

1 3, and 6, 2014, prior to the service of the "Fifteen (15) Day
2 Notice and Order to Abate and Notice of Hearing on a Request for a
3 Determination of a Public Nuisance (sic) and Abatement Order and
4 Petition to Impose Administrative Penalties Involving the
5 Cultivation of Medical Marijuana" ("Fifteen-Day Notice to Abate"
6 or "Notice") constitutes abatement of the nuisance precluding
7 imposition of administrative fines or penalties. While Thao
8 argues that both the Government Code and the County's ordinances
9 provide Appellant with an opportunity to abate prior to the lawful
10 imposition of an administrative fine, the County contends that the
11 Board was justified in imposing the administrative penalty despite
12 Thao's removal of the marijuana plants prior to even being served
13 with the Fifteen-Day Notice to Abate. As discussed below, the
14 Court concludes that Thao's removal of the marijuana plants prior
15 to the issuance of the Fifteen-Day Notice to Abate precludes the
16 Board from imposing administrative fines or penalties on Thao.

17 **BACKGROUND**

18 On January 7, 2014, the Board adopted Fresno County Ordinance
19 No. 14-001 prohibiting the cultivation of medical marijuana in all
20 zone districts in the unincorporated territory of the County by
21 replacing Chapter 10.60 and adding Chapter 10.62 and Chapter 10.64
22 to the Fresno County Ordinance Code ("Code").

23 Appellant's Notice of Appeal alleges that Thao is the record
24 owner of the real property commonly known as 1145 Coleman Avenue,
25 Laton, Fresno County, California 93242. On March 3, 2014, a
26 Fresno County Sheriff's Deputy located 99 marijuana plants on the
27 property. The Deputy Sheriff's decided not to abate the marijuana
28 at that time and did not issue an abatement order at that time.

1 On March 6, 2014, Sheriff's deputies returned to the property,
2 verified that no marijuana plants were on the property, and issued
3 the Fifteen-Day Notice to Abate backdated to March 5, 2014. On
4 April 19, 2014, an administrative citation imposing a fine of
5 \$99,000.00 was issued by mail to Appellant. On July 15, 2014, the
6 Fresno County Board of Supervisors heard Thao's appeal of the
7 fine. The Board members voted to uphold the fine in the amount of
8 \$99,000.00 plus interest in the amount of 10% per month.

9 On July 23, 2014, Appellant filed this appeal from the
10 imposition of an administrative fine pursuant to Government Code
11 section 53069.4. The "appeal" also seeks various "orders"
12 declaring the ordinance unconstitutional, directing Respondents to
13 cease enforcement of the ordinance and other relief. Due to the
14 presence of these requested "orders" in the "Relief Requested"
15 section, it appears that Appellant was also attempting to request
16 declaratory relief in his "appeal."

17 This case was initially filed as a civil unlimited case and
18 given the case number 14CECG02103.

19 On November 5, 2014, Judge Smith issued the following order
20 *sua sponte*:

21 Appellant has impermissibly combined an
22 appeal of an administrative fine or penalty with
23 causes of action seeking additional relief.
24 Pursuant to Government Code section 53069.4, the
25 appellant may appeal a final administrative order
26 or decision of a local agency made pursuant to an
27 ordinance regarding the imposition, enforcement
28 or collection of administrative fines or
penalties.

Appellant may seek review by filing an
appeal to be heard by the superior court, where
the same shall be heard de novo, except that the

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contents of the local agency's file in the case shall be received in evidence. The statutory authority is clear that a proceeding under this subdivision is a limited civil case. Gov. Code §53069.4. There is no authority that permits the combining of an appeal with causes of action seeking additional relief.

As the appellant has paid the proper filing fee for an appeal of the administrative fine or penalty this case is reclassified as a limited civil case and will proceed on the appeal only. If the appellant wishes to pursue any other cause of action against the defendants they must file a separate complaint, petition, etc. This will be filed as a separate action and appropriate filing fees must be paid.

Based on the Court's November 5, 2014 *sua sponte* order, the Civil Clerk's office reclassified this appeal from an unlimited civil case to a limited civil case. The newly designated limited civil case was given a new limited civil case number: 14CECL10024.

On November 6, 2014, the Defendants lodged the local agency file with the Court.

On February 26, 2015, the Court (Judge Snauffer) granted reconsideration and reclassified this case back to an unlimited civil case. The case was reclassified back to its original unlimited civil case number: 14CECG02103.

On March 18, 2015, the Court ordered that the trial of this appeal would be bifurcated and that Phase I of the trial would be conducted on May 27, 2015.

On April 22, 2015, Appellant Xiongh Thao and Respondents County of Fresno and Margaret Mims each filed a trial brief.

On May 6, 2015, Appellant and Respondents each filed a reply trial brief.

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2 **STIPULATED FACTS**

3 The parties adopted the Court's proposed stipulated facts set
4 forth in its pre-trial order of March 18, 2015. The stipulated
5 facts for Phase I of the trial are as follows:

6 1. The property located at 1145 Coleman Avenue, Laton,
7 County of Fresno, is owned and/or controlled by Appellant.

8 2. The subject property is located in the unincorporated
9 territory of Fresno County.

10 3. Appellant was cultivating approximately 99 marijuana
11 plants on the subject property as of March 3, 2014.

12 4. On March 3, 2014, Fresno County Sheriff's Deputies came
13 onto the subject property and observed the approximately 99
14 marijuana plants.

15 5. Appellant removed all of the marijuana plants growing on
16 the subject property prior to March 6, 2014.

17 6. Fresno County Sheriff's Deputies came back to the
18 subject property on March 6, 2014, and determined that all of the
19 marijuana plants had been removed.

20 7. A deputy served Appellant with a 15-Day Notice to Abate
21 on March 6, 2014. The Notice was dated March 5, 2014.

22 8. Appellant possessed a medical marijuana recommendation
23 as of March 3, 2014.

24 9. The Board of Supervisors voted to approve the imposition
25 of an administrative penalty of \$99,000.00 on Appellant on July
26 15, 2014.

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1 and must be upheld absent evidence the interpretation lacks a
2 reasonable foundation." Government Code section 53069.4,
3 subdivision (b) (1) clearly states that "a person contesting that
4 final administrative order or decision may seek review by filing
5 an appeal to be heard by the superior court, where the same shall
6 be heard **de novo**" As stated in *Martin v. Riverside County*
7 *Dept. of Code Enforcement* (App. 4 Dist. 2008) 83 Cal.Rptr.3d 624,
8 166 Cal.App.4th 1406, "Government Code section 53069.4 was enacted
9 in 1995 by Senate Bill No. 814 to provide for the **de novo** appeal
10 of an administrative order and decision." The state statute
11 clearly states that this appeal is a limited "de novo" appeal
12 where the Court conducts an independent hearing on whether or not
13 an administrative fine or penalty should be imposed in this case.
14 As stated in *Collier & Wallis v. Astor*, "'A hearing *de novo*
15 literally means a new hearing, or a hearing the second time.
16 [Citation.] Such a hearing contemplates an entire trial of the
17 controversial matter in the same manner in which the same was
18 originally heard. It is in no sense a review of the hearing
19 previously held, but is a complete trial of the controversy, the
20 same as if no previous hearing had ever been held.... The decision
21 therein ... takes the place of and completely nullifies the former
22 determination of the matter.' *Collier & Wallis, Ltd. V. Astor*
23 (1937) 9 Cal.2d 202, 205. In accord, see *REA Enterprises v.*
24 *California Coastal Zone Com.* (1975) 52 Cal.App.3d 596, 612, 125
25 Cal.Rptr 201; *Kaczorowski v. Mendocino County Board of*
26 *Supervisors*, 88 Cal.App.4th 564. The Court provided the parties
27 with an opportunity to call witnesses and provide additional
28 evidence, but the parties have declined to do so in Phase I of the

1 trial. (The County designated a witness on May 13, 2015, but
2 withdrew the designation at trial.) No witnesses testified at the
3 trial. Given the stipulation of facts and exhibits, the Court's
4 determination is primarily a question of law.

5 **BURDEN OF PROOF AND STANDARD OF PROOF**

6 The County has the burden of proof by a preponderance of the
7 evidence that the administrative fine or penalty was properly
8 imposed. However, the facts set forth in the Fifteen-Day Notice
9 to Abate is prima facie evidence of the facts set forth therein.
10 The County concedes in its Supplemental Brief that it has the
11 burden of proof as to the violation of section 10.60.40 citing
12 Evidence Code section 520. Section 520 provides, "The party
13 claiming that a person is guilty of a crime or wrongdoing has the
14 burden of proof on that issue." The County correctly states that
15 Government Code section 53069.4(b)(1) provides the "notice of the
16 violation and imposition of the administrative fine or penalty
17 shall be admitted into evidence as prima facie evidence of the
18 facts stated therein. The Court accepts the Fifteen-Day Notice to
19 Abate as a notice of violation within the meaning of Government
20 Code section 53069.f and that the facts set forth therein are
21 prima facie evidence of such facts. The burden then shifts to
22 Appellant to refute those facts. However, in this case, most of
23 the operative facts are stipulated facts. For example, the
24 parties stipulate that at the time the Fifteen-Day Notice to Abate
25 was served on Thao, the marijuana plants had been removed.
26 (Stipulated Facts 5-7) The Court accepts the stipulation and that
27 fact is deemed established.

1 this section regarding the imposition, enforcement or collection
2 of the administrative fines or penalties, **a person contesting that**
3 **final administrative order or decision may seek review by filing**
4 **an appeal to be heard by the superior court, where the same shall**
5 **be heard de novo, except that the contents of the local agency's**
6 **file in the case shall be received in evidence.** A proceeding
7 under this subdivision is a limited civil case. **A copy of the**
8 **document or instrument of the local agency providing notice of the**
9 **violation and imposition of the administrative fine or penalty**
10 **shall be admitted into evidence as prima facie evidence of the**
11 **facts stated therein. A copy of the notice of appeal shall be**
12 **served in person or by first-class mail upon the local agency by**
13 **the contestant.** (Emphasis added.)

14 Fresno County Ordinance Code (hereafter, "Code") provides:

15 • **1.12.010 - Penalty for violations.**

16 Unless otherwise specifically provided, any person violating
17 any provisions or failing to comply with any of the mandatory
18 requirements of the ordinances of the county is guilty of a
19 misdemeanor. Any person convicted of a misdemeanor under the
20 ordinances of the county shall be punished by a fine of not more
21 than five hundred dollars, or by imprisonment not to exceed six
22 months, or by both such fine and imprisonment.

23 Each such person is guilty of a separate offense for each and
24 every day during any portion of which any violation of the
25 ordinances of the county is committed, continued or permitted by
26 any such person, and he shall be punished accordingly.

27 • **1.12.020 - Infractions-Penalty.**

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1 When specifically provided in the chapter which makes any act
2 or failure to comply with any mandatory provision thereof a
3 violation of this code, that such violation constitutes an
4 infraction, then the penalty for such violation shall be a fine
5 not to exceed two hundred dollars. Each day or portion of day that
6 any act or failure to act, that is declared to be an infraction,
7 is continued or permitted shall be a separate violation. Any
8 person charged with or convicted of an infraction shall be subject
9 to the provisions of sections 19.6 and 19.7 of the Penal Code of
10 the state of California.

11 • **1.13.010 - Declaration of findings.**

12 The Fresno County board of supervisors (board) finds and
13 declares as follows:

14 A. That code enforcement continues to persist as a problem
15 for the county of Fresno (county), and that county departments
16 (departments) devote considerable personnel and resources to code
17 enforcement efforts;

18 B. **That pursuant to state law, including but not limited to**
19 **Government Code sections 53069.4 and 25132, the board is empowered**
20 **to establish an administrative citation process and provide for**
21 **the imposition of fines as penalties for noncompliance;**

22 C. That due to the nature of real property-related code
23 violations in particular, as well as other code violations, it may
24 often be unclear whether a real property owner, a tenant or an
25 agent is responsible for causing a code violation, or for
26 maintaining it once it exists;

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1 D. That the issuance of an administrative citation will
2 require that each responsible person cited must pay an
3 administrative fine;

4 E. That to provide for notice of a code violation for a
5 real property-related code violation, prior to issuance of a first
6 administrative citation regarding that section of the code, the
7 department charged with enforcement of that code shall send a
8 notice of violation to the current property owner of record or
9 other apparent responsible person, by the sending of a notice of
10 violation, each such respective responsible person is encouraged
11 to contact the issuing enforcement officer to establish a schedule
12 within which the code violation shall be corrected; provided,
13 further, that the enforcement officer shall be, depending upon the
14 circumstances, empowered to grant a time extension or extensions
15 to correct the code violation, which extension of time itself, if
16 granted, will be memorialized in writing also sent to all
17 respective responsible persons;

18 F. That the intent of this process is to encourage the
19 correction of code violations prior to the issuance of an
20 administrative citation or the imposition of a fine;

21 G. That despite best efforts of the department to work with
22 the responsible person, a code violation may not be corrected and,
23 if so, among other remedies or penalties, the ordinance codified
24 in this chapter is intended to empower the department to issue an
25 administrative citation and impose a penalty, and also compel
26 compliance;

- 27 • 1.13.060 - Notice of violation.
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1 A. **When a violation is determined to exist on a property,**
2 **the enforcement officer shall issue the responsible person(s) a**
3 **notice of violation** as provided in section 1.13.090 at the address
4 maintained for the current record owner. **The notice of violation**
5 **shall identify the violation(s) at issue, date of inspection,**
6 **location of the property, the applicable code section(s), and the**
7 **corrective action(s) required to obtain compliance. The notice of**
8 **violation shall demand compliance within a reasonable period of**
9 **time, at the discretion of the enforcement officer, not to exceed**
10 **thirty calendar days.** The responsible person is advised that an
11 inspection fee, as identified in the county's master fee schedule,
12 will be imposed for additional inspections beyond the one
13 inspection to verify compliance as stated in the notice of
14 violation. **The responsible person is also advised that**
15 **administrative citation(s) may be issued if compliance is not**
16 **obtained within the period specified in the notice of violation**
17 and that the notice of violation may be recorded per section
18 1.13.080.

19 B. The time specified for correction of a code violation
20 may be extended at the discretion of the enforcement officer, one
21 or more times, if it is determined that reasonable progress is
22 being made to correct the violation or for other good cause.

23 C. Service of a notice of violation is effective upon hand
24 delivery or five calendar days after the date it is mailed to the
25 violator by first class mail. Failure or refusal to accept the
26 notice of violation does not invalidate the issuance of the notice
27 of violation and subsequent proceedings.

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1 D. The property will be inspected for compliance. If the
2 responsible party refuses to allow inspection, after a reasonable
3 demand, the code enforcement officer may obtain an inspection
4 warrant pursuant to Code of Civil Procedure Section 1822.50.
5 Failure of the responsible party to allow inspection or remedy the
6 violation shall result in the issuance of an administrative
7 citation, the charging of inspection fees, and may result in a
8 separate criminal violation for the failure to allow inspection
9 (CCP Section 1822.57).

10 E. (Intentionally omitted)

11 • **1.13.070 - Issuance of administrative citation.**

12 A. **Following the expiration of the compliance deadline**
13 **stated in the notice of violation, the code enforcement officer**
14 **shall investigate whether the code violation has been addressed.**
15 **If the responsible person does not abate the violation within the**
16 **applicable compliance deadline, the code enforcement officer may**
17 **issue an administrative citation** in the manner provided in section
18 1.13.090. Following service of the administrative citation for a
19 violation, the responsible person must comply with the following:

20 1. Pay the fine to the county within thirty days from
21 the issuance date of the administrative citation. Payment of a
22 fine shall not excuse or discharge the failure to correct the
23 violation nor shall it bar further enforcement action by the
24 county; and

25 2. Remedy the Violation Immediately. If the
26 responsible person fails to correct the violation, a subsequent
27 administrative citation may be issued for the same violation. The
28 amount of the fine for failure to correct the violation shall

1 increase at a rate specified in section 1.13.110 with each
2 subsequent administrative citation.

3 B. - D. (Intentionally omitted)

4 • **10.60.010 - Purpose and intent.**

5 **It is the purpose and intent of this chapter to prohibit**
6 **cultivation of medical marijuana in order to preserve the public**
7 **peace, health, safety and general welfare of the citizens of**
8 **Fresno County.** Additionally, it is the purpose and intent of this
9 chapter to continue in effect Fresno County's prohibition of
10 medical marijuana dispensaries and limitations on places where
11 medical marijuana can be consumed.

12 • **10.60.060 - Medical marijuana cultivation regulations.**

13 • **Medical marijuana cultivation is prohibited in all zone**
14 **districts in the county.**

15 • **10.60.070 - Prohibited medical marijuana cultivation**
16 **declared a public nuisance.**

17 The establishment, maintenance, or operation of any
18 prohibited cultivation of medical marijuana, as defined in this
19 chapter, within the county is declared to be a public nuisance and
20 **each person or responsible party is subject to abatement**
21 **proceedings under chapter 10.62.**

22 • **10.60.080 - Penalties for violation.**

23 A. **Any person violating any of the provisions of this**
24 **chapter shall be guilty of a misdemeanor and subject to the**
25 **penalties as set forth in chapter 1.12 as well as the**
26 **administrative penalties as set forth in chapter 10.64.** Violators
27 shall be subject to any other enforcement remedies available to
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1 the county under any applicable state or federal statute or
2 pursuant to any other lawful power the county may possess.

3 **B. Each day a violation is allowed to continue and every**
4 **violation of the chapter shall constitute a separate violation and**
5 **shall be subject to all remedies.**

6 C. In the event any civil suit or action is brought by the
7 county to enforce the provisions of this chapter, the person
8 responsible for such violation shall be liable to the county for
9 costs of the suit, including, but not limited to, attorney's fees.

10 • **10.62.010 - Purpose.**

11 This chapter is enacted pursuant to Government Code § 25845
12 and complies with Health and Safety Code § 17980. Notwithstanding
13 any other provision of this code, whenever a condition or use
14 exists upon private land which is a public nuisance, the
15 procedures set out in this chapter may be used as an alternative
16 to any other way or proceeding to abate or manner of obtaining
17 abatement which is set forth in this code.

18 • **10.62.040 - Abatement order.**

19 A. Upon making a reasonable determination that a public
20 nuisance exists, the public official shall notify the property
21 owner(s), as such persons' names appear on the last equalized
22 assessment roll, and any lessees that a public nuisance exists
23 upon such persons' property. Notice shall be given by means of
24 first class mail postage prepaid. If the address of any such
25 person is unknown to the public official, then a copy shall be
26 posted on the property. A copy of the notice shall also be sent by
27 first class mail postage prepaid to the last known address of any
28 responsible party if the public official determines that such

1 responsible party directly or indirectly contributed to the
2 condition creating the nuisance.

3 B. The notice shall describe the use or condition which
4 constitutes the public nuisance, and the notice shall also state
5 what repair or other work is required in order to abate the
6 nuisance.

7 C. **The notice shall order that the uses or conditions**
8 **constituting the nuisance be abated within a reasonable time as**
9 **determined by the public official, normally being fifteen days**
10 **from the date such notice is mailed.**

11 D. The notice shall contain instructions to the property
12 owner describing procedures for scheduling a hearing for the
13 purpose of presenting information as to why the property should
14 not be considered a public nuisance.

15 E. **The notice shall also state that if the work is not**
16 **completed within the number of days specified on the notice, or**
17 **hearing has not been requested in accordance with section**
18 **10.62.070, the county may abate the nuisance without further**
19 **notification and the property owner may be responsible for all**
20 **costs associated with the investigation and abatement of the**
21 **public nuisance and the additional administrative penalty of one**
22 **hundred dollars per violation per day that said violation**
23 **continues past the abatement deadline.**

24 F. The notice shall also state that if the property owner
25 fails to request a hearing, all rights to appeal any action of the
26 county to abate the nuisance are waived.

- 27 • **10.62.050 - Immediate threat to public health or safety.**
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1 A. **The public official, upon making a finding that the**
2 **cultivation of marijuana creates an immediate and imminent threat**
3 **or danger to the health, safety or welfare of the occupants or the**
4 **public, may order a summary abatement of the nuisance.**

5 B. **Upon such finding, the public official may require**
6 **immediate action on the part of the property owner or lessee to**
7 **eliminate the hazardous condition.**

8 1. The public official shall make a reasonable attempt
9 to notify the lessees and owners of the property or other
10 responsible party of the dangers which require the immediate
11 vacation, repair, cleanup and/or securing of the property or
12 structures thereof, either by telephone, or by personally visiting
13 the premises; and

14 2. If the imminently dangerous condition can be
15 substantially relieved by the performance of minor repairs,
16 disconnection of certain utility services, or other acts, then the
17 public official may perform or direct such acts of work without
18 the prior consent of, or notice to, the owners, occupants, or
19 responsible party; and

20 3. If such danger cannot be substantially relieved by
21 such work and upon the failure or refusal of the occupants to
22 voluntarily vacate such premises, then the public official may
23 personally disconnect the electrical, gas and other utility
24 services to such premises or may request the appropriate utility
25 companies to do so; and

26 4. **If the public official finds that an immediate**
27 **threat to public health, safety or welfare exists, and that it is**
28 **unhealthy or hazardous to delay abatement action, he/she may order**

1 county staff or contractors to abate the condition. Abatement may
2 be, but is not limited to, removal of plants that are the subject
3 of the violation, disconnection or shutting off substandard
4 utility connections, clean-up and disposal of rubbish or other
5 materials which threaten public health; and

6 5. The property owner, lessee and/or responsible party
7 shall be liable for all costs associated with this abatement,
8 including administrative, labor, material and other costs; and

9 6. The public official shall post warnings to all
10 persons not to enter the premises stating the reasons therefor.

11 • **10.62.060 - Request for a hearing regarding abatement**
12 **order.**

13 A. A hearing regarding an abatement order may be requested
14 by filing a written request for a hearing with the main office of
15 the public official identified in the abatement order prior to
16 such date set for the abatement of the nuisance.

17 B. The filing of such request for hearing shall stay the
18 effectiveness of the order of abatement until such time as the
19 case has been decided by the board of supervisors.

20 C. If a request for a hearing is not filed within the
21 number of days to abate the nuisance as specified on the abatement
22 order, the public official may order the work to be performed.

23 • **10.62.070 - Hearing notice.**

24 A. Upon receipt of a request for hearing, filed in
25 accordance with section 10.62.060, the public official shall
26 schedule a hearing before the board of supervisors. Notice of the
27 hearing shall be sent by first class mail postage prepaid to the
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1 persons filing the request and to those persons identified under
2 section 10.62.040 (A) .

3 B. The notice shall state the date, time and place of the
4 hearing (which in no event shall be sooner than ten days from the
5 date of mailing and posting such notice unless mutually agreed to
6 by the property owner or responsible party and the public
7 official), the specific conditions or uses which constitute the
8 public nuisance, and shall direct the owner(s) and/or lessees to
9 appear and show cause why the specified condition or use should
10 not be declared a public nuisance and abated.

11 C. The failure of any property owner, lessee, responsible
12 party, or other person to receive any notice required to be given
13 or posted pursuant to the provisions of this chapter shall not
14 affect in any manner the validity of any proceedings taken
15 thereunder.

16 • **10.62.090 - Failure of property owner to abate.**

17 If the property owner, lessee or other responsible party
18 fails to abate the nuisance within the time specified in the
19 notice by the public official, or after appeal of the notice, by
20 the board of supervisors, and is not granted a time extension, the
21 public official is authorized to secure, remove, demolish, raze or
22 otherwise abate the nuisance at the expense of the owner(s).

23 • **10.64.010 - Effect.**

24 This chapter does not in any way supersede Fresno County
25 Ordinance Code Chapter 1.12, Administrative Fines.

26 • **10.64.020 - Purpose of administrative penalties on public
27 nuisance.**

28 A. **This chapter is adopted to achieve the following goals:**

1 1. To protect the public health, safety and welfare of
2 the communities and citizens in the County of Fresno; and

3 2. To provide a method to penalize responsible parties
4 who fail or refuse to comply with medical marijuana cultivation
5 provisions of the Ordinance Code of Fresno County; and

6 3. To minimize the expense and delay where otherwise
7 the county must pursue responsible parties in the civil or
8 criminal justice system.

9 B. The procedures established in this chapter shall be in
10 addition to criminal, civil or any other legal remedy established
11 by law and available to address violations of the Ordinance Code
12 of Fresno County (hereinafter, code).

13 C. Notwithstanding any other provision of this code,
14 whenever an act, event or condition results in violation of
15 chapter 10.60 of this code, the procedures set out in this chapter
16 may be used to impose a penalty on violators.

17 • 10.64.030 - Definitions.

18 As used in this chapter:

19 A. "Citation" or "administrative citation" means a civil
20 citation issued pursuant to this chapter stating that there has
21 been a violation of one or more provisions of chapter 10.60 of
22 this code and setting the amount of the administrative penalty to
23 be paid by the responsible party.

24 B. "Days" means calendar days.

25 C. "Public official" means the building official, code
26 enforcement officer, **sheriff** or designees, or any other individual
27 or body appointed by the board of supervisors to enforce codes and
28 which is authorized to administer this chapter.

1 D. "Responsible party" means an individual, association,
2 copartnership, political subdivision, government agency,
3 municipality, industry, public or private corporation, firm,
4 organization, partnership, joint venture or any other entity
5 whatsoever whose action or actions caused or contributed to
6 violations of codes specified in this chapter.

7 E. "Year" means three-hundred and sixty-five days.

8 • **10.64.040 - Administrative penalty.**

9 A. **Any responsible party violating any provision of chapter**
10 **10.60 of this code, which is a misdemeanor that is determined to**
11 **be a public nuisance may be issued an administrative citation by a**
12 **public official or the board of supervisors in accordance with**
13 **this chapter. The administrative citation penalty for each and**
14 **every medical marijuana plant cultivated in violation of chapter**
15 **10.60 shall be: (1) One thousand dollars per plant; plus (2) one**
16 **hundred dollars per plant per day the plant remains unabated past**
17 **the abatement deadline set forth in the notice of abatement order.**

18 B. **Each and every day a violation of the provisions of the**
19 **code exists constitutes a separate and distinct offense and shall**
20 **be subject to citation.**

21 C. The public official may issue a citation for a violation
22 not committed in the official's presence, if the official has
23 determined through investigation that the responsible party did
24 commit or is otherwise responsible for the violation.

25 • **10.64.050 - Procedures.**

26 A. **The administrative citation shall be issued on a form**
27 **containing:**
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- 1 **1.** The name and address of the property owner(s), as
- 2 such persons' names appear on the last equalized assessment roll,
- 3 any lessees and responsible parties and the physical address of
- 4 the property or location where the violation exists or occurred;
- 5 **2.** A statement of the acts, events or conditions which
- 6 resulted in a violation of the code, including a reference to the
- 7 appropriate title and chapter and the date of occurrence of the
- 8 violation(s) included within the citation;
- 9 **3.** The amount of the administrative penalty imposed by
- 10 the citation;
- 11 **4.** A statement explaining how, where, to whom, and
- 12 within what number of days the penalty shall be paid;
- 13 **5. The number of days provided to correct the violation**
- 14 **prior to the administrative penalty becoming effective;**
- 15 **6.** Identification of appeal rights, including the time
- 16 within which the administrative citation may be contested and how
- 17 to contest the citation; and
- 18 **7.** The signature of the public official issuing the
- 19 citation along with the date of issuance of the citation.
- 20 **B.** The administrative citation shall be served upon the
- 21 owner of the real property, the lessee and any other responsible
- 22 party. Failure of the public official to serve any party as
- 23 required in this section shall not invalidate any provisions of
- 24 this chapter.
- 25 **C.** Service of an administrative citation may be made upon
- 26 the parties either by personal delivery or by first class mail
- 27 postage prepaid, return receipt requested, and shall be deemed
- 28

1 completed when it is served to the address of record of the
2 responsible party.

3 • **10.64.060 - Appeal of citation.**

4 Any person disputing the issuance of an administrative
5 citation may contest the citation by completing a request for
6 hearing form and returning it to the address stated on the form
7 within fifteen days from the date of issuance of the
8 administrative citation. The time requirement for filing a
9 request for hearing form shall be deemed jurisdictional and may
10 not be waived. If no timely appeal is filed, the administrative
11 citation and fee set forth therein is final.

12 • **10.64.070 - Hearing Before the Board of Supervisors.**

13 A. The Board of Supervisors shall preside at the hearing
14 and hear all facts and testimony presented and deemed appropriate.
15 The hearing shall be set for a date that is not less than ten days
16 from the date of mailing and posting of the notice of hearing.
17 The notice of hearing shall state the date, time and place of the
18 hearing and direct the owners(s), lessees and other responsible
19 parties to appear and show cause why the administrative fine
20 should not be imposed. The notice of the hearing shall be sent by
21 first class mail postage prepaid.

22 B. **The board of supervisors shall only consider evidence**
23 **that is relevant to whether the violation(s) occurred and whether**
24 **the recipient of the administrative citation has caused or**
25 **maintained the violation(s) on the date(s) specified in the**
26 **administrative citation.**

27 C. Any hearing conducted pursuant to this chapter need not
28 be conducted according to technical rules relating to evidence and

1 witnesses. Any relevant evidence shall be admitted if it is the
2 sort of evidence on which responsible persons are accustomed to
3 rely in the conduct of serious affairs, regardless of the
4 existence of any common law or statutory rule which might make
5 improper the admission of the evidence over objection in civil
6 actions. The Board of Supervisors has discretion to exclude
7 evidence if its probative value is substantially outweighed by the
8 probability that its admission will necessitate undue consumption
9 of time. Personal information about any reporting party related
10 to the violation(s) shall not be disclosed.

11 D. The Board of Supervisors may continue the hearing as
12 necessary. **The decision of the board of supervisors shall be**
13 **final upon adoption of an order containing its determination.**
14 Notice of the final decision shall be served by certified or
15 registered mail on the affected persons. The administrative
16 penalty is due and payable immediately upon the Board of
17 Supervisors' decision.

18 E. Pursuant to Code of Civil Procedure § 1085, any person
19 who has been named in an order issued pursuant to this chapter
20 may, following exhaustion of administrative remedies, seek
21 judicial review of the order by filing a petition for writ of
22 mandate within ninety days after the order becomes final and
23 binding pursuant to this chapter. Notwithstanding the provision
24 of Code of Civil Procedure §§ 1094.5 or 1094.6, **any person who**
25 **contests the final administrative order issued under this chapter**
26 **regarding the imposition, enforcement or collection of the**
27 **administrative penalties imposed, may seek judicial review of the**
28 **order by filing an appeal with the Superior Court within twenty**

1 **days after service of the order in accordance with Government Code**
2 **§ 53069.4.** Any other person who has the right to seek judicial
3 review of the order by filing a petition for writ of mandate
4 pursuant to Code of Civil Procedure § 1085 shall do so within one
5 hundred eighty days after the order has become final and binding
6 pursuant to this chapter. The filing of a petition for writ of
7 mandate to review the order shall not stay any action specified in
8 the order.

9 F. The failure of a responsible party to appear at the
10 administrative citation hearing shall be deemed a failure to
11 exhaust administrative remedies.

12 G. Neither imposition nor payment of an administrative
13 penalty shall relieve the responsible party from his/her
14 obligation to correct the violation, nor shall it bar further
15 enforcement action by the public official.

16 **STATUTORY INTERPRETATIONS SUMMARIZED**

17 Government Code section 53069.4 authorizes the County "by
18 ordinance to make any violation of any ordinance enacted by the
19 local agency subject to an administrative fine or penalty." (Gov.
20 Code sec. 53069.4(a)(1) The County's ordinance must provide a
21 reasonable period of time, as specified in the ordinance, for a
22 person responsible for a continuing violation to correct or
23 otherwise remedy the violation prior to the imposition of
24 administrative fines or penalties. (Gov. C. sec. 53069.4 (a)(2))
25 Pursuant to that authority, the County has enacted Chapter 1.13,
26 10.60, 10.62 and 10.64 of the Code. (Code sec. 1.13.010 B,
27 10.64.070 E) When a violation of the marijuana cultivation
28 ordinance is determined to exist on a property, the enforcement

1 officer is authorized to issue the property owner a notice of
2 violation. (Code sec. 10.62.040, cf. 1.13.060A) The notice must
3 state the corrective action required to obtain compliance and
4 demand compliance within a reasonable time, normally 15 calendar
5 days but not to exceed thirty calendar days. (Code sec. 1.13.060
6 A, 10.62.040 C) If the County's enforcement officer, the Fresno
7 County Sheriff or designated deputies, determines that the
8 condition "created an immediate danger to health or safety," the
9 County can order summarily abate the nuisance requiring the
10 property owner to immediately abate the nuisance or order county
11 staff or contractor to abate the condition and charge the cost to
12 the property owner. (Code sec. 10.62.050 B. 4, 10.62.090) If the
13 responsible party fails to timely abate the nuisance, the county
14 can issue an administrative citation and set the amount of the
15 administrative penalty to be paid. (Code sec. 10.64.030 D,
16 10.64.040 cf. 1.13.070) The administrative citation must state
17 "the number of days provided to correct the violation prior to the
18 administrative penalty becoming effective." (Code sec. 10.64.050A
19 5) The property owner has the right to a hearing on the initial
20 abatement order (Code sec. 10.62.060), appeal the administrative
21 citation to the Board of Supervisors (Code sec. 10.64.060) and
22 appeal the final administrative order to the courts (10.64.060 E).

23 ANALYSIS

24 Government Code section 53069.4, subdivision (a)(1) provides,
25 in pertinent part, "The legislative body of a local agency ... may
26 by ordinance make any violation of any ordinance enacted by the
27 local agency subject to an administrative fine or penalty. The
28 local agency shall set forth by ordinance the administrative

1 procedures that shall govern the imposition, enforcement,
2 collection, and administrative review by the local agency of those
3 administrative fines or penalties." Pursuant to this legal
4 authority, the Fresno County Board of Supervisors adopted County
5 of Fresno Ordinance No. 14-001, which, in part, added Chapter
6 10.64 of Title 10. Chapter 10.64 authorizes the imposition of
7 administrative fines or penalties for impermissible cultivation of
8 medical marijuana, i.e., for violations of Chapter 10.60 of Title
9 10. Section 10.60.080(A) specifically states, in relevant part,
10 that: "Any person violating any of the provisions of this Chapter
11 shall be guilty of a misdemeanor and subject to the penalties as
12 set forth in Chapter 1.12, as well as the administrative penalties
13 as set forth in Chapter 10.64." Therefore, in order for the
14 \$99,000 administrative fine or penalty imposed on Appellant to be
15 proper and valid, the administrative fine or penalty must have
16 been imposed pursuant to the procedures as set forth in Fresno
17 County Ordinance Code, Title 10, Chapters 10.60, 10.62 and 10.64.
18 [Hereinafter, all references to the Fresno County Ordinance Code
19 will be to a chapter or a specific section.]

20 Initially, Respondents argue that several portions of the
21 ordinance clearly establish that an administrative penalty can be
22 imposed regardless of when and in what manner the public nuisance
23 is abated. However, none of the portions of the ordinance
24 unequivocally state that the administrative penalty authorized by
25 Chapter 10.64 can be imposed even if the marijuana plants are
26 abated prior to the end of the abatement period. An ordinance
27 doing so would not comply with Government Code section 53069.4.
28 Government Code section 53069.4, subdivision (a)(2) provides, "The

1 **administrative procedures set forth by ordinance adopted by the**
2 **local agency** pursuant to paragraph (1) **shall provide for a**
3 **reasonable period of time, as specified in the ordinance, for a**
4 **person responsible for a continuing violation to correct or**
5 **otherwise remedy the violation prior to the imposition of**
6 **administrative fines or penalties,** when the violation pertains to
7 building, plumbing, electrical, or other similar structural or
8 zoning issues, that do not create an immediate danger to health or
9 safety." Respondents contend that Section 53069.4, subdivision
10 (a)(2) is not applicable to the medical marijuana ordinance
11 because the violation does not pertain to "zoning issues" and
12 because a reasonable time to abate is only required when the
13 violation does not create an "immediate danger to health or
14 safety."

15 In reaching a decision in this case, this Court has attempted
16 to reconcile Government Code section 53069.4 with Chapters 10.60,
17 10.62 and 10.64 so as to harmonize and give effect to each. The
18 alternative may be to strike down parts of the Code, at least as
19 it is applied in this case. As stated by the California Supreme
20 Court, "We have recently emphasized the importance of harmonizing
21 potentially inconsistent statutes. "A court must, where
22 reasonably possible, harmonize statutes, reconcile seeming
23 inconsistencies in them, and construe them to give force and
24 effect to all of their provisions. [Citations.] This rule applies
25 although one of the statutes involved deals generally with a
26 subject and another relates specifically to particular aspects of
27 the subject.' [Citation.] Thus, when two codes are to be
28 construed, they 'must be regarded as blending into each other and

1 forming a single statute.' [Citation.] Accordingly, they 'must
2 be read together and so construed as to give effect, when
3 possible, to all the provisions thereof.' [Citation.]"
4 '[Citation.] Further, ' " '[a]ll presumptions are against a
5 repeal by implication. [Citations.]' [Citation.] Absent an
6 express declaration of legislative intent, we will find an implied
7 repeal 'only when there is no rational basis for harmonizing the
8 two potentially conflicting statutes [citation], and the statutes
9 are "irreconcilable, clearly repugnant, and so inconsistent that
10 the two cannot have concurrent operation." ' " ' " *Pacific*
11 *Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012)
12 55 Cal.4th 783, 805, 149 Cal.Rptr.3d 383, 288 P.3d 717. In accord,
13 see *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 986, 104
14 Cal.Rptr.3d 710, 224 P.3d 41; *Pittsburg Unified School District v.*
15 *S. J. Amoroso Construction Co., Inc.*, 232 Cal. App. 4th 808.

16 This Court finds that a violation of Chapter 10.60 is a
17 "zoning issue" regardless of the fact that no portion of the
18 marijuana cultivation ban is enacted within the Fresno County
19 Zoning Ordinance. Section 10.60.060 states, "**Medical marijuana**
20 **cultivation is prohibited in all zone districts in the county.**"
21 It is clear that the ordinance is regulating the use of land and
22 is, therefore, a zoning ordinance. The fact that Section
23 10.60.070 also makes medical marijuana cultivation a public
24 nuisance that is subject to abatement proceedings does not change
25 the fact that the ban on medical marijuana cultivation is imposed,
26 in part, under the County's land use, or zoning powers. "The
27 purpose of a zoning law is to regulate the use of land." *Morehart*
28 *v. County of Santa Barbara* (1994) 7 Cal.4th 725, 750. See *City of*

1 *Riverside v. Inland Empire Patients Health and Wellness Center,*
2 *Inc.* (2013) 156 Cal.4th 729, 737-738, 740, 742-743, & 762-763.
3 Therefore, any continuing violation of Section 10.60.060 "pertains
4 to ... zoning issues" within the meaning of Government Code section
5 53069.4, subd. (a)(2).) The fact that Chapters 10.60, 10.62
6 and 10.64 are not located within the zoning chapters of the Code is
7 not determinative.

8 The County argues that medical marijuana cultivation is a
9 nuisance *per se* and, thus, is also an "immediate danger to health
10 or safety." The County further argues that as an immediate danger
11 to health or safety, the provisions of Government Code section
12 53069.4 requiring a reasonable time to abate the nuisance prior to
13 the imposition of administrative penalties does not apply. The
14 County concludes that administrative penalties can therefore be
15 imposed without notice and an opportunity to abate the nuisance.
16 This interpretation is inconsistent with the County's own Code.
17 Section 10.62.040 C requires the notice of violation to state a
18 reasonable time to abate the nuisance. Said section provides,
19 **"The notice shall order that the uses or conditions constituting**
20 **the nuisance be abated within a reasonable time as determined by**
21 **the public official, normally being fifteen days** from the date
22 such notice is mailed." Section 10.62.040 E provides, "The
23 notice shall also state that if the work is not completed within
24 the number of days specified on the notice ... the county may abate
25 the nuisance without further notification and the property owner
26 may be responsible for all costs associated with the investigation
27 and abatement of the public nuisance and the additional
28

1 administrative penalty of one hundred dollars per violation per
2 day that said violation continues past the abatement deadline.”

3 The Court’s interpretation of section 53069.4 is that the
4 County must provide a notice of violation and reasonable time to
5 abate the medical marijuana plants prior to the imposition of
6 administrative penalties in this case. This is consistent with
7 the provisions of section 10.62.050 of the County’s Code.
8 Subsection A of said section provides, “the public official, upon
9 making a finding that the cultivation of marijuana creates an
10 immediate and imminent threat or danger to the health, safety or
11 welfare of the occupants or the public, may order a summary
12 abatement of the nuisance.” No such finding is included in the
13 Fifteen Notice to Abate in this case. Nor could such a finding
14 have been made since the plants had been removed prior to the
15 issuance of the Notice. (Stipulated Fact 5) Even if there had
16 been such a finding, the County’s recourse would be to order the
17 property owner to immediately abate the nuisance. (Code sec.
18 10.62.050 B) If the property owner failed to do so, the County
19 could summarily abate the nuisance with county staff or
20 contractors and impose the cost of abatement on the property
21 owner. (Code sec. 10.62.050 B. 4) The Code does not authorize
22 the imposition of administrative penalties without notice or an
23 opportunity to abate the nuisance even if there is a finding of an
24 immediate danger to health or safety.

25 There may be circumstances in a particular case where a
26 specific medical marijuana grow is an immediate danger to health
27 or safety. For example, Subsection F of Section 1 of Ordinance
28 No. 14-001 states that “According to the Fresno County Sheriff,

1 medical marijuana grows have been the subject of armed robberies
2 with shots fired." However, one marijuana plant growing within a
3 fenced back yard in an unpopulated and little traveled area would
4 not create an "immediate danger to health or safety" by itself.
5 If there are specific facts demonstrating an immediate danger to
6 health or safety, then the plants can be summarily abated pursuant
7 to section 10.62.050 with the required factual finding by the
8 public official. The Court finds the County has failed to prove
9 an "immediate and imminent threat or danger to the health, safety
10 or welfare of the occupants or the public" within the meaning of
11 section 10.62.050 A or an "immediate danger to health or safety"
12 within the meaning of Government Code section 53069.4(a)(2) in this
13 case.

14 Since a violation of the medical marijuana cultivation ban
15 "pertains to ... zoning issues" and there are no facts or findings
16 justifying summary abatement, the County was required to provide
17 Thao with a "notice of violation" pursuant to Code section
18 10.62.040 and a reasonable amount of time to abate the nuisance
19 prior to the issuance of an administrative citation and imposition
20 of an administrative penalty. The notice must give notice of the
21 uses or conditions constituting the nuisance to be abated and "a
22 reasonable period of time ... for a person responsible for a
23 continuing violation to correct or otherwise remedy the violation
24 prior to the imposition of administrative fines or penalties."

25 (Gov. Code, § 53069.4, subd. (a)(2), and Code sec. 10.62.040 C.)
26 The County in fact issued a notice of violation complying with
27 Government Code section 53609.4(a)(2) when it issued the Fifteen
28 Day Notice to Abate on March 6, 2014. (See Stipulated Fact 7 and

1 Stipulated Exhibit 2, attached. Note: The Fifteen-Notice to Abate
2 provided as Exhibit 2 purports to be "amended." The original
3 Notice has not been presented to the Court. However, it appears
4 that the only change between the two notices is the date of the
5 hearing before the Board.) In compliance with section 10.62.040
6 C, the Notice states, "**FIFTEEN (15) DAY NOTICE AND ORDER TO ABATE**
7 **AND NOTICE OF HEARING ON A REQUEST FOR A DETERMINATION OF A PUBLIC**
8 **NUSANCE (SIC) AND ABATEMENT ORDER AND PETITION TO IMPOSE**
9 **ADMINISTRATIVE PENALTIES INVOLVING THE CULTIVATION OF MEDICAL**
10 **MARIJUANA ... YOU ARE HEREBY NOTIFIED that you have the choice to**
11 **abate the public nuisance by removal of all plants from the**
12 **property within fifteen (sic) (15) calendar days from the date of**
13 **this notice. Should you fail to abate the nuisance, a hearing**
14 **before the Fresno County Board of Supervisors will be conducted to**
15 **consider imposing administrative penalties and ordering such**
16 **abatement of the public nuisance."** Since Thao had already removed
17 the plants prior to the issuance of the Fifteen-Day Notice to
18 Abate (Stipulated Fact 5) and prior to March 20, 2014, 15 days
19 from the date of the Notice, he was not subject to an
20 administrative penalty by the County's own Notice. (It appears to
21 the Court that the Notice prematurely scheduled a hearing before
22 the Board. According to Code sections 10.64.060 and 10.64.070,
23 the Board hearing is only set after the property owner appeals the
24 imposition of an administrative penalty after service of an
25 administrative citation.)

26 The County's attorney argued at trial that the first page of
27 the Fifteen-Day Notice to Abate was "surplusage" that should be
28 disregarded and that the second page was really an "administrative

1 citation" pursuant to section 10.64.050. This is not supported in
2 the record. The Fifteen Day Notice to Abate specifically refers
3 to the notice of violation and abatement procedures set forth
4 sections 10.62.040 and 10.62.070. In addition, the Board memo,
5 Agenda Item 17, at the hearing on July 15, 2014, characterizes the
6 Notice as a "notice of violation." Page 2 states, in part, "On
7 March 6, 2014, ... Deputy served **notice of violation.**" Finally, the
8 second page of the Notice could not be a valid administrative
9 citation because it did not state the number of days to correct
10 the violation prior the administrative penalty becoming effective.
11 A fair reading of the ordinances to comply with Government Code
12 section 53069.4 requires a notice of violation. If Thao had
13 failed to abate the nuisance within the required time, then an
14 administrative citation could have been issued. However, those
15 aren't the facts in this case.

16 However, even assuming counsel's argument that the Fifteen
17 Day Notice to Abate was an administrative citation, Thao would
18 still be entitled to an opportunity to abate the plants prior to
19 the imposition of administrative penalties. Section
20 10.64.050(A)(5) states, the "**administrative citation shall be**
21 **issued on a form containing,**" among other things, "**[t]he number of**
22 **days provided to correct the violation prior to the administrative**
23 **penalty becoming effective.**" Section 10.64.050(A)(5) establishes
24 that the administrative penalty listed in the administrative
25 citation cannot be validly imposed upon the property owner unless
26 the time period provided to correct the violation lapses and the
27 violation is still present on the property. Consequently, even if
28 the Fifteen-Day Notice to Abate is construed as an "administrative

1 citation," Thao was in compliance with Chapter 10.60 prior to the
2 expiration of the 15-day abatement period. Therefore, an
3 administrative penalty could not go into effect. Even in the
4 first paragraph of the second page of the Notice, the document
5 declares: "Therefore, at this hearing, this Department will be
6 recommending that the Board of Supervisors direct you to abate the
7 nuisances and impose administrative penalties in such an amount as
8 they may determine appropriate for this violation **and the lack of**
9 **action taken to cure that violation.**" (emphasis added) This
10 language makes it clear that administrative penalties could only
11 be assessed if the plants were not removed within the abatement
12 period.

13 **CONCLUSION**

14 Applying these rules to this case, Thao abated the 99
15 marijuana plants even before he was served with the notice of
16 violation by way of the Fifteen-Day Notice to Abate on March 6,
17 2014. Therefore, due to Government Code section 53069.4,
18 subdivision (a) (2) and Section 10.64.050(A) (5), the Court finds
19 that the Fresno County Board of Supervisors had no legal authority
20 to impose an administrative fine or penalty when Thao removed the
21 marijuana plants prior to the expiration of the abatement period.
22 Consequently, this Court finds in favor of Appellant Thao and
23 reverse the imposition of the \$99,000 administrative penalty
24 imposed by the Board of Supervisors. Appellant Thao is awarded
25 his costs of suit.

26
27 **DATED this _____ day of June, 2015.**
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