lessor and any other appropriate authority having jurisdiction over the Corning Municipal Airport during the term of this Lease, including the Federal Aviation Agency and other federal agencies, the United States, the State of California, County of Tehama, and City of Corning. Lessor covenants that the rules and regulations so promulgated will apply to and be enforced uniformly by Lessor as to all lessees of said Airport as their interests and activities are related thereto.

13. Compliance with Law. Lessee covenants and agrees to comply with all statutes, laws, ordinances, regulations, orders, judgments, decrees, directions and requirements of Lessor, and of all federal, state, county, and city authorities now in force or which may hereafter be in force applicable to said leased premises. The judgment of any Court of competent jurisdiction or the admission of Lessee in any action or proceeding against Lessee, whether Lessor be a party thereto or not, that Lessee has violated any such ordinance or statute in the use of the premises shall be conclusive of the fact as between Lessor and Lessee and shall subject this Lease to immediate termination at the option of Lessor.

14. Maintenance of Building(s). Lessee covenants and agrees that it will, at its own cost and expense, keep and maintain the premises covered by this Lease and all buildings and improvements placed or erected thereon in a reasonably good and attractive state of repair.

15. Inspection. During the term of this Lease or any renewal thereof, Lessee shall permit Lessor or its agent or agents to enter upon the premises and buildings erected thereon for the purpose of inspection of same; Lessor's right of inspection shall be exercised during the normal business hours of Lessee. Lessor agrees not to unreasonably disturb Lessee's peaceable possession and use of the premises in so

doing.

16. Hold Harmless; Insurance.

a. This Lease is granted upon the express condition that Lessor shall be free from any and all liability and claims for damages for personal injury, death, or property damage in any way connected with Lessee's use of the premises hereunder leased, whether or not the same be groundless, including claims of Lessee, his agents, employees, tenants (if approved by Lessor), customers, or other persons upon the leased premises for any reason. Lessee shall indemnify and save harmless Lessor, its officers, agents, and employees, from any and all liability, loss, cost, or obligation on account of or arising out of any acts or omissions, injury, death, or loss caused by the negligence or other legal fault of Lessee or his agents, employees, tenants (if approved by Lessor), customers, or other persons upon the leased premises for any reason.

b. It is specifically understood and agreed as a condition of this Lease that Lessee shall, at his own expense, obtain and keep in full force and effect comprehensive general liability insurance in the amount of \$1,000,000.00 combined single limits, which insurance shall be in a form and content sufficient and adequate to save Lessor, its officers, agents, and employees, harmless from any and all claims arising out of the use and occupancy of said premises. Such insurance shall be carried with an insurance company acceptable to Lessor, and a Certificate evidencing such insurance shall be approved by the Lessor and filed with the City Clerk of Lessor which shall name Lessor, its officers, agents, and employees, as additional insureds and guarantee at least thirty (30) days' advance notice to Lessor, in writing, before any cancellation or reduction of such insurance coverage. Insurance requirements will be reevaluated every year.

c. Lessee shall also secure and maintain fire insurance on the building and other improvements to be erected by Lessee on the premises, to the full insurable value of the building and improvements as erected and placed upon the leased premises. Lessee further agrees that in the event of any fire or partial or

complete destruction of the structures erected by Lessee, Lessor shall be entitled to terminate this lease if the damaged or destroyed structures are not restored to their previous condition [or better] within 12 months following the occurrence of such damage or destruction.

17. Assignment or Subletting. Lessee shall not assign this Lease or any interest therein and shall not sublet said premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person (the agents and servants of Lessee excepted) to occupy or use said premises or any portion thereof, without the advance written consent of Lessor, which consent shall not be unreasonably withheld; and a consent to one assignment, subletting, occupation, or use by another person or entity shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person or entity. Any such assignment or subletting without such consent shall be void and shall, at the option of Lessor, terminate this Lease. This Lease shall not, nor shall any interest therein, be assignable as to the interest of Lessee by operation of law without the written consent of Lessor, which shall not be unreasonably withheld.

18. Improvements. On expiration or termination of this Lease, Lessee may remove from the premises any improvements which have been installed thereon by Lessee; or, with the advance written consent of Lessor, which consent shall not be unreasonably withheld, Lessee may sell such improvements to future leaseholders, or leave such improvements for the use or disposal by Lessor. When any improvements are removed, Lessee shall restore the premises to as good a condition as the same were when first occupied by Lessee. Any improvements, including the buildings and any other structures, not removed by Lessee upon the expiration or termination of this Lease shall become and remain the property of Lessor. Lessee shall not allow any hazardous materials to remain on the premises upon the expiration or termination of this Lease. Lessee shall be responsible for the removal and/or charges for removal of any hazardous materials on the premises.

19. Bankruptcy and Insolvency. If Lessee shall be adjudged bankrupt, either by

voluntary or involuntary proceedings, or if Lessee shall be the subject of any proceeding to stay the enforcement of obligations against him in the form of reorganization or otherwise under and pursuant to any existing or future laws of the Congress of the United States, or if Lessee shall discontinue business or fail in business, or abandon or vacate said premises, or make an assignment for the benefit of creditors, or if said premises should come into possession and control of any trustee in bankruptcy, or if any receiver should be appointed in any action or proceeding with power to take charge, possession, control, or care of said premises, Lessor shall have the option to forthwith terminate this Lease, or any renewal thereof, and re-enter the leased premises and take possession thereof. In no event shall this Lease be deemed an asset of Lessee after adjudication in bankruptcy.

If this lease has been pledged as security for a loan by Lessee and the entity or individual who holds such pledge exercises his right to use the leased premises following some type of business failure or abandonment or other problem experienced by Lessee, the Lessor and the holder of such pledge [lienholder or assignee] shall then negotiate a fair rental value for the premises and such amount will be paid monthly to the Lessor by the entity or individual who has taken possession of the premises.

20. FAA Requirements. Lessee, for himself, his heirs, executors, administrators, legal representatives, successors, and assigns, as a part of the consideration hereof, does hereby covenant and agree to comply with all FAA requirements and regulations.

21. Revocation of Lease, Permit, or License. Lessor shall have the right to terminate any lease, permit, license, or agreement (including that of Lessee herein) covering a commercial or noncommercial operation and to revoke a lease on any land or facility at the Airport (including that of Lessee herein) for any cause or reason provided by these standards, by the lease, license, or agreement itself, or by law, or upon the happening of one or more of the following:

- a. Filing a petition of voluntary or involuntary bankruptcy with respect to the operator or license.
- b. The making by the operator or licensee of any general assignment

for the benefit of creditors.

c. The abandonment or discontinuance of said leasehold at the airport by the Lessee.

d. The failure of an operator or licensee to pay promptly when due all rents, charges, fees, or other payments in accordance with applicable leases or licenses.

e. The failure of the operator or licensee to remedy any default, breach or violation of the Airport Rules and Regulations by him or his employees within thirty (30) days after written notice from the Lessor.

f. Violation of any of these standards and rules and regulations or failure to maintain current licenses required for the permitted operation.

g. Intentionally supplying Lessor with false or misleading information or misrepresenting any material fact on the application or documents, or in statements to or before the Lessor, or intentional failure to make full disclosure on a financial statement, or other required documents.

22. Default. If Lessee shall be in arrears in the payment of rent for thirty (30) days or more, or if the transfer or assignment, voluntarily or involuntarily, of this Lease or any interest therein is attempted, except as herein provided, or if Lessee violates or neglects or fails to keep, observe, and perform any of the covenants, promises, or conditions herein contained which are on his part to be kept, observed, and performed, Lessor may, at its election give Lessee written notice of such default. If such default shall continue for sixty (60) days, and Lessee has failed to commence good faith efforts to cure such default within said period, Lessor shall have the right at any time thereafter and while such neglect or default continues to enter into or upon said premises, or any part thereof, and repossess the same, including all buildings and improvements thereon, and expel lessee and those claiming under Lessee, and remove their effects, forcibly if necessary, without prejudice to any remedies which might otherwise be invoked by Lessor.

23. Eminent Domain. In the event the entire premises shall be appropriated or

taken under the power of eminent domain by any public or quasi-public authority, this Lease shall terminate and expire as of the date of such taking, and Lessee shall thereupon be released from any liability thereafter accruing hereunder.

In the event a portion of the premises is taken under the power of eminent domain by any public or quasi-public authority, such that the improvements thereon cannot, in Lessee's opinion, be used for its intended purposes, Lessee shall have the right to terminate this Lease as of the date Lessee is required to vacate a portion of the premises, upon the giving of notice in writing of such election within thirty (30) days after said premises have been so appropriated or taken. In the event of such termination, both Lessor and Lessee shall thereupon be released from any liability thereafter accruing hereunder. Lessor agrees, immediately after learning of any appropriation or taking, to give Lessee notice thereof in writing.

If the premises are taken, or Lessee elects to terminate upon a partial taking, Lessor agrees to offer to lease to Lessee similar space on similar terms for a term equal to the remaining term hereunder, including any renewals thereof, if any such land is available for lease at the Corning Municipal Airport.

If this Lease is terminated in either manner hereinabove provided, Lessor shall be entitled to the entire award or compensation for the land in such proceedings, but the rent and other charges for the last month of Lessee's occupancy shall be prorated and Lessor agrees to refund to Lessee any unused portion of said rent or other charges paid in advance. Lessee's right to receive compensation or damages for his building and other improvements, as well as his fixtures, personal property, and for the moving or relocation expenses shall not be affected in any manner hereby, and Lessee reserves the right to bring an action for such compensation or damages, including loss of business, leasehold interest, and other reasonable damages.

24. Professional Fees. In case suit or action is instituted to enforce any of the provisions of this Agreement, the prevailing party therein shall be entitled to all reasonable and necessary bookkeeper and accountant fees incurred by that party in connection with such suit or action, plus such sums as may be adjudged reasonable for

that party's attorney fees at trial and on appeal.

25. Notice. Any notices or demands that may be given by either party hereunder, including notice of default and notice of termination, shall be deemed to have been fully and properly given when made in writing, enclosed in a sealed envelope and deposited in the United States Post Office, certified mail, postage prepaid, addressed as follows:

**To Lessor: City Manager  
City of Corning  
794 Third Street  
Corning, CA. 96021**

**To Lessee: Rainbow Aviation Services  
Attn: Brian & Carol Carpenter  
N. 930 Marguerite Avenue  
Corning, CA 96021**

26. Cooperation. The parties hereto agree to fully cooperate in carrying out this Agreement, including the execution of all documents reasonably necessary to effectuate the intention of the parties.

27. Entire Agreement. "This Agreement sets forth the entire agreement between the parties hereto. Modifications or additions to this Agreement shall be considered valid only when mutually agreed upon by the parties in writing.

28. Waiver. No delay or failure by any party to exercise any right, power, or remedy with regard to and breach or default by such party under this Agreement, or to insist upon strict performance of any of the provisions hereof, shall impair any right, power, or remedy of such party, and shall not be construed to be a waiver of any breach or default of the same or any other provisions of this Agreement.

29. Successors and Assigns. All covenants, stipulations, and agreements in this Lease shall extend to and bind the heirs, executors, administrators, legal representatives, successors, and assigns of the respective parties hereto.

30. Invalid Provision. In the event any covenant, condition, or provision herein contained is held invalid by any Court of competent jurisdiction, the invalidity of same

shall in no way affect any other covenant, condition, or provision herein contained, provided that the validity of any such covenant, condition, or provision does not materially prejudice either Lessor or Lessee in their respective rights and obligations contained in the valid covenants, conditions, and provisions of this Agreement.

31. CEQA. It has been determined that this matter is categorically exempt from the provisions of the California Environmental Quality Act.

**LANDLORD (City of Corning)**

**TENANT**

By: \_\_\_\_\_  
**Stephen J. Kimbrough**  
**City Manager**

\_\_\_\_\_  
**Brian Carpenter**

\_\_\_\_\_  
**Carol Carpenter**

**ATTEST:**

By: \_\_\_\_\_  
**Lisa Linnet, City Clerk**

**ITEM NO.: J-7  
CONSIDER EXTENDING INTERIM  
ORDINANCE NO. 637, PROHIBITING  
MEDICAL MARIJUANA  
DISPENSARIES, COLLECTIVES OR  
COOPERATIVES WITHIN ANY  
ZONING DISTRICT IN THE CITY OF  
CORNING, FOR 10 MONTHS AND 15  
DAYS.**

**SEPTEMBER 22, 2009**

**TO: HONORABLE MAYOR AND COUNCIL MEMBERS**

**FROM: JOHN STOUFER, PLANNING DIRECTOR**

**SUMMARY:**

The City of Corning has been in the process of preparing a Draft Ordinance to regulate the cultivation, distribution and possession of medical marijuana in order to protect the public safety, health, and welfare of the citizens of Corning and prevent the cultivation or distribution of medical marijuana in violation of Health and Safety Code Section 11362.5.

California Government Code Section 65858(a) (Attached as Exhibit "A") allows the adoption of an "Urgency measure": interim zoning ordinance without having to follow the procedures otherwise required prior to the adoption of a zoning ordinance. The urgency measure requires a four-fifths vote of the legislative body and will take effective immediately for a period of 45 days. In addition, Section 65858(a) states: "***After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.***"

Section 65858 (c) states: "*The legislative body shall not adopt or extend any ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare.*"

Interim Ordinance No. 637 complies with applicable State Law, as well as imposes reasonable rules and regulations protecting the public health, safety and welfare of Corning residents and businesses.

## **BACKGROUND:**

On August 11, 2009 the Corning City Council unanimously voted to adopt Interim Ordinance #637 (Attached as Exhibit "B"). As required by Ca. Gov. Code Section 65858 (c) the ordinance contains legislative findings that there is a current and immediate threat to public safety due to the operation of medical marijuana dispensaries, collectives, and cooperatives.

This threat remains as reported through the local media on Tuesday September 8, 2009, a medical marijuana patient in Stonyford, a small community southwest of Corning, was assaulted and shots were fired during the burglary of a medical marijuana garden. Previous to this incident a man in Los Molinos, a small community approximately 11 miles northeast of Corning, was killed by known gang members that entered his residence to steal medical marijuana. There are several other documented assaults and deaths associated with the growing and distribution of medical marijuana in states where it is legal to possess for medical use. Additionally, on or around August 30, 2009 the sculpture of an olive, constructed at the southwest corner of the Hall Rd. /South Ave. intersection to represent the olive industry in Corning area, was vandalized with vulgar graffiti supporting the cultivation of marijuana.

Currently Interim Ordinance #637 is in effect until Friday, September 25, 2009. If the Council extends the interim ordinance for 10 months and 15 days, pursuant to Ca. Gov. Code Section 65858 (a), the prohibition of locating or operating profit or non-profit medical marijuana dispensaries, collectives, and cooperatives within any zoning district in the City of Corning would remain in effect until Monday, August 9, 2010.

Other small communities in Northern California such as Anderson, Shasta Lake City, Dixon as well as the County of Tehama have recently passed interim ordinances similar to Interim Ordinance #637. According to the White Paper on Marijuana Dispensaries, (WPMD) issued by the California Police Chiefs Association's Task Force on Marijuana Dispensaries, *"Approximately 80 California cities, including the cities of Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill, and 6 counties, including Contra Costa County, have enacted moratoria banning the existence of marijuana dispensaries."*

In regard to the situation in the City of Corning where THC, Inc. continues to operate in violation of the Corning Municipal Code and Interim Ordinance #637, the WPMD states: *"Certain cities and counties have resisted granting dispensaries business licenses, have denied applications, or imposed moratoria on such enterprises. Here, too, the future is uncertain, and permissible legal action with respect to marijuana dispensaries may depend on future court decisions not yet handed down."*

Attached as Exhibits "C" and "D" are two recent appellate court decisions regarding the illegal establishment of medical marijuana dispensaries within two cities located in California. Exhibit "C" is City of Corona v. Nallus (2008) 166 Cal. App. 4<sup>th</sup> 418, and Exhibit "D" is the City of Claremont v. Darrell Kruse et al., which is not a published case.

Attached as Exhibit "E" is the Addendum from the White Paper on Medical Marijuana Dispensaries, prepared for FixLosAngeles.com, July 26<sup>th</sup>, 2009 by authors Scott McNeely & James O'Sullivan. The addendum provides a brief summary of cases that have been decided upon by the courts or are in the appeals process under the Compassionate Use Act.

This white paper was previously sent to the Council by a group called "The Coalition For A Drug Free California". The Council has also been presented with a substantial amount of material submitted from the operators of THC, Inc., distributed by many organizations that support the use of medical marijuana predominately known as "Americans for Safe Access".

### **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA):**

Extension of Interim Ordinance #637 will not have any type of physical impact to the environment and therefore exempt from CEQA pursuant to Section 15061 (b) (3) which reads as follows: *"The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA."*

### **STAFF RECOMMENDATION:**

The decision on how to regulate the cultivation and distribution of medical marijuana within the City of Corning is going to be very difficult due to local support and opposition regarding the use of medical marijuana, the conflict between state and federal law, and the number of pending court cases regarding the Compassionate Use Act and regulations resulting from the passage of Senate Bill 420. For this reason, and due to the amount of material presented for the Council to review, both in support and opposition of the medical marijuana issue, staff recommends that the Council adopt the following subfindings and findings and extend Interim Ordinance # 637 for 10 months and 15 days, until August 9, 2010, pursuant to Section 65858 (a) of the CA. Gov. Code.

The subfindings and findings are recommend by staff, prior to adoption the Council has the ability to modify, add to, or delete any of the language in the subfindings and findings if deemed appropriate by a majority of the Council members.

In addition staff recommends that the Council discuss and consider taking action at this meeting to form an AdHoc Committee to work with staff to collectively prepare an ordinance regarding the cultivation and distribution of medical marijuana, that complies with existing state and federal laws, protects the health, safety and welfare of the citizens of Corning, and respects the rights of medical marijuana users pursuant to the Compassionate Use Act and Senate Bill 420.

### **Subfinding #1**

CEQA applies jurisdictionally to activities which have the potential for causing environmental effects. Where an activity has no possibility of causing a significant effect, the activity will not be subject to CEQA.

### **Finding #1**

Extension of Interim Ordinance #637 will not have an impact on the environment and therefore is exempt from CEQA pursuant to Section 15061 (b) (3).

### **Subfinding #2**

At a regular scheduled meeting on August 11, 2009 the Corning City Council approved the adoption of Interim Ordinance #637 pursuant to Ca. Gov. Code Section 65858 (a).

### **Finding #2**

Interim Ordinance #637 prohibits the establishment or operation of profit or non-profit medical marijuana dispensaries, collectives, and cooperatives within any zoning district in the City of Corning for 45 days, or until September 25, 2009.

### **Subfinding #3**

On Tuesday September 8, 2009, a medical marijuana patient in Stonyford, a small community southwest of Corning, was assaulted and shots were fired during the burglary of a medical marijuana garden. Previous to this incident a man in Los Molinos, a small community approximately 11 miles northeast of Corning, was killed by known gang members that entered his residence to steal medical marijuana. There are several other documented assaults and deaths associated with the growing and distribution of medical marijuana in states where it is legal to possess for medical use. Additionally, on or around August 30, 2009 the sculpture of an olive, constructed at the southwest corner of the Hall Rd. /South Ave. intersection, to represent the olive industry in the Corning area was vandalized with vulgar graffiti supporting the cultivation of marijuana.

### **Finding #3**

Residents and property in the vicinity of Corning have experienced property damage and violent assaults prior to, and since the adoption of Interim Ordinance #635. These assaults and property damage pose an immediate threat to the safety of the citizens of Corning.

### **Subfinding #4**

In the State of California there have been many violent crimes committed that can be traced to the proliferation of medical marijuana dispensaries. Other adverse secondary impacts associated from the operation of medical marijuana dispensaries include street dealers lurking about dispensaries offering lower prices for marijuana to arriving patrons; marijuana smoking in public places and in front of children in the vicinity of dispensaries; loitering and nuisances; acquiring marijuana and/or money by means of robbery of patrons going to or leaving dispensaries; increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries; the sale at dispensaries of other illegal drugs besides marijuana,

increased traffic accidents due to driving under the influence of marijuana and the failure of medical marijuana dispensary operators to report robberies to police.

#### **Finding #4**

The City of Corning has known gang members residing within the city limits and has experienced violent activities associated with people gathering and loitering in and around the downtown area of the city. The continued operation of THC, Inc and proliferation of other medical marijuana dispensaries, collectives, and cooperatives within the City will increase known adverse impacts associated with these uses that will pose an immediate and continued threat to the public health, safety and welfare of the citizens of Corning.

#### **Subfinding #5**

The Corning City Council and Corning Planning Commission were given a copy of the 2007-2008 Santa Barbara County Grand Jury Report regarding medical marijuana. On August 25, 2009 the Corning City Council and the Corning Planning Commission held a combined study session to discuss the need and desire to establish regulations for the cultivation and distribution of medical marijuana as recommended by the Grand Jury Report.

#### **Finding #5**

The City Council and Planning Commission have reviewed and discussed regulations from other cities in California regulating or prohibiting the cultivation and distribution of medical marijuana. The Council and Commission agreed that the city should adopt an ordinance, or ordinances, that regulate the cultivation and distribution of medical marijuana in the City of Corning.

#### **Subfinding #6**

There are several court cases that have been decided upon or are in the appeals process that will be relevant to how the city attempts to regulate medical marijuana through zoning standards. Of particular interest to the City of Corning is the case: *Qualified Patients v. City of Anaheim* Case No. G040077, 4<sup>th</sup> District Court of Appeals, Division 3, relating to the adoption of an ordinance by the City of Anaheim banning the operation of medical marijuana dispensaries.

#### **Finding #6**

At the February 2009 Planning Commission Meeting the Commission held a study session to review an ordinance adopted by the City of Gridley, and expressed interest in adopting a similar ordinance, banning the operation of medical marijuana dispensaries, collectives or cooperatives within any zoning district in the city. Prior to the adoption of an ordinance similar to the City of Gridley's it would be beneficial for the Planning Commission and City Council to review the appellate courts decision regarding the *Qualified Patients v. City of Anaheim* decision to determine the legality of such a ban.

**Subfinding #7**

The Corning City Council has been presented with numerous articles, letters and information presented by individuals and organizations in support and opposition of the establishment of medical marijuana dispensaries, collectives and cooperatives within the city limits.

**Finding #7**

To protect the health, safety and welfare of the citizens of Corning, and at the same time respect the rights of medical marijuana users, it is in the best interest of City of Corning to extend Interim Ordinance #637 for 10 months and 15 days so that the City of Corning Planning Commission and City Council can continue to review the information they have been presented to determine appropriate regulations for the cultivation and distribution of medical marijuana within the City of Corning.

**ACTION:**

**Move to adopt the seven (7) Subfindings and Findings as presented in the staff report and extend Interim Ordinance #637, an Interim Ordinance of the City of Corning prohibiting the operation of profit or non-profit Medical Marijuana Dispensaries, Collectives or Cooperatives within any zoning district in the City of Corning for 10 months and 15 days, or until Monday, August 9, 2010, pursuant to Section 65858 (a) of the California Government Code.**

**In addition to this action, as recommended by staff, the Council may consider forming a AdHoc Committee to work with staff to collectively prepare an ordinance regarding the cultivation and distribution of medical marijuana,**

**ATTACHMENTS**

EXHIBIT "A"	CA. GOV. CODE SECTION 65858
EXHIBIT "B"	INTERIM ORDINANCE NO. 637
EXHIBIT "C"	COPY OF CITY OF CORONA v. NALLUS COURT CASE
EXHIBIT "D"	COPY OF CITY OF CLAIRMONT v. KRUSE CASE
EXHIBIT "E"	ADDENDUM FIX LA WHITE PAPER

## EXHIBIT "A"

proposed ordinance or amendment to applicable general and specific plans, and shall be transmitted to the legislative body in such form and manner as may be specified by the legislative body.

*(Amended by Stats. 1972, Ch. 639.)*

### 65856. Notice and hearing by legislative body

(a) Upon receipt of the recommendation of the planning commission, the legislative body shall hold a public hearing. However, if the matter under consideration is an amendment to a zoning ordinance to change property from one zone to another, and the planning commission has recommended against the adoption of such amendment, the legislative body shall not be required to take any further action on the amendment unless otherwise provided by ordinance or unless an interested party requests a hearing by filing a written request with the clerk of the legislative body within five days after the planning commission files its recommendations with the legislative body.

(b) Notice of the hearing shall be given pursuant to Section 65090.

*(Amended by Stats. 1984, Ch. 1009.)*

### 65857. Commission review of legislative body's changes

The legislative body may approve, modify or disapprove the recommendation of the planning commission; provided that any modification of the proposed ordinance or amendment by the legislative body not previously considered by the planning commission during its hearing, shall first be referred to the planning commission for report and recommendation, but the planning commission shall not be required to hold a public hearing thereon. Failure of the planning commission to report within forty (40) days after the reference, or such longer period as may be designated by the legislative body, shall be deemed to be approval of the proposed modification.

*(Amended by Stats. 1973, Ch. 600.)*

### 65858. Urgency measure: interim zoning ordinance

(a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health, and welfare, may 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. That urgency measure shall require a four-fifths vote of the legislative body for adoption. The interim ordinance shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for

10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.

(b) Alternatively, an interim ordinance may be adopted by a four-fifths vote following notice pursuant to Section 65090 and public hearing, in which case it shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may by a four-fifths vote extend the interim ordinance for 22 months and 15 days.

(c) The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare. In addition, any interim ordinance adopted pursuant to this section that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing may not be extended except upon written findings adopted by the legislative body, supported by substantial evidence on the record, that all of the following conditions exist:

(1) The continued approval of the development of multifamily housing projects would have a specific, adverse impact upon the public health or safety. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date that the ordinance is adopted by the legislative body.

(2) The interim ordinance is necessary to mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1).

(3) There is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1) as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance.

(d) Ten days prior to the expiration of that interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.

(e) When an interim ordinance has been adopted, every subsequent ordinance adopted pursuant to this section, covering the whole or a part of the same property, shall automatically terminate and be of no further force or effect upon the termination of the first interim ordinance or any extension of the ordinance as provided in this section.

(f) Notwithstanding subdivision (e), upon termination of a prior interim ordinance, the legislative body may adopt

another interim ordinance pursuant to this section provided that the new interim ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances different from the event, occurrence, or set of circumstances that led to the adoption of the prior interim ordinance.

(g) For purposes of this section, “development of multifamily housing projects” does not include the demolition, conversion, redevelopment, or rehabilitation of multifamily housing that is affordable to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or that will result in an increase in the price or reduction of the number of affordable units in a multifamily housing project.

(h) For purposes of this section, “projects with a significant component of multifamily housing” means projects in which multifamily housing consists of at least one-third of the total square footage of the project.

*(Amended by Stats. 1982, Ch. 1108; Amended by Stats. 1984, Ch. 1009; by Stats. 1988, Ch. 1408; by Stats. 1992, Ch. 231; by Stats. 1997, Ch. 129; by Stats. 2001, Ch. 939.)*

Note: Ch. 129 also reads:

In enacting this act to amend Section 65858 of the Government Code by adding subdivision (f) to that section, it is the intent of the Legislature that an ordinance that complies with that subdivision and was in existence on or before April 14, 1997, shall not be invalidated if challenged pursuant to subdivision (e) of Section 65858 of the Government Code.

#### **65859. Prezoning**

(a) A city may, pursuant to this chapter, prezone unincorporated territory to determine the zoning that will apply to that territory upon annexation to the city.

The zoning shall become effective at the same time that the annexation becomes effective.

(b) Pursuant to Section 56375, those cities subject to that provision shall complete prezoning proceedings as required by law.

(c) If a city has not prezoned territory which is annexed, it may adopt an interim ordinance pursuant to Section 65858.

*(Amended by Stats. 1980, Ch. 1132; Amended by Stats. 1994, Ch. 939.)*

#### **65860. Zoning consistency with general plan**

(a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met:

(1) The city or county has officially adopted such a plan.

(2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

(b) Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). Any such action or proceeding shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. No action or proceeding shall be maintained pursuant to this section by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance.

(c) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.

(d) Notwithstanding Section 65803, this section shall apply in a charter city of 2,000,000 or more population to a zoning ordinance adopted prior to January 1, 1979, which zoning ordinance shall be consistent with the general plan of the city by July 1, 1982.

*(Amended by Stats. 1979, Ch. 304; Amended by Stats. 1998, Ch. 689.)*

#### **65860.1. Zoning consistency with flood plan**

(a) Within 36 months of the adoption Central Valley Flood Protection Plan by the Central Valley Flood Protection Board pursuant to Section 9612 of the Water Code, but not more than 12 months after the amendment of its general plan pursuant to Section 65302.9, each city and county within the Sacramento-San Joaquin Valley shall amend its zoning ordinance so that it is consistent with the general plan, as amended.

(b) Notwithstanding any other provision of law, this section applies to all cities, including charter cities, and counties within the Sacramento-San Joaquin Valley. The Legislature finds and declares that flood protection in the Sacramento and San Joaquin Rivers drainage areas is a matter of statewide concern and not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution.

*(Added by Stats. 2007, Ch. 364)*

#### **65861. Procedure without commission**

When there is no planning commission, the legislative body of the city or county shall do all things required or authorized by this chapter of the planning commission.

*(Added by Stats. 1965, Ch. 1880; Amended by Stats. 1995, Ch. 686.)*

## EXHIBIT "B"

### INTERIM ZONING ORDINANCE NO.637 AN INTERIM ORDINANCE OF THE CITY OF CORNING PROHIBITING MEDICAL MARIJUANA DISPENSARIES, COLLECTIVES OR COOPERATIVES

**WHEREAS**, To protect the public safety, health, and welfare of the citizens of Corning, and prevent the possibility of the cultivation or distribution of medical marijuana in violation of Health and Safety Code Section 11362.5, the City of Corning has prepared a Draft Ordinance to regulate the cultivation and possession of medical marijuana. An application for a business license has been submitted to the City for the establishment of a Mutual Benefit Corporation for a Medical Cannabis Collective. In order to prevent the establishment of this business before the City Planning Commission and City Council can study these regulations, at duly noticed public hearings, the City Council determines that it is necessary to adopt an urgency measure in the form of Interim Ordinance No 637

**WHEREAS**, THE City has recently received additional inquiries whether any of the Zoning Districts within the City Limits of Corning would allow a Medical Marijuana Dispensary, Collective, or Cooperative to be established; and

**WHEREAS**, the Municipal Code does not specifically permit the location and operation of a Medical Marijuana Dispensary, Collective or Cooperative within any of the City Zoning Districts as either a Permitted or a Conditional Use; and

**WHEREAS**, in California Cities that have allowed the establishment of Medical Marijuana Dispensaries, Collectives and Cooperatives, issues and concerns have arisen related to their location in proximity to residential properties, Schools and Daycare Facilities and some communities have reported adverse impacts that threaten public health, safety and welfare, including an increase in crimes such as loitering, illegal drug activity, burglaries, robberies and other criminal activity within and around Dispensaries, as well as increased pedestrian and vehicle traffic, noise and parking violations, thereby generating a need for increased police response; and

**WHEREAS**, The establishment of a medical marijuana collective in the downtown area of the City of Corning, as proposed by Tehama Herbal Collective, will increase loitering and promote illegal drug activity by established gang members in and around the City that will cause an immediate threat to the public safety; and

**WHEREAS**, Interim Ordinance No. 637 complies with applicable State Law, as well as impose reasonable rules and regulations protecting the public health, safety and welfare of Corning residents and businesses.

**WHEREAS**, the State of California approved Proposition 215 “The Compassionate Use Act of 1996” (Health and Safety Code Section 11362.5), which was to enable persons who are in need of marijuana for medical purposes; and

**WHEREAS**, the State also enacted SB 420 in 2004 (Health and Safety Code Section 11362.7 et seq.) to clarify the scope of The Compassionate Use Act to allow local governing bodies to adopt and enforce rules and regulations consistent with SB 420; and

**WHEREAS**, State law has created a limited affirmative defense to criminal prosecution for qualifying persons who collectively gather to cultivate medical marijuana but there is no provision in State law which specifically authorizes or protects the establishment of a medical marijuana dispensary or other storefront distribution operation;

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CORNING** to adopt Interim Ordinance No. 637.

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**Prohibiting Medical Marijuana Dispensaries, Collectives or Cooperatives.**

**Definition of a Medical Marijuana Dispensary:**

“Medical Marijuana Dispensary” or “Dispensary” means any facility or location where medical marijuana is made available to and/or distributed by or to three or more of the following: a primary care giver, a qualified patient, or a person with an identification card, in strict accordance with California Health and Safety Code Section 11362.5 et seq. A “medical marijuana dispensary” shall not include the following uses, as long as the location of such uses are otherwise regulated by this code or applicable law: a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code; a health care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code; a residential care facility for persons with chronic life-threatening illnesses licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code; a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code; or a residential hospice or home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code, as long as any such use complies strictly with applicable law including but not limited to, Health and Safety Code Section 11362.5 et. seq.

**Definition of a Medical Marijuana Collective:**

“Medical Marijuana Collective” or “Collective” as referenced in Health and Safety Code Section 11362.775 shall be defined in accordance with State statutory and case law.

**Definition of a Medical Marijuana Cooperative:**

“Medical Marijuana Cooperative” or “Cooperative” as referenced in Health and Safety Code Section 11362.775 shall be defined in accordance with State statutory and case law.

**Medical Marijuana Dispensaries, Collectives and Cooperatives Prohibited:**

It is unlawful to establish or operate a profit or nonprofit medical marijuana dispensaries, collectives or cooperatives within any zoning district in the city limits of the City of Corning.

**Public Nuisance:**

A violation of any of the provisions of this chapter shall constitute a public nuisance and be subject to abatement as provided by all applicable provisions of law including but not limited to California Code of Civil Procedure Section 731, et. seq.

## EXHIBIT "C"

# City of Corona v. Naulls (2008)166 Cal.App.4th 418

[No. E042772. Fourth Dist., Div. Two. Jul. 30, 2008.]

CITY OF CORONA, Plaintiff and Respondent, v. RONALD NAULLS et al., Defendants and Appellants.

(Superior Court of Riverside County, No. RIC454599, Joan F. Burgess, Temporary Judge. fn. \* )

(Opinion by Miller, J., with McKinster, Acting P. J., and Gaut, J., concurring.)

### COUNSEL

Ackerman, Cowles & Lindsley, Richard D. Ackerman, Michael W. Sands; Law Offices of James Anthony and James Anthony for Defendants and Appellants.

Best, Best & Krieger, Jeffrey V. Dunn, Dean Derleth, and Marc S. Ehrlich for Plaintiff and Respondent. [166 Cal.App.4th 420]

### OPINION

#### MILLER, J.-

The trial court issued a preliminary injunction preventing Ronald Naulls and his business enterprise, Healing Nations Collective (HNC), a medical marijuana dispensary operating within the City of Corona (the City), from conducting any further operations. The court found that, because HNC was "operating as a non-permitted, non-conforming use," its operation "constitutes a nuisance *per se*, which the City may abate by seeking injunctive relief in this Court." On appeal, Naulls and HNC challenge the sufficiency of the evidence to support the order, contending the court's finding as to "non-permitted, non-conforming use" is based on a faulty legal premise. We affirm. fn. 1

### FACTUAL AND PROCEDURAL BACKGROUND

Naulls is president and chief executive officer of HNC, a California mutual benefit nonprofit corporation. On May 2, 2006, Naulls applied for a business [166 Cal.App.4th 421] license to operate HNC as a new business in the City. The City uses a preprinted form which states, in red text, the following: "The City of Corona Municipal Code requires that all businesses pay a business tax, but such payment does not authorize an applicant to do business in the City. All Businesses must comply with all city codes and must have the Department of Planning approval prior to opening." In the portion of the license application calling for a description of the proposed business activity, Naulls penned, "Misc. Retail." Naulls signed the application, declaring under penalty of the laws of California that the information provided was true and correct.

Before submitting his application, Naulls visited the City's business license department and spoke with Carol Warfield, a customer service representative. According to Warfield, although the application does not enumerate the types of businesses eligible for licensure, the City expects the applicant to truthfully describe the nature of his or her business in the space provided. In response to Warfield's inquiry as to the type of business he was planning on operating, Naulls said that he would be opening a "miscellaneous retail' establishment" and would be selling "miscellaneous medical supplies." Warfield reviewed the application and, based upon the information provided, issued Naulls a receipt, which served as a temporary business license. She

would not have issued a business license to Naulls had she known that the true nature of HNC's operations was "to cultivate, store, sell and distribute marijuana."

On June 20, 2006, Naulls telephoned the City's planning director, Peggy Temple, to schedule a meeting "regarding establishing a business in the City." At first reluctant to respond to Temple's inquiry as to the nature of the business, Naulls eventually admitted that he operated a medical marijuana establishment. At their meeting two days later, Temple informed Naulls that marijuana dispensaries were not, and never have been, a permitted land use under the City's zoning laws. Temple also then informed Naulls that, at a special meeting held the day before, the City had enacted a moratorium on medical marijuana dispensaries. Naulls admitted that prior to opening his dispensary he was informed by a planning department employee that the proposed use was not permitted and that, in the event he proceeded to open the business, he would be subject to law enforcement.

On July 7, 2006, legal counsel for the City wrote to Naulls informing him that, among other things, the City had imposed a moratorium on the establishment of medical marijuana dispensaries. Further, because HNC had been established unlawfully, it was not exempt even though its application had already been filed. Naulls was directed to cease distributing marijuana, either from his business or otherwise. In a letter dated July 14, 2006, Naulls's **[166 Cal.App.4th 422]** attorney referenced a telephone conversation with the City's counsel, reiterating his position that "the clinic is a prior legal non-conforming use. If you are aware of any authority supporting the position that anything not permitted under the zoning code is therefore prohibited, please make me aware of it."

On August 8, 2006, counsel for the City replied, informing Naulls's attorney that HNC's business license was invalid because he had falsified his application, medical marijuana dispensaries were not a permitted use under the City's municipal code and Specific Plan, and HNC failed to comply with the procedures required for establishing a "similar use" zoning designation. Naulls was again directed to cease and desist from operating HNC.

The following day, the City filed the underlying lawsuit, alleging that HNC's operation constituted a public nuisance in violation of Civil Code section 3479. Specifically, the City alleged that use of the premises at which HNC was operating was a nuisance per se under section 1.08.20 of the City's municipal code in that Naulls operated HNC in contravention of sections 5.02.030 (pertaining to business licenses) and 5.02.370, subdivision (B) (pertaining to zoning regulations). The City sought a temporary restraining order to close down HNC's operations, and preliminary and permanent injunctions to prevent use of the premises pending submission of a new business license application and compliance with all federal, state, and local laws.

At a hearing in August, the court denied the City's ex parte application for a temporary restraining order, but set a hearing for September 28, 2006, regarding the City's request that a preliminary injunction issue. Having directed the City to file a new motion, the court remarked it "think[s] there is some probability of a preliminary injunction issuing." The hearing on the City's request for a preliminary injunction was eventually continued, and on October 4, 2006, Naulls filed his answer to the complaint.

In late October, the City filed its motion for a preliminary injunction, asserting various grounds, i.e., (1) notwithstanding the passage of the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA), Naulls was operating HNC in violation of the Controlled Substances Act (CSA), as interpreted in *Gonzales v. Raich* (2005) 545 U.S. 1, and (2) Naulls's continued operation of HNC violated provisions of the City's municipal code and Specific Plan with regard to its application for business license and zoning regulations and thus constituted a nuisance per se. **[166 Cal.App.4th 423]**

In a declaration in support of the City's motion, Temple alleged that because a medical marijuana dispensary was not a permitted use in any of the zoning areas within the Specific Plan, any other specific plan, fn. 2 or any of the code's zoning provisions, Naulls would have been required to amend the Specific Plan to include his requested use. She asserted: "In order to obtain an amendment of the Specific Plan, Mr. Naulls would be required to submit the requested revisions to the Specific Plan document concerning the location of Healing Nations to the City, submit documentation demonstrating that the owner of the property where Healing Nations is located authorized the requested changes to the Specific Plan, submit development standards applicable to the operation of Healing Nations as a medical marijuana dispensary, and pay all required application and processing fees. Thereafter, City personnel would review the documents submitted to determine if additional information was required. This would be followed by a planning commission public hearing to determine whether the requested amendment was in the City's best interests and complied with the City's general plan. A recommendation would then be made to the city council, which in turn would hold another public hearing to approve or deny the amendment. After the hearing, an ordinance would be adopted either approving or denying the requested amendment, and make findings supporting its decision. Naulls submitted no request to amend the Specific Plan. Alternatively, Naulls could have requested a "similar use finding" pursuant to section 17.88 of the City's municipal code. This would require submission of an application, with supporting documentation, to demonstrate that the proposed use was similar to an existing use with the Specific Plan and was consistent with the City's general plan. Thereafter, proceedings would be scheduled before the planning commission. Naulls never made a request for a similar use finding. As such, HNC's operation within the boundaries of the Specific Plan was an unpermitted and illegal use.

Attached as an exhibit to the City's motion was a printout of materials pertaining to the Specific Plan, which encompassed HNC's location. Chapter No. 4 of the Specific Plan "sets forth permitted uses and development standards for various land use areas" within the districts it covers. The development regulations which govern the Specific Plan supersede the zoning provisions of title 17 of the Corona Municipal Code except to the extent the Specific Plan is silent. In those instances, the municipal code controls. These regulations make no provision for a medical marijuana dispensary as a permitted use. However, "[t]he Commission may, by resolution of record, permit any other uses which it may determine to be similar to those **[166 Cal.App.4th 424]** [enumerated]; provided such uses are not or will not be dangerous or offensive by reason of the emission of dust, gas, noise, fumes, odors, vibrations, or otherwise in conformity with the intent and purpose of the Zone, and not more obnoxious or detrimental to the public health, safety and welfare, or to other uses permitted in the Zone. See chapter 17.88 in title 17 of the Corona Municipal Code for the procedure."

In opposing the motion, Naulls argued that he substantially complied with the procedure for obtaining a business license and was not required to describe HNC as a medical marijuana dispensary; that HNC should have been zoned as a prior conforming use because it was "grandfathered in" before the City passed its moratorium; and under the CUA, California's nuisance statute does not apply to medical marijuana dispensaries.

After a hearing on December 13, 2006, the court granted the City's motion for preliminary injunction. fn. 3 The court indicated its opinion "that defendants did conceal from the City that this was a medical marijuana dispensary." The court also inferred that Naulls had thereby avoided the requisite procedures for obtaining a variance for a nonconforming use. The court expressly stated that its decision was based upon the declaration of the City's planning director that the use is not permitted and "also . . . upon the absence of any authority that says one way or the other." Accordingly, because any nonenumerated use is presumptively prohibited under the City's municipal code, the operation of HNC constituted a nuisance per se. As directed, the City prepared a statement of decision, which the court signed on February 7, 2007, and filed on February 20, 2007. Pursuant to that decision, the court found that the City was likely to prevail on the merits of its action and ordered Naulls and HNC to cease and desist from conducting any further operations at HNC's designated address.

The trial court found that, based upon Naulls's application, HNC was classified as "commercial retail" for purposes of zoning. However, "medical marijuana dispensary" is not among the uses enumerated in the City's municipal code or the Specific Plan which encompasses HNC's address. Such nonenumerated uses must be presented to the City's planning commission, which holds a hearing, makes findings, and where appropriate, assigns a zoning designation based on the proposed "similar use." The court found, however, that by virtue of Naulls's failure to disclose the nature of HNC's [166 Cal.App.4th 425] operations, this procedure was not implemented and the City was therefore unable to make a zoning determination based upon the intended use.

The trial court also found that the City's municipal code is drafted in a permissive fashion, i.e., any use not enumerated in the code is presumptively prohibited. Thus, because medical marijuana dispensaries are not enumerated within the code, HNC is operating within the City as a nonpermitted, nonconforming use. As such, HNC's operation is a nuisance per se and may be abated by means of injunctive relief pursuant to Civil Code section 3479 and Code of Civil Procedure section 731.

Further, as to "the hardships stemming from the issuance or non-issuance of an injunction," the court had considered declarations submitted on appellants' behalf as to "the physical conditions of Healing Nations' clientele;" however, it had "also recognize[d] the power of cities to make the determination under what circumstances, if at all, certain uses will be permitted."

## DISCUSSION

At the outset, we emphasize that the sole question before us is the validity of the preliminary injunction. Thus, we refrain from addressing the issues raised in appellants' opening brief, which is devoted exclusively to their position that, notwithstanding the CUA and the MMPA, the City is improperly refusing to allow HNC to operate its medical marijuana dispensary. fn. 4 In fact, not until their reply brief, which reads more like an opening brief than a reply to the City's respondent's brief, do appellants mention the dispositive issue before us. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-764 (*Reichardt*)). Indeed, nowhere in their opening brief do they so much as allude to the matters set forth in their reply brief.

"Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." [Citation.] (*Reichardt, supra*, [166 Cal.App.4th 426] 52 Cal.App.4th at p. 764.) Although the City does, in its respondent's brief, affirmatively state its position the trial court was correct in issuing injunctive relief, fn. 5 it has not been afforded an opportunity to respond to appellants' particular assignments of error, including their contentions that "[t]he statement of decision and the record do not provide substantial evidence to support the necessary findings of fact that any violations of the municipal code or any state law occurred," and "[t]he order is based on an incorrect determination of the law regarding land uses not listed in the Corona Municipal Code as either permitted or prohibited (including medical marijuana collective dispensaries legal under state law) . . . ." Nonetheless, we shall address appellants' claims except to the extent, as we now explain, they challenge the adequacy of the court's statement of decision.

Appellants' reply brief brings to light another procedural shortcoming. That is, the arguments contained in the brief are framed in terms of the court's statement of decision, contending that it reflects erroneous conclusions of law and also omits express findings regarding Naulls's violation of various sections of the City's municipal code. However, appellants voiced no challenge to the statement of decision, although they were afforded an opportunity to do so. fn. 6

"If the party challenging the statement of decision fails to bring omissions or ambiguities in it to the trial court's attention, then, under Code of Civil Procedure section 634, the appellate court will infer the trial court made implied factual findings favorable to the prevailing party on all issues necessary to support the judgment, including the omitted or ambiguously resolved issues.

[Citations.] The appellate court then reviews the implied factual findings under the substantial evidence standard. [Citations.]" (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59-60.) Here, because appellants raised no objections to the City's proposed statement of decision, in conducting our review we will presume the trial court made all necessary findings to support its order. (*Id.* at p. 60.) **[166 Cal.App.4th 427]**

*A. Standard of review.*

"We review an order granting a preliminary injunction, under an abuse of discretion standard, to determine whether the trial court abused its discretion in evaluating the two interrelated factors pertinent to issuance of a preliminary injunction--(1) the likelihood that the plaintiffs will prevail on the merits at trial, and (2) the interim harm that the plaintiffs are likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued. [Citation.] Abuse of discretion as to either factor warrants reversal. [Citation.]" (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1300 (*Alliant*)).

"In determining the validity of the injunction, we look at the evidence presented to the trial court to determine if there was substantial support for the trial court's determination that the plaintiff was entitled to the relief granted.' [Citation.] 'Where the evidence before the trial court was in conflict, we do not reweigh it or determine the credibility of witnesses on appeal. "[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court's province to resolve conflicts." [Citation.] Our task is to ensure that the trial court's factual determinations, whether express or implied, are supported by substantial evidence. [Citation.] Thus, we interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court's order. [Citations.]" [Citation.]" (*Alliant, supra*, 159 Cal.App.4th at p. 1300.)

*B. Substantial evidence supports the trial court's findings.*

[1] The evidence showed that Naulls, in applying for a business license, failed to indicate that he intended to operate a medical marijuana dispensary, instead describing the business as "miscellaneous retail." Had Naulls provided the correct information, his application would not have been granted. Based on that application, the City issued a business license; however, the issuance of a license and payment of a business tax do not authorize the applicant to do business within the City. As expressly stated on the business license application, "All Businesses must comply with all city codes and must have the Department of Planning approval prior to opening." Naulls did not comply with the City's requirements, failing to take any steps to obtain approval before opening his doors for business. As a consequence, operation of HNC violated the City's municipal code and, as such, constituted a nuisance per se. **[166 Cal.App.4th 428]**

But for the fact that appellants filed a *reply* brief asserting a position unlike the one taken in their opening brief, this opinion would likely have ended after the preceding paragraph. Indeed, substantial evidence supports the trial court's conclusion. In any event, we turn now to appellants' various claims.

[2] First, appellants challenge the court's statement of decision insofar as they assert "Naulls applied for a business licenses from the city and 'did not indicate' that it was for a medical marijuana collective; instead he described it as 'miscellaneous retail.'" Appellants concede the accuracy of that statement, but argue the statement of decision contains no factual finding that Naulls *falsified* the business license application or that the business licensing sections of the City's municipal code had been violated. Appellants are correct that the statement of decision makes no reference to falsification of the application. However, they overlook the fact that our function is to review the record for substantial evidence to support the court's findings, whether express or implied. Thus, it matters not whether the statement of decision contains an express finding to

support the court's decision; it is enough that the record reflects substantial evidence to support an implied finding. Furthermore, we reject appellants' position that the court's so-called "musings" throughout the hearing, upon which the City relies in its respondent's brief, do not constitute findings and, in any event, are not supported by substantial evidence. For example, they point to the court's statement that Naulls "was not particularly forthcoming on the application," contending, "[a] finding that one is less than forthcoming does not amount to a finding of falsification." Assuming that a finding of falsification requires intent, it matters not whether Naulls intentionally lied on his application. What does matter is that he was required, under section 5.02.040, subdivision (A), of the City's municipal code, to specify "[t]he exact nature or kind of business for which a license is requested," which he failed to do. He therefore provided incomplete information, in violation of the code, and as a result the City issued a business license which it would not otherwise have done.

Next, appellants challenge the reference in the statement of decision to the language appearing on the preprinted license application stating, "All Businesses must comply with all city codes and must have the Department of Planning approval prior to opening." Appellants concede that the form contains this language, but maintain there is no authority for the proposition that a business owner must obtain approval before opening his or her business. Appellants overlook section 5.02.370, subdivision (B), which states: "The issuance of a license under the provisions of this chapter to a particular licensee does not constitute a consent, direct or indirect, by the city that the licensee may operate such business in violation of any of the provisions of this code, ordinances or resolutions or any law of the state or federal [166 Cal.App.4th 429] government. Any business to whom a license has been issued under this chapter *will continue to be required, after the issuance thereof, to comply with all the laws of the city*, including, but not limited to its zoning regulations, building regulations, fire regulations, plumbing regulations, electrical regulations, mechanical code and subdivision regulations." (Corona Mun. Code, § 5.02.370, subd. (B), italics added.)

Next, appellants contend the statement of decision contains a "serious misstatement of fact" insofar as it asserts, "Based on the application, the City 'classified' the business as 'commercial retail' for zoning purposes." They insist there is no evidence to support the notion that the business was "classified" as such for zoning purposes. Referring to Temple's declaration, appellants concede that the *location* of the business is in a commercial retail zone, but contend that this is unrelated to the use of the business for zoning purposes based on Naulls's application. They argue the City took no action for purposes of zoning because, relying upon declarations from Naulls and his attorney, "unlike other cities, [it] has no mandatory zoning procedure for new businesses." In short, appellants contend the City merely issued a business license for revenue purposes; it did not "classify" HNC as commercial retail or anything else for zoning purposes. However, as discussed below, regardless of whether HNC was erroneously classified as commercial retail for purposes of zoning, appellants opened for business without the City's approval, in violation of various sections of the City's municipal code.

Next, contending that the statement of decision reaches an erroneous legal conclusion, appellants point to the following statement: "'Uses not categorized under the Specific Plan or the Municipal Code must be presented to the City's Planning Commission, which holds a hearing, makes findings and, where appropriate, assigns a zoning designation based on the proposed 'similar use.''" Challenging the word "must," appellants insists that this is an incorrect assertion of law based solely on the "say-so" of Temple as alleged in her declaration, as no such requirement appears in the City's municipal code. Although appellants are correct, we fail to see their point. A business operator who wishes to operate a business which does not qualify as a conforming or permitted use has several options, none of which were followed in this case. Whether or not Naulls was *required* to initiate "similar use" proceedings has no bearing on the reality that he failed to take appropriate steps to obtain the City's approval for opening his business.

Next, appellants challenge as speculative Temple's assertion that, had Naulls been up-front on his application, the City would have required him to submit to the procedure for obtaining a variance.

Again, they argue there is [166 Cal.App.4th 430] nothing in the municipal code to support this so-called "requirement." However, even if the procedure is optional rather than mandatory, the fact remains that Naulls would not have been given a license and would not have been able to open his business had he presented accurate information on his application as to the nature of his business.

Finally, we have saved for last what appellants describe as the "ultimate erroneous legal conclusion that leads directly to the unsupported preliminary injunction." That is, they contend there is no legal basis for the court's finding, as set forth in its statement of decision, that "[a]ny use not enumerated [in the City's municipal code] is presumptively prohibited." They argue: "Based on this faulty legal premise, the Statement of Decision proceeds on a short logical chain to the erroneous conclusion that Mr. Naulls has violated this unwritten rule, is therefore in violation of the Municipal Code (the precise section unstated), and is thus to be deemed a nuisance subject to abatement. This is the reasoning that underlies the trial court's finding that the City is likely to prevail on the merits which in turn supports the preliminary injunction. [¶] But the Planning Director's pronouncement that any use not expressly permitted is therefore prohibited is not law and cannot form the basis of a finding that the City is likely to prevail on the merits."

In challenging the court's conclusion, appellants assert, "the sleight of hand underlying the City's argument and the Court's ruling is unveiled: it depends not on the Municipal Code (for which no specific cite is provided) or any other written law, but rather on the unvarnished opinion of the Planning Director that anything not explicitly permitted by the City is therefore prohibited. Thus, centuries of legal principle [*sic*] establishing the right to use private property freely is swept away in the vaguest of terms and without any written authority, based only on the pronouncement of a government functionary. [¶] The City cannot impose so overarching a prohibition in this casual and uncertain fashion, based only on the Director's opinion of the meaning of the ordinance without any ascertainable written basis therein. Without consulting the Director's oracle, how is one possibly to know from reading the ordinance that this is its meaning?"

They continue: "It is fundamentally unfair to allow this extreme deprivation of the right to use private property based only on the pronouncements of the Planning Director. Such an exercise of the police power, like all zoning ordinances, can only be achieved through the legislative process, in writing, with notice and opportunity to be heard, and other required elements of due [166 Cal.App.4th 431] process. [Citations.] Without such due process, a zoning ordinance is void. [Citation.] Unlike other cities' municipal codes which do contain such language explicitly, [fn. 7] Corona's does not. [Citations.] If Corona wants to add such language legislatively, it should do so with all required due process. But it should not be allowed to shortcut the required process by Directorial pronouncement." Appellants' position is unsound.

As previously indicated, the trial court found, based upon its reading of both the City's municipal code and Temple's declaration, that the City's municipal code "is drafted in a permissive fashion," and that "[a]ny use not enumerated therein is presumptively prohibited." fn. 8 During the hearing, the court acknowledged that, in the absence of authority for the proposition that if a use is not expressly permitted, then it is nonpermitted, its ruling would be that the use is nonpermitted. fn. 9 The court thereafter concluded that, because medical marijuana dispensaries are not enumerated in the municipal code as a permissive use, HNC was operating within the City as a nonpermitted, nonconforming use, thereby constituting a nuisance per se. As we shall explain, the record supports the trial court's conclusion.

HNC is located within the City's Specific Plan. The Specific Plan lists all of the uses within each zoning district, including permitted and nonpermitted uses. The City is responsible for selecting the appropriate zoning category. Neither selling nor distributing medical marijuana is among the classified uses. An additional category entitled "Miscellaneous" provides for "[s]imilar uses permitted by Planning Commission determination." In that regard, the Specific Plan refers property users to the procedures set forth in chapter 17.88 of the City's municipal code, which

describes Planning Commission proceedings for determining appropriate zoning uses either not categorized under the Specific Plan or not applicable under title 17. **[166 Cal.App.4th 432]**

[3] Furthermore, chapters 17.33 (commercial and office zones) and 17.44 (industrial zones) of the City's municipal code contain language evidencing an intent by the City to prohibit uses not expressly identified. Pursuant to section 17.33.030 (permitted and conditionally permitted uses), the uses set forth in Table 1-17.33 (permitted land uses), are either permitted, conditionally permitted, or not permitted. "Other similar permissible uses not identified in Table 1-17.33 may be permitted by Planning Commission determination pursuant to Chapter 17.88 of the Corona Municipal Code (Similar Uses)." (Corona Mun. Code, § 17.33.030.) Similarly, pursuant to section 17.44.030 (permitted uses; conditional uses; prohibited uses), the uses set forth in Table 1, "shall be permitted, may be permitted with a conditional use permit . . . or shall not be permitted . . . . Other similar permissible uses not identified in Table 1 may be permitted by Planning Commission determination pursuant to Chapter 17.88." (Corona Mun. Code, § 17.44.030.)

As the municipal code presently reads, medical marijuana dispensaries are expressly prohibited in commercial and office zones, and in industrial zones. Of course, when the circumstances in this case occurred, there was no reference in the municipal code to medical marijuana dispensaries, thus, a business owner looking to open such a business would be obliged to look to the language set forth in section 17.33.030. This would mean that the property owner would be required to comply with the provisions of chapter 17.88 of the City's municipal code, which in turn sets forth the procedure for obtaining planning commission approval for proposed similar uses.

In essence, appellants take the position that the City's action precluding Naulls from operating HNC is based solely on Temple's declaration. Appellants are mistaken. Because Naulls gave incorrect information on his business license application, the City issued a business license in error and assigned a "commercial retail" designation for purposes of zoning. Had Naulls complied with the requirements set forth by the City with regard to business license applications, he would not have been issued a business license and instead would have been placed in a position whereby he would have had no alternative but to request either an amendment to the Specific Plan or a "similar uses" determination. He did neither. Thus, by evading the procedures which applied to his situation, and with knowledge--as provided to him by a City representative both verbally and in writing--that a medical marijuana dispensary was not a permitted use, he began operating HNC in violation of various sections of the City's municipal code, i.e., section 5.02.030 (requiring a valid business license be obtained through compliance with all applicable rules); section 5.02.040, subdivision (A), (requiring applicant to describe "the exact nature or kind of business for which a license is requested"); **[166 Cal.App.4th 433]** section 5.02.040, subdivision (F), (requiring applicant to provide "any further information" necessary to issue the type of license sought); section 5.02.370 (requiring compliance with all city laws, including zoning regulations, after issuance of a business license); section 17.88.010 (recognizing that ambiguity may arise concerning appropriate classification of or permission of particular unlisted use); section 17.088.020 (allowing the planning commission to initiate proceedings to ascertain all relevant facts concerning proposed use, to hold public hearings, make findings and state reasons for approving or denying classification and permitting of the proposed unlisted use as "similar" to those permitted in a particular zone); and section 17.88.030 (providing that the planning department shall study the proposed similar use and provide all information necessary to assure action consistent with the City's municipal code and general plan), Naulls and HNC created a nuisance per se pursuant to section 1.08.020, subdivision (B). fn. 10

[4] We therefore conclude that, notwithstanding the City's police power to impose zoning ordinances as a means of promoting the public welfare (see, e.g., *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279), the trial court had ample evidence upon which to conclude that any use not expressly designated by the City was prohibited in the absence of appropriate action to secure a variance. Our conclusion finds further support by analogy to the rule of statutory construction known as *expression unius est exclusion alterius*, which means "'the expression of certain things in a statute necessarily involves exclusion of other things not expressed. . . ." [Citation.]" (*Dyna-*

*Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13.) Applying the same rationale, where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*. We find unpersuasive the argument that the municipal codes of other cities *do* include a provision to the effect that any use not specifically permitted is prohibited.

[5] In sum, the court was presented with substantial evidence that Naulls, by failing to comply with the City's various procedural requirements, created a nuisance per se, subject to abatement in accordance with the City's municipal code. Issuance of a preliminary injunction was therefore a proper exercise of the court's discretion. **[166 Cal.App.4th 434]**

## DISPOSITION

The order is affirmed. Respondent is awarded its costs on appeal.

McKinster, Acting P. J., and Gaut, J., concurred.

FN \*. Pursuant to California Constitution, article VI, section 21.

FN 1. While this appeal was pending, the City filed a motion for judicial notice as to relevant portions of the City's municipal code: the application for business license tax filed by Naulls, the City's North Main Street Specific Plan (the Specific Plan) encompassing the location of HNC, and records of the United States District Court reflecting enforcement activity and criminal proceedings against Naulls and HNC. Thereafter, the City filed a motion to take additional evidence pertaining to the status of the aforementioned criminal proceedings. Rulings on both motions were reserved for consideration with the appeal. We now grant the request for judicial notice as to all documents except those pertaining to criminal proceedings in federal district court. We also deny the motion to take additional evidence with regard to those criminal proceedings.

FN 2. According to Temple, a specific plan "operates as a site specific zoning ordinance governing all land use, development requires and infrastructure requirements within its boundaries."

FN 3. We note that the court at this juncture questioned whether the City should have taken some other type of action, such as citing Naulls and closing down the dispensary, after which the matter could have been resolved by means of an administrative writ petition under Code of Civil Procedure section 1094.5.

FN 4. Appellants argue: "The City is obligated to enforce the CUA and MMPA, regardless of its views of medical marijuana and its Constitutional status. . . . While certain elements of the City may be uncomfortable with medical marijuana, the people of California have spoken, and now the City is required to implement the law. If they want to stop medical marijuana they can go about [it] by taking the case to the state legislature or to the people—they cannot, however, block medical marijuana facilities because they disfavor them. Because California law explicitly allows for medical marijuana collectives, the City must stop stonewalling and allow Healing Nations to operate."

FN 5. In its response to the opening brief, the City maintains that each and every one of appellants' contentions lacks merit. However, it first addresses the propriety of the preliminary injunction, concluding that its issuance was correctly based upon the evidence that appellants had violated several provisions of the City's municipal code, thereby creating a nuisance per se.

FN 6. The City served its proposed statement of decision on February 2, 2007. The court signed the document on February 7 and filed it on February 20. Appellants were afforded an opportunity to voice objections, but apparently failed to do so.

FN 7. In opposing the City's motion, appellants' counsel submitted a declaration wherein he set forth a provision of Kern County's zoning ordinance, as follows: "Any use not specifically permitted by the provisions of this title is prohibited. All prohibited uses specified at any place within this title are examples only and are not to be construed as a complete listing of all prohibited uses." Kern County Code 19.02.060(C)." Counsel then alleged that a diligent search of the City's municipal code revealed no comparable language.

FN 8. Of course, effective as of 2007, sections 17.33.030 (commercial and office zones) and 17.44.030 (industrial zones) of the City's municipal code now provide that a medical marijuana dispensary is not a permitted land use. (Corona Ord. No. 2885, § 2.)

FN 9. Earlier, the court indicated it was unaware "if there's any language anywhere within Corona's Specific Plan, or Municipal Code, or any other type of statute or ordinance that says that. But it would seem the logical thing that . . . if it's not allowed and if it's not disallowed, that it would probably be . . . disallowed, unless they go through and obtain the correct zoning, which they never did."

FN 10. Section 1.08.020, subdivision (A), of the City's municipal code provides that, unless a different penalty is prescribed, the violation of any provision of or failure to comply with any of the requirements of the code is punishable as a misdemeanor. Additionally, pursuant to section 1.08.020, subdivision (B), "any condition caused or permitted to exist in violation of any of the provisions of this code is a public nuisance and may be, by this city, abated as such."

**EXHIBIT "D"**

Filed 8/27/09 City of Claremont v. Kruse CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE CITY OF CLAREMONT,

Plaintiff and Respondent,

v.

DARRELL KRUSE et al.,

Defendants and Appellants.

B210084

(Los Angeles County  
Super. Ct. No. KC049836)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dan T. Oki, Judge. Affirmed.

Law Office of Burton Mark Senkfor and Burton Mark Senkfor; Allison B. Margolin for Defendants and Appellants.

Jeffrey V. Dunn, Sonia R. Carvalho, and Marc S. Erlich for Plaintiff and Respondent.

Defendants and appellants Darrell Kruse (Kruse) and Claremont All Natural Nutrition Aids Buyers Information Service (also known as CANNABIS)<sup>1</sup> 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

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<sup>1</sup> Kruse and CANNABIS are referred to collectively herein as defendants.

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 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, Shultz 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 Shultz and requested a meeting. Kruse met with Shultz 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**

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.

## DISCUSSION<sup>2</sup>

### 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.)

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<sup>2</sup> We discuss the applicable standards of review as we address each of the issues below.

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.<sup>3</sup> 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

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<sup>3</sup> The trial court also found that Kruse's operation of CANNABIS could be enjoined as a nuisance per se because, notwithstanding California's medical marijuana laws, the cultivation and distribution of marijuana remains illegal under the federal Controlled Substances Act (21 U.S.C. § 801, et seq.). Kruse contends this was error because the City lacks authority to enforce violations of the Controlled Substances Act. Because we affirm the trial court's order enjoining defendants' operation of a medical marijuana dispensary in violation of the City's municipal code as a nuisance per se, we need not determine whether or not the Controlled Substances Act provided a separate basis for granting injunctive relief in this case. "[W]e review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record." (*Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.* (1977) 71 Cal.App.3d 706, 712.)

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

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<sup>4</sup> We granted the City’s request for judicial notice of various provisions of its municipal code, including section 1.12.010.

<sup>5</sup> The defendant in *Naulls* failed to indicate in his application for a business license that he intended to operate a medical marijuana dispensary, instead describing the business as “miscellaneous retail.” Based on that application, the city issued a business license; however, had the defendant provided the correct information, his application would not have been granted. (*Naulls, supra*, 166 Cal.App.4th at p. 427.)

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: “‘‘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 1362.5<sup>6</sup> 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:

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<sup>6</sup> All further statutory references are to the Health & Safety Code unless otherwise indicated.

“(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>

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<sup>7</sup> The penal statutes referenced in section 11362.775 include possession of marijuana for sale (§ 11359); maintaining a place for the sale, giving away, or use of marijuana (§ 11366); making available premises for the manufacture, storage, or distribution of controlled substances (§ 11366.5); and abatement of nuisance created by premises used for manufacture, storage, or distribution of controlled substances (§ 11570). (§ 11362.765, subd. (a).)

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

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<sup>8</sup> Section 11362.79 prohibits the use of medical marijuana in any place where smoking is prohibited by law, in or within 1,000 feet of a school, recreation center, or youth center, in a school bus, in a motor vehicle while it is being operated, and while operating a boat.

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]

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<sup>9</sup> Section 11362.5, subdivision (b)(1)(A).

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, fns. 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, subs. (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.<sup>10</sup> 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

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<sup>10</sup> In the trial court below, defendants presented an opinion of the Attorney General (88 Ops.Cal.Atty.Gen. 113 (2005)), as authority for their argument that the ability to obtain and use medical marijuana is a "matter of statewide concern," preempting local regulation. That opinion addresses only one specific area of regulation covered by the MMP -- the establishment of a registry and identification card program. The Attorney General opined that "the Legislature has demonstrated its intention to fully occupy" that narrow, specific field of regulation. At the same time, the Attorney General noted: "[T]he Legislature expressly did not intend to 'fully occupy' all areas of law concerning the use of medical marijuana when it enacted the statewide registry and identification card program" and concluded that state marijuana laws "do not expressly or impliedly preempt this entire field of regulation." That opinion thus undermines, rather than supports defendants' position.

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.'" (*Ignia 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.)

**DISPOSITION**

The judgment is affirmed. The City is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
DOI TODD

\_\_\_\_\_, J.  
ASHMANN-GERST

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## EXHIBIT "E"

### Addendum

The following addenda reflect materials not available, known or decided upon in a court of law at the time of the previously published July 10, 2009 paper. For the purposes of this paper, the terms "Proposition 215" and the "Compassionate Use Act" ("CUA") are interchangeable, and the terms "SB420", "MMP" and "MMPA" are interchangeable.

#### VI. Legal Questions

Below are brief summaries of cases that have been decided upon by the courts or are in the appeals process under the Compassionate Use Act. These cases are relevant to how a city attempts to regulate medical marijuana through zoning standards. The points addressed in these cases include:

- The right of a municipality to ban dispensaries
- The legality of SB 420 (Medical Marijuana Program) to amend Prop 215 without voter approval, as stipulated by the California State Constitution (unless authority is granted in the proposition)
- Federal law superseding State law
- Right of possession and transportation of medical marijuana (as outlined in SB 420)

The court challenges, in effect, will further define the legality of Prop 215 and the subsequent Medical Marijuana Program created by SB 420. These and future challenges will more than likely question the legal nature of establishing a business entity whose purpose is to grow and distribute marijuana, which is in direct conflict with federal law as written, regardless of its intended use or the political climate of federal enforcement agencies. Neither Proposition 215 or SB 420 adequately address this question.

Although some court decisions *at a state level* may be found to be favorably argued and addressed in Proposition 215 and SB 420, the underlying legal foundation as applied to federal law may invalidate the lower courts findings on appeal.

Of particular interest is *Qualified Patients v City of Anaheim*. Case No. G040077, 4th District Court of Appeals, Division 3. The case results from the adoption of an ordinance by the City of Anaheim banning the operation of medical marijuana dispensaries. Qualified Patients Association who sought to operate a medical marijuana dispensary, sued in court to challenge the ordinance. The court found that such a ban did not violate the CUA because the CUA was not intended to occupy all areas of law concerning medical marijuana. Rather, the CUA merely exempted certain medical marijuana users from criminal liability under two specific California statutes. The Qualified Patients Association has appealed this decision. Several cities with similar ordinances have joined the City of Anaheim on appeal.

It will also be interesting to see if the Appeals Court decides, as in *People v Kelly*, that the legislature overstepped their bounds with the MMP. The lower court stated Section 11362.77 amends the CUA, and therefore it is unconstitutional. Legislative acts, such as the MMP, are entitled to a strong presumption of constitutionality. The Legislature nonetheless cannot amend an initiative, such as the CUA, unless the initiative grants the Legislature authority to do so. (Cal. Const., art. II, § 10, subd. (c);8 *People v. Cooper* (2002) 27 Cal.4th 38, 44; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251-1253, 1256.) The CUA does not grant the Legislature the authority to amend it without voter approval. Therefore, if section 11362.77, which was enacted without voter approval, amends the CUA, then it is unconstitutional. The legislature's effort to clarify what is a "reasonable" personal medical supply of marijuana is unconstitutional because the Proposition 215 initiative did not authorize the legislature to tamper with its statutes. California. Attorney General Brown has appealed this case.

Since Prop 215, the CUA never addressed dispensaries one wonders if people would have voted for prop 215 had there been language detailing dispensaries as a commercial enterprise?

### U.S. Supreme Court

*Gonzales v. Raich*, (2005) 125 S. Ct. 2195. The United States Supreme Court held in this decision that the possession, growing, sales and use of marijuana continues to be illegal since it is classified as a Schedule I drug under Federal law. Further, under the supremacy and commerce clauses of the Constitution, federal regulation of marijuana supersedes the Compassionate Use Act. As a Schedule I drug, the manufacture, distribution, or possession of marijuana is a criminal offense, with the sole exception being use of the drug as part of a FDA pre-approved research study.

*U.S. v. Oakland Cannabis Buyers' Cooperative*, (2001) 532 US 483, 121 S. Ct. 1711. The United States Supreme Court held in this case that there is no medical necessity exception to the Federal Controlled Substances Act's prohibitions on manufacturing and distributing marijuana.

### California Supreme Court

*Ross v. Raging Wire Telecommunications, Inc.*, (2008) 42 Cal 4th 920; In this case; the California Supreme Court ruled that an employer may require pre-employment drug "tests and may make employment decisions based on the use of medical marijuana even if such use is not at the workplace., The California Fair Employment Housing' Act (FEHA) does not require employers to accommodate the use of illegal drugs, which marijuana remains under federal law.

*People v. Wright*, (2004) 40 Cal. 4th 81. The California Supreme Court ruled in this case that under the MMP, the CUA medical marijuana cultivation and possession defense may include transportation.

*People v. Mower*, (2002) 28 Cal. 4th 457. The California Supreme Court in this case concluded that the use of the medical marijuana defense provided by the Compassionate Use Act requires that the defendant raise a reasonable doubt as to the facts underlying the defense, as opposed to requiring that the defendant prove the medical need by a preponderance of evidence. In order to use the defense of primary caregiver status, the defendant has to present that he or she consistently has assumed responsibility for either one's housing, health or safety before asserting a defense.

### California Courts of Appeal

*People v. Kelly*, (2008) Cal. 4th App. \_\_\_\_\_ May 22, 2008, Slip Op B195624. The Court of Appeals ruled in this case that the portion of the Medical Marijuana Program, which imposes limits on the amount of marijuana a qualified patient can possess (8 dry ounces, 6 mature plants or 12 immature plants, See Health and Safety Code 11362.77); impermissibly amended the Compassionate Use Act. Because the Compassionate Use Act was adopted by initiative, it may be amended only by voter approval and not the legislature. The Court of Appeals was careful to state that only Section 11362.77 of the Medical Marijuana Program was adopted improperly. It is not known at this point whether all of SB 420 is unconstitutional, and what the impact on the Compassionate Use Act will be. The State through the Attorney General's Office has asked the California Supreme Court to review this decision.

*City of Garden Grove v. Superior Court of Orange County*. (2007) \_\_\_\_ Cal. App. 4th \_\_\_\_ (Slip Op G036250, November 28, 2007. This Court of Appeals case held that medical marijuana seized as evidence must be

returned to the defendant who establishes that he/she legally possessed medical marijuana. Federal law does not preempt the due process right to return of property lawfully held, even if it is held lawfully only in accordance with state law.

*People v. Urziceanu* (2005) 132 Cal. App. 4th 747, 881. The Court of Appeals acknowledges in this case that the Compassionate Use Act did not authorize the collective cultivation and distribution of medical marijuana. This activity was authorized instead by the Medical Marijuana Program later enacted, which represents a dramatic change in the prohibitions on the use, distribution and cultivation of marijuana for qualified patients and primary caregivers.

*People v. Tilekkoob* (2003) 13 Cal. App. 4th 1433. The Court of Appeals held in this case that the Compassionate Use Act provides a defense to probation revocation. Additionally, the Court stated that California courts do not enforce federal criminal statutes, particularly the federal marijuana possession laws.

### **California Trial Courts**

*Qualified Patients Association v. Anaheim* (2008) Orange County Superior Court. Case #07CC09524. The trial court in this case upheld the City of Anaheim's ordinance banning all medical marijuana dispensaries from operating in the City. This decision has been appealed.

ITEM NO: K-8  
VOLUNTARY REDUCTION IN CITY  
COUNCIL SALARIES  
SEPTEMBER 22, 2009

TO: HONORABLE MAYOR AND COUNCIL MEMBERS  
FROM: STEPHEN J. KIMBROUGH, CITY MANAGER

*STB VS*

**SUMMARY:**

During the recent Budget Meetings, while the City Council was discussing the need for employee furloughs amounting to a ten percent (10%) reduction in total compensation, the Council also discussed a voluntary reduction in individual Council Member monthly compensation.

Mayor Gary Strack asked that this discussion be brought back to the City Council for a final consideration.

**BACKGROUND:**

In the July 29, 2009 Memo from City Attorney Michael Fitzpatrick, he confirmed that City Council Members may voluntarily take a reduction in their salaries which had been set by City Ordinance.

City Attorney Fitzpatrick writes: "Although the law is clear that a Council vote to reduce salaries of all Council Members implemented by a change in the Ordinance would not affect any Council Member during his or her current term of office, there is no legal prohibition against individual Council Members choosing not to accept the salary (or any portion thereof) to which they are entitled to by law [Corning Municipal Code Section 2.04.020]. To do so would not require a Council vote; it would only require some form of written notice from the Council Member to the City that this is what he or she has chosen to do and stating the beginning and ending date of this action."

**RECOMMENDATION:**

**STAFF MAKES NO RECOMMENDATION.**