January 26, 2011 Special Meeting

BENICIA PLANNING COMMISSION

CITY HALL COUNCIL CHAMBERS

SPECIAL MEETING AGENDA

Wednesday, January 26, 2011

7:00 P.M.

I. OPENING OF MEETING

A. Pledge of Allegiance

B. Roll Call of Commissioners

C. Reference to Fundamental Rights of Public - A plaque stating the Fundamental Rights of each member of the public is posted at the entrance to this meeting room per Section 4.04.030 of the City of Benicia's Open Government Ordinance.

II. ADOPTION OF AGENDA

III. OPPORTUNITY FOR PUBLIC COMMENT

This portion of the meeting is reserved for persons wishing to address the Commission on any matter not on the agenda that is within the subject jurisdiction of the Planning Commission. State law prohibits the Commission from responding to or acting upon matters not listed on the agenda.

Each speaker has a maximum of five minutes for public comment. If others have already expressed your position, you may simply indicate that you agree with a previous speaker. If appropriate, a spokesperson may present the views of your entire group. Speakers may not make personal attacks on council members, staff or members of the public, or make comments which are slanderous or which may invade an individual's personal privacy.

A. WRITTEN

B. PUBLIC COMMENT

IV. PRESENTATION

A. NONE

V. CONSENT CALENDAR

Consent Calendar items are considered routine and will be enacted, approved or adopted by one motion unless a request for removal for discussion or explanation is received from the Planning Commission or a member of the public by submitting a speaker slip for that item.

***Any Item identified as a Public Hearing has been placed on the Consent Calendar because it has not generated any public interest or dissent. However, if any member of the public wishes to comment on a Public Hearing item, or would like the item placed on the regular agenda, please notify the**

Community Development Staff either prior to, or at the Planning Commission meeting, prior to the reading of the Consent Calendar.

A. Approval of Minutes of December 9, 2010

V. REGULAR AGENDA ITEMS

A. AMENDMENT OF THE INCLUSIONARY HOUSINGORDINANCE TO CLARIFY DEFINITIONS (NOTE: to view attachments for this item, scroll to the bottom of this page and click on the applicable link)

PROPOSAL:

Staff requests Planning Commission review proposed revisions to the Inclusionary Housing ordinance and adopt a resolution recommending approval by the City Council. The City's Inclusionary Housing ordinance contains definitions, particularly in determining rent for low and very-low income households, that are difficult to understand and interpret. The City Attorney's Office has made recommended changes to the definitions in the Inclusionary Housing Ordinance to remove the redundancies and clarify the figures to be used to determine appropriate rent for low and very-low income inclusionary housing rental units.

Recommendation:

Review proposed revisions to the Inclusionary Housing ordinance and adopt a resolution recommending approval by the City Council.

B. MEDICAL MARIJUANA DISPENSARY BAN (NOTE: to view attachments to this item, scroll to the bottom of this page and click on applicable link)

PROPOSAL:

In 2009, the City Council adopted a moratorium on the establishment of medical marijuana dispensaries and hookah lounges. This was in response to an inquiry regarding opening a medical marijuana dispensary. Like many cities, Benicia has a "permissive" zoning system, under which any use-including medical marijuana dispensaries-that is not expressly enumerated as a permitted use is deemed to be prohibited. Thus, although the Benicia Municipal Code does not specifically regulate such dispensaries, the City's practice has always been to deem dispensaries prohibited. Nevertheless, the City adopted the previous moratorium to make this policy explicit. Since the moratorium is due to expire, permanent rules should be enacted.

Recommendation:

Recommend, by motion, the City Council the adoption of the ordinance to prohibit medical marijuana dispensaries except in limited, specified licensed facilities.

VI. COMMUNICATIONS FROM STAFF

VII. COMMUNICATIONS FROM COMMISSIONERS

VIII. ADJOURNMENT

Public Participation

The Benicia Planning Commission welcomes public participation.

Pursuant to the Brown Act, each public agency must provide the public with an opportunity to speak on any matter within the subject matter jurisdiction of the agency and which is not on the agency's agenda for that meeting. The Planning Commission allows speakers to speak on agendized and non-agendized matters under public comment. Comments are limited to no more than 5 minutes per speaker. By law, no action may be taken on any item raised during the public comment period although informational answers to questions may be given and matters may be referred to staff for placement on a future agenda of the Planning Commission.

Should you have material you wish to enter into the record, please submit it to the Commission Secretary.

Disabled Access

In compliance with the Americans with Disabilities Act (ADA), if you need special assistance to participate in this meeting, please contact Valerie Ruxton, the ADA Coordinator, at (707) 746-4211. Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting.

Meeting Procedures

All items listed on this agenda are for Commission discussion and/or action. In accordance with the Brown Act, each item is listed and includes, where appropriate, further description of the item and/or a recommended action. The posting of a recommended action does not limit, or necessarily indicate, what action the Commission may take.

The Planning Commission may not begin new public hearing items after 11 p.m. Public hearing items, which remain on the agenda, may be continued to the next regular meeting of the Commission, or to a special meeting.

Pursuant to Government Code Section 65009; if you challenge a decision of the Planning Commission in court, you may be limited to raising only those issues you or someone else raised at the Public Hearing described in this notice, or in written correspondence delivered to the Planning Commission at, or prior to, the Public Hearing. You may also be limited by the ninety (90) day statute of limitations in which to file and serve a petition for administrative writ of mandate challenging any final City decisions regarding planning or zoning.

Appeals of Planning Commission decisions that are final actions, not recommendations, are considered by the City Council. Appeals must be filed in the Public Works & Community Development Department in writing, stating the basis of appeal with the appeal fee within 10 business days of the date of action.

Public Records

The agenda packet for this meeting is available at the City Clerk's Office, the Benicia Public Library and the Public Works & Community Development Department during regular working hours. To the extent feasible, the packet is also available on the City's web page at www.ci.benicia.ca.us under the heading

"Agendas and Minutes." Public records related to an open session agenda item that are distributed after the agenda packet is prepared are available before the meeting at the Public Works & Community Development Department's office located at 250 East L Street, Benicia, or at the meeting held in the City Hall Council Chambers. If you wish to submit written information on an agenda item, please submit to Gina Eleccion, Management Analyst, as soon as possible so that it may be distributed to the Planning Commission.

- December 9, 2010 Minutes
- Inclusionary Housing Staff Report
- Inclusionary Housing Ordinance -- Changes Shown **Exhibit A**
- Inclusionary Housing Resolution **Planning Commission**
- Inclusionary Housing Ordinance - Clean Version **Exhibit B**
- Medical Marijuana Staff Report
- Medical Marijuana -- Attachment A **Draft Ordinance**
- Federal Laws and Federal Enforcement **Attachment B**
- Proposition 215 the Compassionate Use Act **Attachment C**
- SB420 the Medical Marijuana Program Act **Attachment D**
- Attorney General Guildelines **Attachment E**
- AB 2650 **Attachment F**
- Frequently Asked Questions (FAQ's) **Attachment G**
- Recent Court Case Review **Attachment H**
- Review of other Cities Approaches **Attachment I**
- Map of Nearby Distribution Facilities **Attachment J**
- Calif Police Chief's Assoc Research **Attachment K**
- Summary of Adverse Secondary Effects **Attachment L**
- Jan 5, 2011 Press Release from Coalition for a Drug Free Calif **Attachment M**
- Excerpt of Dec 16, 2010 Sunnyvale CC Report **Attachment N**
- Potential Regulatory Outline and Options **Attachment O**
- List of Fees from other Cities **Attachment P**

DRAFT

BENICIA PLANNING COMMISSION

CITY HALL COUNCIL CHAMBERS

REGULAR MEETING MINUTES

Thursday, December 9, 2010
7:00 p.m.

I. OPENING OF MEETING

A. Pledge of Allegiance

B. Roll Call of Commissioners

Present: Commissioners Don Dean, Rick Ernst, Rod Sherry, Lee Syracuse, and Chair Dan Healy

Absent: Commissioners Bortolazzo and Brad Thomas

Staff Present: Lisa Porras, Senior Planner
Doug Vu, Associate Planner
Melissa Morton, Land Use and Engineering Manager
Heather McLaughlin, City Attorney
Kathy Trinque, Administrative Secretary

C. Reference to Fundamental Rights of Public - A plaque stating the Fundamental Rights of each member of the public is posted at the entrance to this meeting room per Section 4.04.030 of the City of Benicia's Open Government Ordinance.

II. ADOPTION OF AGENDA

On motion of Commissioner Syracuse, seconded by Commissioner Ernst, the agenda was adopted by the following vote:

Ayes: Commissioners Dean, Ernst, Sherry, Syracuse and Chair Healy
Noes: None
Absent: Commissioners Bortolazzo and Thomas
Abstain: None

III. OPPORTUNITY FOR PUBLIC COMMENT

A. WRITTEN

None.

B. PUBLIC COMMENT

Dana Dean of 835 First Street, congratulated Chair Healy on his election to District Court Judge and thanked him for his years of service and contribution to the community.

Kimball Goodman, resident, congratulated Chair Healy on his new election to District Court Judge and thanked him for his years of service on the Planning Commission.

IV. PRESENTATION

A. PROCLAMATION OF COMMENDATION FOR DAN HEALY

Lisa Porras, Senior Planner, read and presented the proclamation to Chair Dan Healy for his service on the Planning Commission and most recently as Planning Commission Chair.

Chair Healy thanked his former and current Planning Commissioners and staff for their professionalism and hard work and Benicia residents for their involvement in this community.

V. CONSENT CALENDAR

A. Approval of Amended Minutes of September 8, 2010

B. Approval of Minutes of October 14, 2010

On motion of Commissioner Dean, seconded by Commissioner Ernst, the Consent Calendar was adopted by the following vote:

Ayes: Commissioners Dean, Ernst, (on Item V.A.) Sherry, Syracuse and Chair Healy
Noes: None
Absent: Commissioners Bortolazzo and Thomas
Abstain: (on Item V.B. only) Commissioner Sherry

VI. REGULAR AGENDA ITEMS

A. REVIEW OF PROPOSED ZONING TEXT AMENDMENT TO MODIFY REGULATIONS THAT ALLOW LARGE FAMILY DAYCARES IN THE SINGLE FAMILY RESIDENTIAL (RS) ZONING DISTRICT AND REPLACE EXISTING DAY CARE USE CLASSIFICATIONS WITH DEFINITIONS CONSISTENT WITH THE CALIFORNIA HEALTH AND SAFETY CODE

PROPOSAL:

Staff requested that Planning Commission recommend approval of a zoning text amendment to various sections in Title 17 to allow large family day care homes within the Single Family Residential zoning district without a minimum parcel size requirement and replace two existing day care use classifications with three separate use classifications and definitions that are consistent with the California Healthy and Safety Code.

Recommendation:

Adopt a resolution recommending the City Council adopt an ordinance to amend various sections in Title 17 (Zoning Ordinance) to allow large family day care homes within the Single Family Residential zoning district without a minimum parcel size requirement

and replace existing day care use classification with definitions consistent with the California Health and Safety Code, based on the findings set forth in the attached resolution.

Doug Vu, Associate Planner, gave a brief review of his staff report on the proposed ordinance amendment.

Questions from Commissioner Dean included duplicate paragraphs on page 2 of the draft ordinance; whether childcare facilities were allowed in the industrial park and why childcare facilities are allowed in industrial zones and not in commercial. He stated that he would like to see daycare facilities allowed in more areas and asked for consistency with existing State and Health codes.

Questions from Commissioner Ernst included why the State code does not specifically reference lot size requirements for daycare; concern about owners of a smaller residence and smaller lots wanting to provide daycare for a large number of children resulting in noise issues with neighbors.

Commissioner Sherry supports large daycare use in Commercial zones. He asked if the ordinance amendment would change from a use permit process to Community Development Director approval. Mr. Vu responded that within the Commerical zoning districts, the Community Development Department could approve the Use Permit. However, large day cares within the Industrial districts would require a Planning Commission Use Permit.

Chair Healy asked how many requests staff has had for large family daycare use in a single family residential zone.

Mr. Vu responded that we have had several applications and they have been waiting for the ordinance amendment to be approved. Regarding concern expressed about noise and traffic impacts to the neighborhood, the staff level Use Permit process will allow staff discretion to notify and work with affected neighbors.

Commissioner Dean asked if the Zoning Administrator's decisions are appealable. Mr. Vu responded that yes, they are.

Opened for public comment.

Gerry Raycraft with the Children's Network, 2320 Courage Drive, Fairfield, spoke in favor of the ordinance amendment and in support of more inclusive language in the code. He commended staff for their work to bring the City's ordinance into compliance with the State law. He stated that there is a difference between a large family daycare (14 children) and a daycare center.

Public comment closed (no further comments).

Commissioner Dean made a motion to forward the resolution and the ordinance amendments to the City Council for their action. Commissioner Syracuse seconded the motion.

Commission discussed recommending allowing daycare use in Commercial Districts.

Heather McLaughlin, City Attorney, advised the Commission that daycare is already permitted in Commercial Districts with the exception of Commercial General District.

Lisa Porras, Senior Planner, provided examples of Commercial General District as retail shopping centers (Southampton, Solano Square, etc.)

Commission Dean asked about the process to add this use in the 2 other districts.

Mr. Vu stated that staff will do some research on that question and if no discrepancies are found it may be included in the resolution. If not, staff can return to the Planning Commission with a recommendation.

Gerry Raycroft commented that a family day care is not a daycare center. Residential use doesn't usually exist in a Commercial zone, so this should not be an issue.

The Commission continued their discussion of family daycare being allowed in a mixed-use zone.

Commissioner Dean stated that he is keeping his motion as originally stated and asked staff to make sure that family daycare is allowed and that the City Council adopt a ordinance as broadly as possible to maximize daycare facilities in Benicia.

On motion of Commissioner Dean, seconded by Commissioner Ernst, the Planning Commission approved the resolution recommending the City Council to adopt an ordinance to amend various sections in Title 17 (Zoning Ordinance) to allow large family day care homes within the Single Family Residential Zoning District by the following vote:

Ayes:	Commissioners Dean, Ernst, Sherry, Syracuse and Chair Healy
Noes:	None
Absent:	Commissioners Bortolazzo and Thomas
Abstain:	None

VII. COMMUNICATION FROM STAFF

Status Update Regarding 10 Solano Square (Chevron)
Melissa Morton, Land Use and Engineering Manager provided an update to the Planning Commission regarding condition of approval compliance for 10 Solano Square (Chevron). On December 10, 2009 the Commission adopted four (4) conditions of approval regarding landscape and refuse maintenance, monthly inspections, and reporting.

In August, the City received a complaint about the lack of landscaping and refuse maintenance on West 2nd Street. Staff contacted the manager and cleanup of the pine needles littering the sidewalk was completed the same day. The manager was reminded of the conditions of approval and asked that they remain in compliance with these requirements.

Regular inspections have occurred since that time and Chevron has stayed in compliance with their conditions of approval.

Chair Healy asked staff to turn the routine inspections over to code compliance for future enforcement.

VIII. COMMUNICATION FROM COMMISSIONERS

None.

IX. ADJOURNMENT

Meeting was adjourned at 7:45 pm.

AGENDA ITEM
PLANNING COMMISSION SPECIAL MEETING: JANUARY 26, 2011
PUBLIC HEARING

DATE : January 26, 2011

TO : Planning Commission

FROM : : Kat Wellman, Contract Attorney

SUBJECT : **AMENDMENT OF THE INCLUSIONARY HOUSING ORDINANCE TO CLARIFY DEFINITIONS**

RECOMMENDATION:

Review proposed revisions to the Inclusionary Housing Ordinance and adopt a resolution recommending approval by the City Council.

EXECUTIVE SUMMARY:

The City's Inclusionary Housing ordinance contains definitions, particularly in determining rent for low and very-low income households, that are difficult to understand and interpret. The City Attorney's Office has made recommended changes to the definitions in the Inclusionary Housing Ordinance to remove the redundancies and clarify the figures to be used to determine appropriate rent for low and very-low income inclusionary housing rental units.

GENERAL PLAN:

Relevant General Plan Goals and Policies include:

Goal 2: Promote the development of an adequate supply and mix of housing to meet existing and future housing needs.

Policy 2.01: Require affordable housing in residential developments under an "inclusionary" housing program and disperse affordable housing throughout the City to avoid concentration in any one part of the City.

Program 2.01: Continue to implement the City's Inclusionary Housing Ordinance.

STRATEGIC PLAN:

Relevant Strategic Plan Issues and Strategies:

Issue #5: Maintain and Enhance a High Quality of Life

Strategy: Provide support to disadvantaged segments of the community.

Actions: Facilitate construction of affordable housing per updated Housing Element.

BUDGET INFORMATION:

There is no financial impact on the budget.

ENVIRONMENTAL ANALYSIS:

Staff has reviewed the project and determined it is Categorically Exempt under Section 15305 – Minor Alterations in Land Use Limitations of the California Environmental Quality Act (CEQA), which applies to minor alterations in land use limitations in areas with an average slope of less than 20% that do not result in any changes in land use or density. The proposed modifications to Title 17 do not result in changes to land use.

BACKGROUND:

The City's Inclusionary Housing Ordinance contains definitions in the definition section that are redundant and are therefore difficult to understand and interpret. The proposed revisions to the Inclusionary Housing Ordinance are intended to clarify the definitions and provide for uniform application of inclusionary housing rent determinations pursuant to State Law. Affordable rents are determined by using a formula set forth in the ordinance that applies a set percentage to the area median income determinations based on figures produced by the U.S. Department of Housing and Urban Development for Solano County (HUD), which are then adopted by the California Department of Housing and Community Development (HCD). The figures are adjusted by HUD based on family size. The figures that are developed by HUD are used to determine the appropriate rental amounts pursuant to the City's Inclusionary Housing ordinance in Section 17.70.320 E.1. The income of individual rental applicants, determines whether the applicant qualifies to receive affordable housing based on the figures produced by HUD.

The changes to the Inclusionary Housing Ordinance that are proposed are attached as Exhibit A and are red-lined and highlighted within portions of the

Ordinance so that the Commission can understand them in context. Staff recommends that the Planning Commission adopt the attached resolution recommending that the City Council adopt the ordinance which is attached as Exhibit B.

Attachments:

- Exhibit A - Proposed Red-lined changed to the Inclusionary Housing Ordinance
- Resolution recommending City Council Adoption of the Ordinance
- Exhibit B - Inclusionary Housing Amendment Ordinance

EXHIBIT A

17.70.320 Inclusionary housing.

A. Findings. The city finds that Benicia is experiencing a housing shortage for very-low- and low-income households. A goal of the city is to ensure development of an adequate supply and mix of new housing to meet future housing needs. Policies within the current housing element (as amended April 5, 1994) provide incentives to developers producing affordable housing, including: density bonuses, permit processing “fast tracking,” relaxation of minimum lot standards, waiver of covered parking requirements, and modification of development standards.

Very-low- and low-income households that include persons who work and/or live within the city are typically unable to locate housing at prices they can afford and are excluded from living in the city. The city finds that the high cost of newly constructed housing does not provide housing affordable by very-low- and low-income households, and that continued new development which does not include nor contribute toward lower cost housing will serve to further aggravate the current housing problems by reducing the supply of developable land.

It is the city’s preference that developers comply with this section by actually building the affordable dwelling units required for their project. The lack of land available for affordable housing projects and the additional costs associated with development of affordable housing projects by the city or nonprofit developers requires that any in-lieu fee paid be calculated at a rate to provide sufficient funds to actually build affordable housing.

The city further finds that the housing shortage for persons of very low and low incomes is detrimental to the public welfare, and further that it is a public purpose of the city, and public policy of the state of California as mandated by the requirement for a housing element of the city’s general plan, to make available an adequate supply of housing for persons of all economic segments of the community.

B. Purpose. The purpose of this section is to enhance the public welfare and assure that further housing development contributes to the attainment of the housing goals of the city by increasing the production of units available to, and affordable by, households of very low and low income, as herein

defined. In order to ensure that a balance of housing for all economic segments of the community remains available and is increased as far as possible to meet the need documented in the housing element, the city declares that a percentage of inclusionary units shall be developed in every residential development, or land dedicated for residential development, or an in-lieu fee shall be collected, or some combination of the foregoing shall be required, to support the development of lower-income housing.

C. Definitions.

"Accessory unit" shall mean an accessory dwelling unit as defined in BMC 17.70.060.

"Affordable" shall mean that the relevant dwelling units are available on terms such that the housing cost or affordable rent is 30 percent or less of the income ~~of~~ of low or very-low~~- or low~~-income households based on the figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"Affordable rents" means housing that is affordable, based upon monthly rent of 30% or less of the income of ~~, to~~ low or very-low-~~ or low-~~income households based on the figures produced by the U.S. Department of Housing and Urban Development for Solano County.~~ Affordable rental housing payments are up to 30 percent of gross monthly target income less utilities~~. ~~Rents for low-income households shall be set at a level affordable to low-income households at not more than 30 percent of 80 percent of area median income, and to very-low-income households at not more than 30 percent of 50 percent of area median income, adjusted for family size.~~

"Affordable rental restriction agreement" means legal restrictions by which the rents for inclusionary rental units will be controlled to ensure that the rents remain affordable to very-low- or low-income households for a period of not less than 30 years.

"Area median income" means the most recent area median income adjusted by household size ~~as determined by HCD~~ based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"At one location" means all adjacent land owned or controlled by the developer, the property lines of which are contiguous at any point, or the property lines of which are separated only by a public or private street, road or other public or private right-of-way, or separated only by other land of the developer.

“Capital improvements” means the fair market value of any improvement, appliance, fixture, or equipment when considered as an addition or fixture to the property (i.e., the amount by which said improvement, appliance, fixture, or equipment enhances the market value of the property) at the time of sale, minus the value of any improvement, appliance, fixture or equipment which the city determines resulted from deferred maintenance costs or building code violations.

“City” means the city of Benicia.

“CPI” or “Consumer Price Index” means the U.S. Bureau of Labor Statistics annual average CPI-U (Consumer Price Index for all Urban Consumers) for the San Francisco-Oakland-San Jose Area, for the Housing Series, Home Owners Cost Component.

“Density bonus” means an increase in the number of units per acre otherwise allowed for any particular parcel.

“Developer” means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities which seeks city permits and approvals. “Developer” also includes developers’ successors in interest to the real property.

“Discretionary permit” means any permit or license issued by the city of Benicia after the effective date of the ordinance codified in this section for a project which requires the exercise of judgment or deliberation wherein the city decides to either approve or disapprove a particular activity in accordance with applicable laws including but not limited to a development agreement, amended development agreement, tentative map, use permit, or design review, and excluding minor changes to previously granted approvals.

“Dwelling unit” means a structure or portion of a structure designed for occupancy by one household.

“HCD” means the California Department of Housing and Community Development.

“Housing authority” means the housing authority of the city of Benicia.

“Housing cost” means the monthly mortgage principal and interest, property taxes and assessments, fire and casualty insurance covering replacement value of property improvements, property maintenance and repairs, a

reasonable allowance for utilities, owner association fees, and space rent if the dwelling is situated on rented land.

“HUD” means the U.S. Department of Housing and Urban Development.

“Inclusionary unit” means an ownership or rental dwelling unit as required by this section, which is affordable to very-low- or low-income households.

“Income eligibility” shall mean the countable annual household income and resources of very-low- and low-income households, as defined by HCD at C.C.R. Sections 6914 and 6916, or such other eligibility factors as may be imposed by a state or federal funding source applicable to the dwelling unit.

“In-lieu housing fee” means a fee paid to the city’s affordable housing trust fund to provide affordable housing opportunities to very-low- and low-income households.

“Low-income households,” for the purposes of this section, are defined as those households earning up to 80 percent of the most recent area median income adjusted by household size ~~as determined by HCD~~ based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

“Market rate unit” means an ownership or rental dwelling unit which is not restricted to those prices or rents affordable to very-low- or low-income households.

“Percent” or “Percentages.” In applying percent or percentages referred to in this section, any decimal fraction less than 0.50 may be disregarded and any decimal fraction greater than or equal to 0.50 shall be rounded up to the next whole number.

“Resale control agreement” means legal restrictions by which the inclusionary units will be controlled to ensure that the unit remains affordable to very-low- or low-income households for a period of not less than 30 years.

“Residential development” means any development with dwelling units or lots at one location intended and designed for permanent occupancy including, but not limited to, single-family dwellings, apartments, multiple dwelling units, group of dwellings, condominium developments, townhouse developments, cooperatives, or land subdivisions; conversions from nonresidential use to residential use; or conversions from rental units to ownership units. “Residential development” includes any development with

dwelling units or lots for which discretionary approvals or building permits have been applied for or granted within any 12-month period that begins after the effective date of the ordinance codified in this section, which development shall be considered to be a single project for CEQA purposes. "Residential development" does not include remodeling, rehabilitation or maintenance.

"Section 8" means the U.S. Department of Housing and Urban Development's Section 8 voucher or home ownership programs pursuant to 42 U.S.C. 1437f, as they may be amended, or any successor program.

"Very-low-income households," for the purposes of this section, are defined as those households earning up to 50 percent of the most recent area median income adjusted by household size ~~as determined by HCD~~ based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

E. Inclusionary Unit Requirements for Rental Developments.

1. The inclusionary rental units shall only be offered to and occupied by very-low- and low-income households. Rent for the low-income units shall be determined as follows: The average of the rent of all low-income units in the residential development shall be the price affordable to households with an income of not more than 75 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In order to achieve this average, no unit may be rented at or above a price affordable to a household with an income at 80 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In addition, if multiple units affordable to low-income households are required to be produced, at least one unit shall be rented at a price affordable to households with an income of not more than 70 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

Rent for the very-low-income units shall be determined as follows: The average of the rent of all very-low-income units in the residential development shall be the rent affordable to households with an income no more than 45 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In order to achieve this average, no unit may be

rented at or above a price affordable to a household with an income at 50 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In addition, if multiple units affordable to very-low-income households are required to be produced, at least one unit shall be rented at a price affordable to households with an income of not more than 40 percent of the most recent area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

For residential developments where only one inclusionary unit is required to be built, the unit shall be rented at a price affordable to households with an income of not more than 60 percent of the area median income. For residential developments where two inclusionary units are required to be built, one unit shall be rented at a price affordable to households with an income of not more than 75 percent of the area median income and the other shall be rented at a price affordable to households with an income of not more than 45 percent of the area median income. For residential developments where an odd number of inclusionary units are required to be built, the odd unit shall be rented at a price affordable to households with an income of not more than 60 percent of area median income.

To increase the pool of eligible households, a developer may rent the affordable dwelling units (a) to households who have incomes below the specified percentage of area median income and/or (b) at rents below that required by this subsection.

RESOLUTION NO. 11-__ (PC)

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF BENICIA RECOMMENDING CITY COUNCIL APPROVAL OF AN AMENDMENT TO CLARIFY DEFINITIONS IN THE INCLUSIONARY HOUSING ORDINANCE IN SECTION 17.17.70.320 PERTAINING TO AFFORDABLE RENT DETERMINATIONS

WHEREAS, the City's existing Inclusionary Housing Ordinance contains definitions that are redundant and not easily understood and staff has requested that the City Attorney review and clarify both the applicable definitions and the formula used to determine affordable rent so that it can be applied uniformly to inclusionary housing rental units in compliance with State law; and

WHEREAS, the Planning Commission at a special meeting on January 26, 2011, conducted a public hearing, considered all testimony and documents and reviewed the proposed text amendment.

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission of the City of Benicia hereby recommends the City Council approve a zoning text amendment to clarify specific definitions and determinations regarding affordable rent for Inclusionary Housing rental units as set forth in the attached Exhibit A; and

BE IT FURTHER RESOLVED THAT the Planning Commission of the City of Benicia finds that:

a) The proposed project is exempt from California Environmental Quality Act review under Section 15305 – Minor Alterations to Land Use Limitations because the proposed changes do not result in changes in land use.

b) The proposed amendment is consistent with the objectives and other provisions of Title 17 of the Benicia Municipal Code and in compliance with State law.

c) The proposed zoning text amendment is consistent with the goals, policies, programs, and maps of the General Plan.

* * * * *

On a motion of Commissioner _____, seconded by Commissioner _____, the above Resolution was adopted by the Planning Commission of the City of Benicia at the regular meeting of said Commission held on the 26th day of January, 2011, and adopted by the following vote:

Ayes
Noes:

CITY OF BENICIA

ORDINANCE NO. 11-__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BENICIA AMENDING SECTION 17.70.320 (INCLUSIONARY HOUSING) OF CHAPTER 17.70 (SITE REGULATIONS) OF TITLE 17 (ZONING) TO CLARIFY DEFINITIONS AND DETERMINATION OF AFFORDABLE RENTS

WHEREAS, the City Council desires to clarify specific sections of the definitions of "affordable rent" to ensure uniform application of application of State Law standards with respect to Inclusionary Housing.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BENICIA DOES ORDAIN as follows:

Section 1. The following "Definitions" in Section 17.70.320 C. entitled "Definitions" are amended to read as follows:

"Affordable" shall mean that the relevant dwelling units are available on terms such that the housing cost or affordable rent is 30 percent or less of the income of low or very-low-income households based on the figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"Affordable rents" means housing that is affordable, based upon monthly rent of 30% or less of the income of low or very-low-income households based on the figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"Area median income" means the most recent area median income adjusted by household size based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"Low-income households," for the purposes of this section, are defined as those households earning up to 80 percent of the most recent area median income adjusted by household size based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

"Very-low-income households," for the purposes of this section, are defined as those households earning up to 50 percent of the most recent area median income adjusted by household size based on figures produced by the U.S. Department of Housing and urban Development for Solano County.

Section 2. Section 17.70.320 E.1., entitled Inclusionary Unit Requirements for Rental Developments, is amended to read as follows:

1. The inclusionary rental units shall only be offered to and occupied by low and very-low-income households. Rent for the low-income units shall be determined as follows: The average of the rent of all low-income units in the residential development shall be the price affordable to households with an income of not more than 75 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In order to achieve this average, no unit may be rented at or above a price affordable to a household with an income at 80 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In addition, if multiple units affordable to low-income households are required to be produced, at least one unit shall be rented at a price affordable to households with an income of not more than 70 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

Rent for the very-low-income units shall be determined as follows: The average of the rent of all very-low-income units in the residential development shall be the rent affordable to households with an income no more than 45 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In order to achieve this average, no unit may be rented at or above a price affordable to a household with an income at 50 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. In addition, if multiple units affordable to very-low-income households are required to be produced, at least one unit shall be rented at a price affordable to households with an income of not more than 40 percent of the most recent area median based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

For residential developments where only one inclusionary unit is required to be built, the unit shall be rented at a price affordable to households with an income of not more than 60 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. For residential developments where two inclusionary units are required to be built, one unit shall be rented at a price affordable to households with an income of not more than 75 percent of the area median income and the other shall be rented at a

price affordable to households with an income of not more than 45 percent of the area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County. For residential developments where an odd number of inclusionary units are required to be built, the odd unit shall be rented at a price affordable to households with an income of not more than 60 percent of area median income based on figures produced by the U.S. Department of Housing and Urban Development for Solano County.

Section 3. Severability. If any section, subsection, phrase or clause of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance.

The City Council hereby declares that it would have passed this and each section, subsection, phrase or clause thereof irrespective of the fact that any one or more sections, subsections, phrase or clauses be declared unconstitutional on their face or as applied.

*****

On the motion of Council Member , seconded by Council Member , the foregoing ordinance was
introduced at a regular meeting of the City Council on the day of,
and adopted at a regular meeting of the Council held on the day of , 2011,
by the following vote:

Ayes:

Noes:

Absent:

_____
Elizabeth Patterson, Mayor

Attest:

_____
Lisa Wolfe, City Clerk

AGENDA ITEM
PLANNING COMMISSION SPECIAL MEETING: JANUARY 26, 2011
ACTION ITEM

DATE : January 20, 2011

TO : Planning Commission

FROM : City Attorney

SUBJECT : **MEDICAL MARIJUANA DISPENSARY BAN**

RECOMMENDATION:
Recommend, by motion, the City Council the adoption of the ordinance to prohibit medical marijuana dispensaries except in limited, specified licensed facilities.

EXECUTIVE SUMMARY:
In 2009, the City Council adopted a moratorium on the establishment of medical marijuana dispensaries and hookah lounges. This was in response to an inquiry regarding opening a medical marijuana dispensary. Like many cities, Benicia has a "permissive" zoning system, under which any use—including medical marijuana dispensaries—that is not expressly enumerated as a permitted use is deemed to be prohibited. Thus, although the Benicia Municipal Code does not specifically regulate such dispensaries, the City's practice has always been to deem dispensaries prohibited. Nevertheless, the City adopted the previous moratorium to make this policy explicit. Since the moratorium is due to expire, permanent rules should be enacted.

ENVIRONMENTAL REVIEW:
Pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3) this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

GENERAL PLAN:
Relevant General Plan Goals and Policies include:

- Goal 2.1: Preserve Benicia as a small-sized city
  - POLICY 2.1.1: Ensure that new development is compatible with adjacent existing development and does not detract from Benicia's small town qualities and historic heritage, (and to the extent possible, contributes to the applicable quality of life factors noted above.)

    - POLICY 2.1.2: Make efficient use of land in new development areas consistent with the surrounding neighborhood.
- Goal 2.3: Ensure orderly and sensitive site planning and design for large undeveloped areas of the City, consistent with the land use designations and other policies in this General Plan
- Goal 2.5: Facilitate and encourage new uses and development which provides substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life.

STRATEGIC PLAN:
Relevant Strategic Plan Goals and Strategies:

None.

BUDGET INFORMATION:
If Council introduces the ordinance to prohibit most medical marijuana dispensaries "MMD'" in the City, the costs to the City to implement this would be minimal.

If Council were to direct staff to introduce an ordinance to permit MMDs in the City, it is estimated that staff time for the audits and inspections could cost up to $60,000 annually (this estimate is based on a fee study used by the City of Oakland to implement charges for auditing and inspecting operating MMDs). Some cities require significant fees paid by MMD operators for the review of plans and operations, as well as to enforce specific regulations.

In either case, of course, the ordinance may be challenged by people acting contrary to the ordinance or in court. The City would then incur code enforcement and court costs.

BACKGROUND:
The City enacted a moratorium on medical marijuana facilities in 2009 in order to allow the City more time to study the issue. The moratorium prohibited all medical marijuana facilities except in specific limited circumstances. Specifically, the City was waiting for court decisions such as *Qualified Patients Assoc. v. City of Anaheim* to address whether, as asserted by some marijuana advocacy groups, local ordinances regulating or prohibiting marijuana dispensaries were preempted by the State's laws on medical marijuana, namely the Compassionate Use Act ("CUA") and the Medical Marijuana Program Act ("MMPA"). Unfortunately, the Court in that case did not answer that question.

As noted above, while medical marijuana dispensaries are not uses defined in the Benicia Municipal Code. The passage of Proposition 215 ("The

Compassionate Use Act of 1996" or "CUA") and the adoption of SB 420 ("the Medical marijuana Program Act" or "MMPA") in 2003 has increased the interest in opening medical marijuana dispensaries. The CUA allows a person to use marijuana for medicinal purposes without criminal liability as long as a doctor so recommends. The MMPA established regulations related to medical marijuana. The regulations include a voluntary program for identification cards for qualified patients and primary care givers, limits on the amount of marijuana per qualified patient, and confidentiality and privacy restrictions. Neither the CUA nor the MMPA, however, addresses the issue of whether cities may use their zoning/land use authority to prohibit or regulate dispensaries. The only Court that has been presented the question, *City of Claremont v. Kruse*, has held that neither the CUA nor the MMPA preempts cities from doing so. Again, the Court in the Anaheim case expressly declined to rule on that issue.

Under federal law (the Controlled Substances Act ("CSA")), the cultivation, possession and/or use of marijuana is illegal. It is still unlawful to possess, transfer, or use marijuana under California law, unless one can prove that he or she is a qualified patient or caregiver, under the CUA. Although the CUA appears to conflict with Federal law which clearly states that possession, use and sale of marijuana is illegal, California courts such as the Court in the Anaheim case, have ruled that the federal CSA does not preempt either the CUA or the MMPA.

Medical marijuana dispensaries ("MMDs") are not specifically defined under the Municipal Code. In the zoning ordinance, Section 17.16.010 allows the Community Development Director to determine how an undefined use is classified.[1] Again, under the City's "permissive" zoning system, uses that are not expressly enumerated as permitted are deemed to be prohibited. Two appellate cases have upheld cities' right to prohibit medical marijuana dispensaries on this basis. (*City of Corona v. Naulls; City of Claremont v. Kruse*.) Nevertheless, since a medical marijuana dispensary is not specifically defined in the zoning provisions of the Benicia Municipal Code, potential applicants for a MMD may wish to claim the use is similar to a pharmacy, medical office, or miscellaneous retail use and might assert that operation of a medical marijuana dispensary should be allowed in a variety of zoning locations including near schools or day care facilities. This is clearly not the law. However, to prevent disputes about whether a medical marijuana facility is an allowed use, it is

[1] 17.16.010 Purpose and applicability.
Use classifications describe one or more uses having similar characteristics, but do not list every use or activity that may appropriately be within the classification. The community development director shall determine whether a specific use shall be deemed to be within one or more use classifications or not within any classification in this title. The community development director may determine that a specific use shall not be deemed to be within a classification, whether or not named within the classification, if its characteristics are substantially incompatible with those typical of uses named within the classification.

recommended that the zoning ordinance be amended to prohibit specifically the establishment of medical marijuana facilities in all zoning of the City.

In addition to amending the zoning ordinance, it is recommended that Title 9 of the Benicia Municipal Code (Public Peace, Morals and Welfare) be amended to prohibit medical marijuana establishments. Medical marijuana advocates have argued that the MMPA and CUA implicitly prohibit cities from imposing any criminal penalty (even an infraction is deemed to be quasi-criminal) for violating the medical marijuana provisions. While no appellate court has accepted that argument, Staff recommends, out of an abundance of caution, the ordinance should specifically provide that violations of the ordinance are not crimes. Enforcement of the ordinance will be done via nuisance action or other methods. The proposed ordinance is included as Attachment A.

Medical marijuana dispensaries include cooperatives, collectives and dispensaries. They are not regulated by state or federal agencies. Currently in Solano County, Fairfield bans medical marijuana facilities. Dixon, Rio Vista and Vacaville currently have moratoria on medical marijuana facilities. According to an internet search, medical marijuana is available at two facilities in Vallejo and one facility in Martinez. There are also facilities in Berkeley, Oakland and Richmond. (Richmond does not have any legal dispensaries; they are in the process of accepting applications.) Albany also has an ordinance that will likely allow a dispensary soon. An El Cerrito location offers delivery. Thus there appears to be sufficient ways for Benicians qualifying under the Compassionate Use Act to obtain medical marijuana.

A ban (with limited exceptions for specified State-licensed facilities) would allow the City to avoid some of the problems that have been associated with medical marijuana dispensaries. Other bay area cities that have medical marijuana dispensaries have reported increases in illegal drug activity and sales, robberies of patrons of the dispensaries, loitering, and other criminal activity. Because of these problems, it is expected that a medical marijuana dispensary will increase the calls for police services as well as public works services for clean up of the streets and sidewalks. In addition, land use issues such as traffic, odors and neighborhood compatibility could arise if medical marijuana dispensaries are allowed. Any regulations to allow this use would require significant staff time and costs to enforce. The oversight of medical marijuana dispensaries should include the following at a minimum:

- Ensuring the collectives/cooperatives are non-profit organizations;
- Tracking the marijuana to make sure it is supplied only from members of the collective/cooperative;
- Ensuring the product is laboratory-tested to ensure it is free from molds, pesticides, or harmful additives; and
- Assuring the marijuana is dispensed legally.

A permit fee could cover some of the costs but it is unlikely it would cover all of the planning, police and city attorney time required. Given the City's reduced staffing, this work does not seem essential since there are other ways, as noted above, for Compassionate Use users to obtain the marijuana. Finally, the state of the law on medical marijuana is in doubt.

The issue of medical marijuana facilities is complex and not without controversy. Questions on both sides of the issue include:

- Do current laws allow the use and how are the laws enforced?
- What was the intent of the State Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA)?
- What is the role of the City in implementing the CUA and MMPA?
- What are the impact of marijuana on the community, and the possible increase of those impacts if MMDs are allowed to locate in the City?
- What is the impact on public safety, including a possible increase in violent crime?
- What are the land use compatibility concerns regarding MMDs in the city?
- How should the concerns that easier access to marijuana could increase usage in undesirable ways versus the desire to provide this compassionate care alternative to Benicia residents be balanced?
- What sort of regulations and procedures should be considered, should the decision be made to allow MMDs in the City?

Of course, the advantage of allowing MMDs in Benicia is that patients could more easily obtain marijuana in legally-operating facilities in the city. Disadvantages include the problems with regulating them. In addition to regulation issues related to land use (appropriate zones, traffic, and noise), it appears the profit or non-profit status of the facility is hard to enforce and the criminal element is hard to avoid. There is a widespread perception that MMDs sell to recreational users.

Factors to Consider

The City of Sunnyvale recently adopted a medical marijuana ban. The following factors are taken substantially from the staff report for the Sunnyvale City Council meeting on December 16, 2010.

Federal Laws and Enforcement

In general, the Federal Drug Enforcement Agency sets the guidelines and standards for drug policy in the country and the U.S. Attorney General decides what laws to enforce. The following is a brief description of those federal parameters (more detail is shown in Attachment B):

- The Federal Controlled Substance Act (CSA) was adopted in 1970. It states that it is unlawful to manufacture, distribute, dispense, or possess any controlled

substance. The Federal Government's view is that marijuana is a Schedule I substance, which is classified as having a high potential for abuse. Further, the federal view is that use of marijuana for medicinal purposes is not an accepted treatment method in the United States, and it has not been accepted that marijuana is safe to prescribe as a drug or other substance under medical supervision. Because of this position, marijuana cannot be prescribed or dispensed in the same way as legal drugs, which is why marijuana is not available from doctors or pharmacies.

• In March 2009, U.S. Attorney General Eric Holder Jr. announced it would no longer enforce the federal laws prohibiting distribution or possession of marijuana for medicinal purposes, allowing states to have the final say in the matter. It was also stated that dispensaries that use medical marijuana as a storefront for dealers of illegal drugs would be prosecuted. In a more recent announcement, Attorney General Holder's office stated they will prosecute people for growing, selling, and possessing marijuana in California if they are not in compliance with State law.

State Laws

California has passed laws and general regulations allowing the cultivation, distribution, possession, and use of marijuana for specific medical purposes, as detailed below:

• In 1996, the voters of California passed Proposition 215, known as the Compassionate Use Act (CUA). The purpose of the CUA was to give individuals the right to obtain and use medical marijuana as deemed appropriate and as recommended by a physician (Attachment C).

• The CUA ensures patients and primary caregivers will not be subject to state or local criminal prosecution for the possession or cultivation of marijuana for medical purposes.

• In 2003, the State Senate passed and the Governor signed into law SB 420, the Medical Marijuana Program Act (MMPA), which codified the regulations for the possession, distribution, and use of marijuana for medical purposes, as described in the CUA (Attachment D).

• In 2008, the California Attorney General published guidelines for the security and non-diversion of marijuana grown for medical use. These guidelines are a helpful tool for law enforcement to perform duties effectively and in accordance with California law. It assists patients and caregivers on how they may cultivate, transport, possess, and use medical marijuana under California law. In addition, it provides the framework for "collective/cooperatives" and provides greater direction to ensure marijuana used for medical purposes is secure and does not find its way to non-patients or illicit markets. (Attachment E).

AB 2650 was signed into law in September of 2010. This law amends the California Health and Safety Code to provide that no medical marijuana

dispensary authorized by law to possess, cultivate, or distribute medical cannabis that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. (Attachment F).

Frequently Asked Questions Relating to the MMPA and AG Guidelines
Attachment G lists several frequently asked questions (FAQ's) to address this issue, including:
• What medical conditions can marijuana relieve?
• How much marijuana can an individual have?
• How does a patient get a recommendation from a doctor?
• Who is a primary caregiver?
• What is a medical marijuana ID card and how are they issued?
• Can the sale of medical marijuana be taxed?
• How can medical marijuana be distributed?
• What is a cooperative, collective or dispensary?
• Who can cultivate marijuana for medical purposes?

Effect of Recent Court Cases on City Consideration
There have been several important court cases regarding medical marijuana that have bearing for the City. A recent court case, *Qualified Patients Ass'n. v. City of Anaheim*, was closely watched by Benicia and other cities and proponents: it is summarized in Attachment H. Unfortunately, the clear answer cities hoped for on the issue of whether the CUA and the MMPA preempted local ordinances was not provided. Accordingly, the state of the law is that provided by the Court in *City of Claremont v. Kruse*, which held that the CUA and the MMPA do not preempt cities from enforcing their land use controls to prohibit medical marijuana dispensaries.

In general, the *Anaheim* case involved a legal challenge to the City of Anaheim's ordinance banning MMDs. The plaintiffs, Qualified Patients Association, sought to overturn the ordinance on the ground that it was preempted by the CUA and MMPA. The City of Anaheim filed a motion to dismiss the complaint arguing, among other things, that the plaintiffs had no standing to bring a suit to overturn the ordinance because their planned activities would be illegal under federal law.

With regard to the first question, the court ruled that the CUA and MMPA are not preempted by federal law. In the matter of interest to cities hoping to know the state of the law on MMDs, the court concluded that it was too early in the litigation to decide on the plaintiff's challenge whether state law precludes cities from banning MMDs. It is important to emphasize that the court did not

decide this issue, and that question will probably not be finally resolved by the courts for at least another 2 to 3 years, if not longer. Again, however, the state of the law is that provided by the Court in *City of Claremont v. Kruse*, which held that the CUA and MMPA do not preempt cities from enforcing their land use controls to prohibit medical marijuana dispensaries.

Other Cities

Medical Marijuana cooperatives, collectives and dispensaries have recently been a hot topic for California cities. For years after Proposition 215 was passed, only a few cities in the state allowed these facilities, while others followed the federal rules that made cultivation, possession and distribution illegal. This changed in the past couple years, most likely in response to the current Presidential administration's decision regarding enforcement of marijuana offenses. As a result, most cities in the state have taken specific action to either prohibit the distribution facilities, adopt moratoriums to allow time to study the issue; or pass ordinances that allow them under specific conditions.

Attachment I also lists other cities throughout the state that have passed ordinances regulating MMDs. In reviewing all the cities listed, some cities have reversed their policies from allowing MMDs to either banning them, or to place a moratorium while they restudy the issue. In December 2010, a number of Southern California counties proposed bans on MMDs including Riverside, Orange and Los Angeles counties.

Medical Marijuana Availability

Making medical marijuana easier to obtain by city residents with serious medical conditions is a goal for some medical marijuana activists. As noted above, there are several options near Benicia for medical marijuana. It should also be noted that residents currently have to travel outside of the City for traditional hospitals and more extensive medical care. Attachment J is a map that shows locations for several MMDs near by. At least one MMD, in El Cerrito, is reported to provide delivery service.

Cultivation

While nothing in State law addresses whether there is a right to cultivate or distribute marijuana in violation of local zoning/land use controls, State law allows individuals with a physician's recommendation to cultivate marijuana for their personal use without criminal liability. The law allows each person with a doctor's recommendation to maintain no more than six mature or 12 immature plants. A person cannot sell the marijuana they grow, but can provide it to their cooperative or collective. Currently, although the zoning ordinance is deemed to prohibit cultivation and distribution alike, no permit is expressly required for medical marijuana cultivation in Benicia.

Cultivation is a greater concern when marijuana is grown in large quantities in residential homes in what are known as "grow houses." There are many safety issues associated with grow houses. These include: dangerous electrical wiring, unsafe changes to the structure, and the possible safety concerns on the surrounding residents from having a large amount of an illegal substance grown in residential locations.

MMDs are required by State law to obtain their marijuana from their members, which could mean allowing homeowners to cultivate the plant. Cultivation is also possible in larger commercial operations, such as those recently allowed in Oakland. If the City Council desires to allow MMD's, staff would suggest that cultivation requirements and restrictions be included in an ordinance. At this point, however, State law minimums allowed for plant cultivation would be the standard.

Legal Alternatives to Marijuana

The ingredient in marijuana that provides relief for those with serious medical conditions is tetrahydrocannabinol (THC). According to the U.S. Drug Enforcement Administration, a pharmaceutically-available, FDA approved product called "Marinol" is available, which contains synthetic THC as the active ingredient. Marinol comes in the form of a pill, and is available at pharmacies.

Although proponents of medical marijuana claim that Marinol does not help all medical conditions, and may not be as effective as marijuana, it does have value in that it can be distributed through existing, legally operating pharmacies, meaning separate MMDs would not be necessary for its distribution. This is important because pharmacies are located throughout the city and are required to store, distribute and track what is dispensed.

Criminal Activity Concerns

The secondary effects and adverse impacts related to medical marijuana have been well documented. These impacts have been documented in a report written by the California Police Chiefs Association, White Paper (Attachment K). The Benicia Police Department took enforcement action on 67 separate marijuana investigations in 2010. These actions included arrests, citations or requested warrants on 67 separate individuals for possessing, selling, transporting, furnishing and cultivating marijuana. Although Benicia has not seen the explosion of indoor marijuana grows like many other communities have, these statistics clearly show that marijuana is readily available in our community. The statistics are broken down further as follows:

- Fifty-four (54) individuals were issued citations for possessing marijuana
- Nine (9) individuals were arrested for selling marijuana
- Two (2) individuals were arrested for cultivating marijuana

- Two (2) individuals were arrested for furnishing marijuana.

The Benicia Police Department participates in a Solano County narcotics taskforce. In 2010 they investigated a marijuana dispensary in the unincorporated area of Fairfield. This case is currently being litigated, but three arrests were made for a variety of criminal offenses, including violating tax laws, and illegally selling marijuana. Prior to investigating the dispensary the Solano County Sheriff's Office responded to several disturbances at the dispensary and reported an increase in crime in the area during the time the dispensary was being operated. In addition, Solano County has seen other violent crime associated with the marijuana industry. The crimes include home invasion robberies, assaults, murders and burglaries.

The Benicia statistics are not yet of the magnitude of those reported in the Sunnyvale Council report. They reported:

> "Recent negative impacts in Santa Clara County have been directly linked to marijuana dispensaries and marijuana growers. There have been three armed takeover style robberies at San Jose marijuana dispensaries this year. These violent crimes are similarly patterned after the robberies Southern California marijuana dispensaries have experienced over the past few years; several robberies resulted in the homicide of dispensary employees.
>
> Recently in Santa Clara County, Superior Court Judges issued warrants established by probable cause based upon illegal sales and distribution of marijuana for profit. These warrants were served by officers from the Santa Clara County Special Enforcement Team (SCCSET), the Attorney General's Bureau of Narcotic Enforcement (BNE), along with several other law enforcement agencies. These warrants were served and resulted in numerous arrests, seizures of marijuana (possession and cultivation), weapons, and money."

The U.S. Drug Enforcement Agency and other federal, state, and local law enforcement agencies enforcement efforts have shown medical marijuana dispensaries routinely underreport revenues, resulting in the need to aggressively regulate their businesses. It is anticipated that public safety will be asked to provide assistance to regulatory agencies to investigate marijuana dispensaries. In order to provide minimum regulation, it will be necessary to make regular unscheduled inspections of its facilities to ensure compliance with the city's municipal code, the state's Penal Code, fire code, and the health and safety code. Regulation should include random audits to ensure accurate record keeping and compliance.

Adverse Secondary Effects
Several secondary effects are associated with the distribution and use of marijuana. These include criminal acts, driving under the influence, white collar crimes, and negative impacts on our youth. This issue is discussed in greater detail in Attachment L and Attachment M.

Public Health
All medicines distributed by pharmacies are regulated by the United States Food and Drug Administration (FDA). FDA approval is required in order for a specific, finished medication to be marketed and distributed to patients. Scientific testing of marijuana for medical use is not performed at professionally recognized and regulated laboratories. The FDA is responsible for protecting and promoting public health. They have a safety protocol in place to alert and protect consumers of possible product contamination. This program results in the ability to recall products should they present health or safety concerns for the consumer. Marijuana growers and dispensary operators have no oversight and cannot validate the safety of their product.

Land Use Concerns
Land use comparisons for MMDs range from a facility similar to a retail outlet with frequent customer turnaround, to facilities similar to a place of assembly where people go to socialize, take classes, etc. The land use considerations vary depending on the characteristics of the use. Benicia has no experience with MMDs, but the December 16, 2010 Sunnyvale staff report recently reported their staff visited 15 MMD locations and was given a tour of a large MMD in order to understand how they fit into an area, and to better understand their operations. An excerpt of their report is included as Attachment N.

APPROACHES
There are two broad options that can be chosen with this issue: either prohibit MMDs in the city (with limited exceptions for specified State-licensed facilities) or allow them with clear criteria, regulations and conditions.

Option A: Prohibit MMDs in Benicia
This option would require the Council to introduce and adopt an ordinance that specifically prohibits MMDs in the city. The zoning code would need to be changed to specify that MMDs are a prohibited use.

Positive Effects

- Removes the possibility of illegal activity at MMDs, including profit oriented dispensaries.
- Reduces secondary negative social impacts that could arise by restricting the ability to obtain marijuana in the City.

• Avoids land use compatibility issues between MMDs and surrounding uses and businesses.
• Avoids complicated and potentially-expensive enforcement efforts.

Negative Effects

• Does not respond to the "compassionate care" concerns of Proposition 215.
• Removes the ability for Benicia patients to obtain medical marijuana from collectives or cooperatives in their own city.
• Prevents cooperatives or collectives that could meet State laws from operating in city and providing assistance to those in need.
•Is a possible loss of revenue to the City.

The proposed ordinance to prohibit MMDs defines a MMD as a facility with two or more qualified patients. This would allow a patient to receive medical marijuana from a primary caregiver in the patient's home, but would prohibit the distribution to any other person. In addition, the proposed ordinance would allow patients to receive medical marijuana at a State-licensed medical clinic, hospice, or similar facility.

Option B: Allow MMDs in Benicia, subject to regulations and controls

This option would allow MMDs in the city at limited or defined locations with conditions and restrictions. There are various approaches and issues that should be evaluated and resolved if this option is chosen. Whereas Option A to prohibit MMDs requires a relatively straightforward ordinance, Option B is more complex and requires decisions on the appropriate location, necessary use restrictions, public review process, and degree of oversight by the City in the operations of a MMD.

The effects of allowing MMDs in Benicia could include:

Positive Effects

• Allows local, legal access to medical marijuana for authorized patients in the community.
• Accommodates alternative approaches to the treatment of illnesses, including the use of medical marijuana.
• Responds to an expressed desire for such facilities by some people.

Negative Effects

• Possible rise in crime activity with possibly easier access to marijuana by unauthorized users such as youths.
• Secondary negative social impacts and costs associated with more prevalent marijuana use.

• Potentially expensive enforcement required by the city and school districts to ensure the community does not experience a rise in crime from MMDs in the City.
• Difficult to apply conditions on approved MMDs because of the intrusive nature of the options necessary to ensure adherence to State laws.
• Possibility of profit-oriented MMDs in the City.

Cities have addressed the issue of permitting MMDs in different ways. Most cities have amended their zoning code to require the equivalent of a Use Permit with a public hearing. Other cities allow MMDs with a staff level approval, City Manager approval, or Public Safety permit. The option of a competitive Request for Proposals approach has also been adopted to allow one or several MMDs in a community when several applications are received (to ensure the best-run MMD is allowed to make application, not just the first to make application). There are also different approaches to the type and extent of information necessary for a MMD application, regulations to control land use aspects, and conditions of approval and operating standards to ensure a MMD meets the goals and requirements of the City.

Draft Ordinance
Staff recommends adopting the draft ordinance included with this report (Attachment A) if Council chooses to *prohibit* MMDs in the City.

If Council decides to *allow* MMDs, staff would proceed to prepare a draft ordinance for the City Council to review and possibly adopt by the end of January. The list shown in Attachment O provides a suggested outline for Council to give staff direction on how to regulate these uses.

FISCAL IMPACT
As noted above, assuming there are no challenges to the implementation or adoption of the ordinance, there will be minimal budget impact to implement this ordinance. If Council were to direct staff to introduce an ordinance to permit MMDs in the City, it is estimated that staff time for the audits and inspections could cost up to $60,000 annually (this estimate is based on a fee study used by the City of Oakland to implement charges for auditing and inspecting operating MMDs). Some cities require significant fees paid by MMD operators for the review of plans and operations, as well as to enforce specific regulations. Attachment P shows how a few cities approach application and on-going fees for MMDs. With Council direction, staff could also investigate regulatory fees for MMDs. Although fees could possibly cover the costs for regulating MMDs, secondary costs associated with regulating marijuana sale, cultivation, and use would be difficult to capture, such as legal and enforcement costs related to criminal activity and business violations.

RECOMMENDATION

For the reasons noted in this staff report and the attachments, Staff recommends adoption of the attached ordinance to prohibit medical marijuana distribution facilities in the City (subject to exceptions for specified State-licensed facilities). The attached ordinance would prohibit distribution of medical marijuana to two or more people, thereby allowing patients to receive assistance from a primary caregiver. The ordinance would also allow patients to receive medical marijuana at a licensed medical clinic, hospice, or other state licensed medical facility. This recommendation is supported by the Benicia Youth Action Coalition.

List below are a few key reasons staff recommends prohibiting MMDs (see Attachment Q for additional staff concerns):

• Although the City has the right to consider whether or not to allow MMDs in the city, it would be difficult and expensive to ensure that these facilities comply with all laws, including those imposed by the City. The uncertainty between state and federal laws would further complicate and impede the effectiveness of local regulation.

• Time consuming and intrusive controls and regulations would be required to ensure that MMDs operate as non-profit "compassionate care" facilities as anticipated in Proposition 215.

• Allowing MMDs in Benicia could raise the possibility of criminal activity in the city.

• There are social and public safety concerns associated with allowing the sale of a substance that is only legal when used for medical purposes, but are otherwise illegal to possess, grow or use.

The original intent of the CUA was to allow individuals to grow marijuana individually and collectively for medical purposes, and to ensure they are safe from prosecution. In 2003, SB 420 expanded that by allowing distribution outlets of marijuana. By doing so, the State placed the entire burden on each city to ensure these facilities meet all aspects of State law.

A suggested outline of the contents of an ordinance that can be used if Council decides to allow MMDs is included in Attachment O. This approach is not recommended.

It should be noted that this ordinance does not address the hookah lounges. They are addressed in the smoking ordinance that is being reviewed by the Chamber and Main Street.

Attachments:

A. Draft Ordinance prohibiting medical marijuana distribution facilities
B. Federal laws and Federal enforcement summary
C. Proposition 215, the Compassionate Use Act (CUA)
D. SB 420, the Medical Marijuana Program Act (MMPA)
E. Attorney General Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Purposes
F. AB 2650
G. Frequently Asked Questions (FAQ's)
H. Recent court case review
I. Review of approaches of other cities
J. Map of nearby medical marijuana distribution facilities
K. California Police Chief's Association research
L. Summary of adverse secondary effects
M. January 5, 2011 Press Release from Coalition for a Drug Free California
N. Excerpt of December 16, 2010 Sunnyvale City Council report
O. Potential regulatory outline and options
P. List of fees from other cities

CITY OF BENICIA

ORDINANCE NO. 11 -__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BENICIA ADDING A NEW CHAPTER 9.60 (MEDICAL MARIJUANA DISTRIBUTION FACILITIES) TO TITLE 9 (PUBLIC PEACE, MORALS AND WELFARE), A NEW CHAPTER 17.102 (MEDICAL MARIJUANA DISTRIBUTION FACILITIES) TO TITLE 17 (ZONING), AND AMENDING SECTIONS 17.24.020, 17.26.020, 17.28.020, 17.32.020, 17.36.030, 17.40.030, and 17.46.010 OF TITLE 17 (ZONING) OF THE BENICIA MUNICIPAL CODE

WHEREAS, in 1970, Congress enacted the Controlled Substances Act (CSA) which, among other things, makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States; and

WHEREAS, in 1996, the voters of the State of California approved Proposition 215, known as the Compassionate Use Act ("CUA") (codified as Health and Safety (H&S) Code Section 11362.5 et seq.); and

WHEREAS, the CUA creates a limited exception from criminal liability for seriously ill persons who are in need of medical marijuana for specified medical purposes and who obtain and use medical marijuana under limited, specified circumstances; and

WHEREAS, on January 1,2004, the "Medical Marijuana Program" (MMPA), codified as H&S Code Sections 11362.7 to 11362.83, was enacted by the state Legislature to clarify the scope of the Act and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the MMPA; and

WHEREAS, the CUA expressly anticipates the enactment of additional local legislation. It provides: "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." (H&S Code Section 11362.5); and

WHEREAS, the City Council takes legislative notice of the fact that several California cities and counties which have permitted the establishment of medical marijuana distribution facilities or "dispensaries" have experienced serious adverse impacts associated with and resulting from such uses. According to these communities, according to news stories widely reported and according to medical marijuana advocates, medical marijuana dispensaries have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana distribution facilities. The City Council reasonably anticipates that the City of Benicia will experience similar adverse impacts and effects. A California Police Chiefs Association compilation of police reports, news

stories and statistical research regarding such secondary impacts is contained in a 2009 white paper report located at http://www.procon.org/sourcefiles/CAPCAWhitePaperonMarijuanaDispensaries.pdf ; and

WHEREAS, the City Council further takes legislative notice that as of December 2010, according to at least one compilation, 103 cities and 14 counties in California have adopted moratoria or interim ordinances prohibiting medical marijuana dispensaries. The city council further takes legislative notice that 139 cities and 11 counties have adopted prohibitions against medical marijuana dispensaries. The compilation is available at: http://www.safeaccessnow.org/article.php?id=3165; and

WHEREAS, the City Council further takes legislative notice that the California Attorney General has adopted guidelines for the interpretation and implementation of the state's medical marijuana laws, entitled "GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (August 2008)" (http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf). The Attorney General has stated in the guidelines that "[a]lthough medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law"; and

WHEREAS, the City Council further takes legislative notice that the experience of other cities has been that many medical marijuana distribution facilities or "dispensaries" do not operate as true cooperatives or collectives in compliance with the MMPA and the Attorney General Guidelines, and thus these businesses are engaged in cultivation, distribution and sale of marijuana in a manner that remains illegal under both California and federal law; as a result, the City would be obligated to commit substantial resources to regulating and overseeing the operation of medical marijuana distribution facilities to ensure that the facilities operate lawfully and are not fronts for illegal drug trafficking; and, furthermore, it is uncertain whether even with the dedication of significant resources to the problem, the City would be able to prevent illegal conduct associated with medical marijuana distribution facilities, such as illegal cultivation and transport of marijuana and the distribution of marijuana between persons who are not qualified patients or caregivers under the CUA and MMPA; and

WHEREAS, the City Council further takes legislative notice that concerns about nonmedical marijuana use arising in connection with the CUA and the MMPA also have been recognized by state and federal courts. (See, e.g., *Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1386 to 1387; Gonzales v. Raich (2005) 545 U.S. 1); and

WHEREAS, the City Council further takes legislative notice that the use, possession, distribution and sale of marijuana remain illegal under the CSA (*Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588); that the federal courts have recognized that despite California's CUA and MMPA, marijuana is deemed to have no accepted medical use (*Gonzales v. Raich,* 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483); that medical necessity has been ruled not to be a defense to prosecution under the CSA (*United States v. Oakland Cannabis Buyers'*

Cooperative, 532 U.S. 483); and that the federal government properly may enforce the CSA despite the CUA and MMP (*Gonzales v. Raich,* 545 U.S. 1); and

WHEREAS, the City Council further takes legislative notice that the United States Attorney General in 2008 announced its intention to ease enforcement of federal laws as applied to medical marijuana dispensaries which otherwise comply with state law. There is no certainty how long this uncodified policy will remain in effect, and the underlying conflict between federal and state statutes still remains; and

WHEREAS, an ordinance prohibiting medical marijuana distribution facilities, and prohibiting the issuance of any permits, licenses and entitlements for medical marijuana distribution facilities, is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of Benicia; and

WHEREAS, the City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BENICIA DOES ORDAIN as follows:

Section 1.

Title 9 (Public Peace, Morals and Welfare) of the Benicia Municipal Code is amended by adding a new Chapter 9.60 ((Medical Marijuana Distribution Facilities) to read as follows:

Chapter 9.60

MEDICAL MARIJUANA DISTRIBUTION FACILITIES

9.60.010 Definitions.
9.60.020 Operation of medical marijuana distribution facilities prohibited.
9.60.030 Violation – penalty.
9.60.040 Public nuisance.

9.60.010 Definitions.

"Medical marijuana distribution facility" is any facility or location, whether fixed or mobile, where a primary caregiver makes available, sells, transmits, gives or otherwise provides marijuana to two or more persons with identification cards or qualified patients, as defined in California Health and Safety Code section 11362.5 et. seq., or any facility where qualified patients, persons with identification cards and primary caregivers meet or congregate collectively and cooperatively to cultivate or distribute marijuana for medical purposes under the purported authority of California Health and Safety Code section 11362.5 et. seq.

"Medical marijuana distribution facility" shall not include the following uses, so long as such uses comply with this Code, Health and Safety Code Section 11362.5 et seq., and other applicable law:

(1) A clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code.

(2) A health care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code.

(3) A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code.

(4) A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code.

(5) A hospice or a home health agency, licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code.

9.60.020 Operation of medical marijuana distribution facilities prohibited. Medical marijuana distribution facilities, as defined in this chapter, are prohibited uses in the City of Benicia.

9.60.030 Violation–penalty.

(a) Any person found to be in violation of any provision of this chapter shall not be subject to the criminal enforcement remedies set forth in Title 1.

(b) Each violation of this chapter and each day of violation of this chapter shall be considered as separate and distinct violations thereof and the imposition of a penalty shall be as set forth in subsection (a) of this section for each and every separate violation and each and every day of violation.

9.60.040 Public nuisance. Any use or condition caused or permitted to exist in violation of any of the provisions of this chapter shall be and is hereby declared a public nuisance and may be abated by the City pursuant to the procedures set forth in Chapter 8.04.

Section 2.

Title 17 (Zoning) of the Benicia Municipal Code is amended by adding a new Chapter 17.102 (Distribution of Medical Marijuana) to read as follows:

Chapter 17.102

Medical Marijuana Distribution Facilities

17.102.10. Medical marijuana distribution facilities.

17.102.010 Medical marijuana distribution facilities.
Medical marijuana distribution facilities, as defined in Chapter 9.86, are prohibited uses in all zoning districts in the City of Benicia.

Section 3.

Section 17.24.020 (RS, RM, and RH districts – Land use regulations) of Chapter 17.24 (Residential Districts) of Title 17 (Zoning) is amended by adding to the table as follows:

RS, RM, and RH Districts: Land Use Regulations

P – Permitted
U – Use Permit
L – Limited (See "Additional Use Regulations")
– – Not Permitted

	RS	RM	RH	Additional Regulations
Other Uses				
Medical Marijuana Distribution Facilities	--	--	--	

SECTION 4.

Chapter 17.26 (Mixed Use Districts) of Title 17 (Zoning) is amended by adding a new section 17.26.020 to read as follows:

17.26.020 Medical Marijuana Distribution Facilities Prohibited.
Notwithstanding anything in the Downtown Mixed Use Master Plan, medical marijuana distribution facilities are prohibited in the Mix Use District.

Section 5.
Section 17.28.020 (CC, CO, CG and CW districts – Land use regulations) of Chapter 17.28 (Commercial Districts) of Title 17 (Zoning) is amended by adding to the table as follows:

CC, CO, CG, and CW Districts: Land Use Regulations

P – Permitted
U – Use Permit
L – Limited (See “Additional Use Regulations”)
– – Not Permitted

	CC	**CO**	**CG**	**CW**	**Additional Regulations**

Other Uses					
Medical Marijuana Distribution Facilities	--	--	--	--	

Section 6.
Section 17.32.020 (CC, CO, CG and CW districts – Land use regulations) of Chapter 17.32 (Industrial Districts) of Title 17 (Zoning) is amended by adding to the table as follows:

IL, IG, IW, and IP Districts: Land Use Regulations

P – Permitted
U – Use Permit
L – Limited (See "Additional Use Regulations")
– – Not Permitted

	IL	**IG**	**IW**	**IP**	**Additional Regulations**
Other Uses					
Medical Marijuana Distribution Facilities	--	--	--	--	

Section 7.
Section 17.36.030 (Land use regulations) of Chapter 17.36 (OS Open Space Districts) of Title 17 (Zoning) is amended by adding to the table as follows:

OS District: Land Use Regulations

P – Permitted
U – Use Permit
L – Limited (See "Additional Use Regulations")
– – Not Permitted

	OS	Additional Regulations
Other Uses		
Medical Marijuana Distribution Facilities	--	

Section 8.
Section 17.40.030 (Land use regulations) of Chapter 17.40 (PS Public and Semipublic Districts) of Title 17 (Zoning) is amended by adding to the table as follows:

PS District: Land Use Regulations

P – Permitted
U – Use Permit
L – Limited (See "Additional Use Regulations")
– – Not Permitted

	PS	Additional Regulations
Other Uses		
Medical Marijuana Distribution Facilities	--	

Section 9.
Section 17.46.010 (Schedule S-1) of Chapter 17.46 (Use Regulations Summary) District) of Title 17 (Zoning) is amended by adding to the table as follows:

Schedule S-1: Summary of Land Use Regulations							P – Permitted U – Use Permit L – Limited (See "Additional Regulations") – – Not Permitted						
CATEGORY	RS	RM	RH	CC	CO	CG	CW	IL	IG	IW	IP	OS	PS
Other Uses													
Medical Marijuana Distribution Facilities	--	--	--	--	--	--	--	--	--	--	--	--	--

Section 10.
Section 17.128.070 (Prosecution of violations) of Chapter 17.128 (Enforcement) is amended to read as follows:

17.128.070 Prosecution of violations. Except for violations related to medical marijuana dispensaries, a violation of any provision of this title shall be prosecuted as an infraction. In addition, the city attorney shall, upon order of the city council, commence action or proceedings for the abatement, removal and enjoinment of any violation in the manner provided by law. Violations of the medical marijuana dispensary regulations shall only be pursued civilly.

Section 11.
Severability. If any section, subsection, phrase or clause of this ordinance is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance.

The City Council hereby declares that it would have passed this and each section, subsection, phrase or clause thereof irrespective of the fact that any one or more sections, subsections, phrase or clauses be declared unconstitutional on their face or as applied.

******

On motion of Council Member _____, seconded by Council Member _____, the foregoing ordinance was introduced at a regular meeting of the City Council on the ___ day of February, 2011, and adopted at a regular meeting of the Council held on the ___ day of February, 2011 by the following vote:

Ayes

Noes:

Absent:

_____
Elizabeth Patterson, Mayor

ATTEST:

_____
Lisa Wolfe, City Clerk

FEDERAL LAWS AND ENFORCEMENT

Federal Laws

In general, the Federal Drug Enforcement Agency sets the guidelines and standards for drug policy in the country and the U.S. Attorney General decides what laws to enforce. The following is a brief description of those federal parameters:

- The Federal Controlled Substance Act (CSA) was adopted in 1970. It states that it is unlawful to manufacture, distribute, dispense, or possess any controlled substance. The Federal Government's view is that marijuana is a Schedule I substance, which is classified as having a high potential for abuse. Further, the federal view is that use of marijuana for medicinal purposes is not an accepted treatment method in the United States, and it has not been accepted that marijuana is safe to prescribe as a drug or other substance under medical supervision.

- As a result of this standard, marijuana cannot be prescribed or dispensed in the same way as legal drugs, which is why they are not available from doctors or pharmacies.

- The Federal Drug Enforcement Agency has stated the following on its web site:
    1. Marijuana is a dangerous, addictive drug that poses significant health threats to users.
    2. Marijuana has no medical value that can't be met more effectively by legal drugs.
    3. Marijuana users are far more likely to use other drugs like cocaine and heroin than non-marijuana users.
    4. Drug proponents use "medical marijuana" as red herring in effort to advocate broader legalization of drug use.

- In March 2009, U.S. Attorney General Eric Holder Jr. announced it would no longer enforce the federal laws prohibiting distribution or possession of marijuana for medicinal purposes, allowing states to have the final say in the matter. It was also stated that dispensaries that use medical marijuana as a storefront for dealers of illegal drugs would be prosecuted. In a more recent announcement, Attorney General Holder's office stated they will prosecute people for growing, selling, and possessing marijuana in California.

Proposition 215 Text

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds a section to the Health and Safety Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

SECTION 1. Section 11362.5 is added to the Health and Safety Code, to read:

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

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

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

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

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

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

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

SECTION 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

BILL NUMBER: SB 420 CHAPTERED

BILL TEXT

CHAPTER 875
FILED WITH SECRETARY OF STATE OCTOBER 12, 2003
APPROVED BY GOVERNOR OCTOBER 12, 2003
PASSED THE SENATE SEPTEMBER 11, 2003
PASSED THE ASSEMBLY SEPTEMBER 10, 2003
INTRODUCED FEBRUARY 20, 2003 BY Senator Vasconcellos
(Principal coauthor: Assembly Member Leno.)
(Coauthors: Assembly Members Goldberg, Hancock, and Koretz)

An act to add Article 2.5 (commencing with Section 11362.7) to Chapter 6 of Division 10 of the Health and Safety Code, relating to controlled substances.

LEGISLATIVE COUNSEL'S DIGEST

SB 420, Vasconcellos. Medical marijuana.

Existing law, the Compassionate Use Act of 1996, prohibits any physician from being punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. The act prohibits the provisions of law making unlawful the possession or cultivation of marijuana from applying 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.

This bill would require the State Department of Health Services to establish and maintain a voluntary program for the issuance of identification cards to qualified patients and would establish procedures under which a qualified patient with an identification card may use marijuana for medical purposes. The bill would specify the department's duties in this regard, including developing related protocols and forms, and establishing application and renewal fees for the program.

The bill would impose various duties upon county health departments relating to the issuance of identification cards, thus creating a state-mandated local program.

The bill would create various crimes related to the identification card program, thus imposing a state-mandated local program. This bill would authorize the Attorney General to set forth and clarify details concerning possession and cultivation limits, and other regulations, as specified. The bill would also authorize the Attorney General to recommend modifications to the possession or cultivation limits set forth in the bill. The bill would require the Attorney General to develop and adopt guidelines to ensure the security and no diversion of marijuana grown for medical use, as specified.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that no reimbursement is required by this act for specified reasons.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) On November 6, 1996, the people of the State of California enacted the Compassionate Use Act of 1996 (hereafter the act), codified in Section 11362.5 of the Health and Safety Code, in order to allow seriously ill residents of the state, who have the oral or written approval or recommendation of a physician, to use marijuana for medical purposes without fear of criminal liability under Sections 11357 and 11358 of the Health and Safety Code.

(2) However, reports from across the state have revealed problems and uncertainties in the act that have impeded the ability of law enforcement officers to enforce its provisions as the voters intended and, therefore, have prevented qualified patients and designated primary caregivers from obtaining the protections afforded by the act.

(3) Furthermore, the enactment of this law, as well as other recent legislation dealing with pain control, demonstrates that more information is needed to assess the number of individuals across the state who are suffering from serious medical conditions that are not being adequately alleviated through the use of conventional medications.

(4) In addition, the act called upon the state and the federal government to develop a plan for the safe and affordable distribution of marijuana to all patients in medical need thereof.

(b) It is the intent of the Legislature, therefore, to do all of the following:

(1) Clarify the scope of the application of the act 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.

(2) Promote uniform and consistent application of the act among the counties within the state.

(3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

(c) It is also the intent of the Legislature to address additional issues that were not included within the act, and that must be resolved in order to promote the fair and orderly implementation of the act.

(d) The Legislature further finds and declares both of the following:

(1) A state identification card program will further the goals outlined in this section.

(2) With respect to individuals, the identification system established pursuant to this act must be wholly voluntary, and a patient entitled to the protections of Section 11362.5 of the Health and Safety Code need not possess an identification card in order to claim the protections afforded by that section.

(e) The Legislature further finds and declares that it enacts this act pursuant to the powers reserved to the State of California and its people under the Tenth Amendment to the United States Constitution.

SEC. 2. Article 2.5 (commencing with Section 11362.7) is added to Chapter 6 of Division 10 of the Health and Safety Code, to read:

Article 2.5. Medical Marijuana Program

11362.7. For purposes of this article, the following definitions shall apply:

(a) "Attending physician" means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate.

(b) "Department" means the State Department of Health Services.

(c) "Person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card pursuant to this article.

(d) "Primary caregiver" means the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

(1) In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

(2) An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

(3) An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

(e) A primary caregiver shall be at least 18 years of age, unless the primary caregiver is the parent of a minor child who is a qualified patient or a person with an identification card or the primary caregiver is a person otherwise entitled to make medical decisions under state law pursuant to Sections 6922, 7002, 7050, or 7120 of the Family Code.

(f) "Qualified patient" means a person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.

(g) "Identification card" means a document issued by the State Department of Health Services that document identifies a person authorized to engage in the medical use of marijuana and the person's designated primary caregiver, if any.

(h) "Serious medical condition" means all of the following medical conditions:

(1) Acquired immune deficiency syndrome (AIDS).

(2) Anorexia.

(3) Arthritis.

(4) Cachexia.

(5) Cancer.

(6) Chronic pain.

(7) Glaucoma.

(8) Migraine.

(9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis.

(10) Seizures, including, but not limited to, seizures associated with epilepsy.

(11) Severe nausea.

(12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101- 336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

(i) "Written documentation" means accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

11362.71. (a) (1) The department shall establish and maintain a voluntary program for the issuance of identification cards to qualified patients who satisfy the requirements of this article and voluntarily apply to the identification card program.

(2) The department shall establish and maintain a 24-hour, toll-free telephone number that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of an identification card issued by the department, until a cost-effective Internet Web-based system can be developed for this purpose.

(b) Every county health department, or the county's designee, shall do all of the following:

(1) Provide applications upon request to individuals seeking to join the identification card program.

(2) Receive and process completed applications in accordance with Section 11362.72.

(3) Maintain records of identification card programs.

(4) Utilize protocols developed by the department pursuant to paragraph (1) of subdivision (d).

(5) Issue identification cards developed by the department to approved applicants and designated primary caregivers.

(c) The county board of supervisors may designate another health-related governmental or nongovernmental entity or organization to perform the functions described in subdivision (b), except for an entity or organization that cultivates or distributes marijuana.

(d) The department shall develop all of the following:

(1) Protocols that shall be used by a county health department or the county's designee to implement the responsibilities described in subdivision (b), including, but not limited to, protocols to confirm the accuracy of information contained in an application and to protect the confidentiality of program records.

(2) Application forms that shall be issued to requesting applicants.

(3) An identification card that identifies a person authorized to engage in the medical use of marijuana and an identification card that identifies the person's designated primary caregiver, if any. The two identification cards developed pursuant to this paragraph shall be easily distinguishable from each other.

(e) No person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in an amount established pursuant to this article, unless there is reasonable cause to believe that the information contained in the card is false or falsified, the card has been obtained by means of fraud, or the person is otherwise in violation of the provisions of this article.

(f) It shall not be necessary for a person to obtain an identification card in order to claim the protections of Section 11362.5.

11362.715. (a) A person who seeks an identification card shall pay the fee, as provided in Section 11362.755, and provide all of the following to the county health department or the county's designee on a form developed and provided by the department:

(1) The name of the person, and proof of his or her residency within the county.

(2) Written documentation by the attending physician in the person's medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of marijuana is appropriate.

(3) The name, office address, office telephone number, and California medical license number of the person's attending physician.

(4) The name and the duties of the primary caregiver.

(5) A government-issued photo identification card of the person and of the designated primary caregiver, if any. If the applicant is a person under 18 years of age, a certified copy of a birth certificate shall be deemed sufficient proof of identity.

(b) If the person applying for an identification card lacks the capacity to make medical decisions, the application may be made by the person's legal representative, including,
but not limited to, any of the following:

(1) A conservator with authority to make medical decisions.

(2) An attorney-in-fact under a durable power of attorney for health care or surrogate decision maker authorized under another advanced health care directive.

(3) Any other individual authorized by statutory or decisional law to make medical decisions for the person.

(c) The legal representative described in subdivision (b) may also designate in the application an individual, including himself or herself, to serve as a primary caregiver for the person, provided that the individual meets the definition of a primary caregiver.

(d) The person or legal representative submitting the written information and documentation described in subdivision (a) shall retain a copy thereof.

11362.72. (a) Within 30 days of receipt of an application for an identification card, a county health department or the county's designee shall do all of the following:

(1) For purposes of processing the application, verify that the information contained in the application is accurate. If the person is less than 18 years of age, the county health department or its designee shall also contact the parent with legal authority to make medical decisions, legal guardian, or other person or entity with legal authority to make medical decisions, to verify the information.

(2) Verify with the Medical Board of California or the Osteopathic Medical Board of California that the attending physician has a license in good standing to practice medicine or osteopathy in the state.

(3) Contact the attending physician by facsimile, telephone, or mail to confirm that the medical records submitted by the patient are a true and correct copy of those contained in the physician's office records. When contacted by a county health department or the county' s designee, the attending physician shall confirm or deny that the contents of the medical records are accurate.

(4) Take a photograph or otherwise obtain an electronically transmissible image of the applicant and of the designated primary caregiver, if any.

(5) Approve or deny the application. If an applicant who meets the requirements of Section 11362.715 can establish that an identification card is needed on an emergency basis, the county or its designee shall issue a temporary identification card that shall be valid for 30 days from the date of issuance. The county, or its designee, may extend the temporary identification card for no more than 30 days at a time, so long as the applicant continues to meet the requirements of this paragraph.

(b) If the county health department or the county's designee approves the application, it shall, within 24 hours, or by the end of the next working day of approving the application, electronically transmit the following information to the department:

(1) A unique user identification number of the applicant.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(c) The county health department or the county's designee shall issue an identification card to the applicant and to his or her designated primary caregiver, if any, within five working days of approving the application.

(d) In any case involving an incomplete application, the applicant shall assume responsibility for rectifying the deficiency. The county shall have 14 days from the receipt of information from the applicant pursuant to this subdivision to approve or deny the application.

11362.735. (a) An identification card issued by the county health department shall be serially numbered and shall contain all of the following:

(1) A unique user identification number of the cardholder.

(2) The date of expiration of the identification card.

(3) The name and telephone number of the county health department or the county's designee that has approved the application.

(4) A 24-hour, toll-free telephone number, to be maintained by the department, that will enable state and local law enforcement officers to have immediate access to information necessary to verify the validity of the card.

(5) Photo identification of the cardholder.

(b) A separate identification card shall be issued to the person's designated primary caregiver, if any, and shall include a photo identification of the caregiver.

11362.74. (a) The county health department or the county's designee may deny an application only for any of the following reasons:

(1) The applicant did not provide the information required by Section 11362.715, and upon notice of the deficiency pursuant to subdivision (d) of Section 11362.72, did not provide the information within 30 days.

(2) The county health department or the county's designee determines that the information provided was false.

(3) The applicant does not meet the criteria set forth in this article.

(b) Any person whose application has been denied pursuant to subdivision (a) may not reapply for six months from the date of denial unless otherwise authorized by the county health department or the county's designee or by a court of competent jurisdiction.

(c) Any person whose application has been denied pursuant to subdivision (a) may appeal that decision to the department. The county health department or the county's designee shall make available a telephone number or address to which the denied applicant can direct an appeal.

11362.745. (a) An identification card shall be valid for a period of one year.

(b) Upon annual renewal of an identification card, the county health department or its designee shall verify all new information and may verify any other information that has not changed.

(c) The county health department or the county's designee shall transmit its determination of approval or denial of a renewal to the department.

11362.755. (a) The department shall establish application and renewal fees for persons seeking to obtain or renew identification cards that are sufficient to cover the expenses incurred by the department, including the startup cost, the cost of reduced fees for Medi- Cal beneficiaries in accordance with subdivision (b), the cost of identifying and developing a cost-effective Internet Web-based system, and the cost of maintaining the 24-hour toll-free telephone number.

Each county health department or the county's designee may charge an additional fee for all costs incurred by the county or the county's designee for administering the program pursuant to this article.
(b) Upon satisfactory proof of participation and eligibility in the Medi-Cal program, a Medi-Cal beneficiary shall receive a 50 percent reduction in the fees established pursuant to this section.

11362.76. (a) A person who possesses an identification card shall:

(1) Within seven days, notify the county health department or the county's designee of any change in the person's attending physician or designated primary caregiver, if any.

(2) Annually submit to the county health department or the county' s designee the following:

(A) Updated written documentation of the person's serious medical condition.

(B) The name and duties of the person's designated primary caregiver, if any, for the forthcoming year.

(b) If a person who possesses an identification card fails to comply with this section, the card shall be deemed expired. If an identification card expires, the identification card of any designated primary caregiver of the person shall also expire.

(c) If the designated primary caregiver has been changed, the previous primary caregiver shall return his or her identification card to the department or to the county health department or the county's designee.

(d) If the owner or operator or an employee of the owner or operator of a provider has been designated as a primary caregiver pursuant to paragraph (1) of subdivision (d) of Section 11362.7, of the qualified patient or person with an identification card, the owner or operator shall notify the county health department or the county's designee, pursuant to Section 11362.715, if a change in the designated primary caregiver has occurred.

11362.765. (a) 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 Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570. However, nothing in this section shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.

(b) Subdivision (a) shall apply to all of the following:

(1) A qualified patient or a person with an identification card who transports or processes marijuana for his or her own personal medical use.

(2) A designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the

qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.

(3) Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.

(c) A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, shall not, on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360.

11362.77. (a) A qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient.

(b) If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient' s medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.

(c) Counties and cities may retain or enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a).

(d) Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.

(e) The Attorney General may recommend modifications to the possession or cultivation limits set forth in this section. These recommendations, if any, shall be made to the Legislature no later than December 1, 2005, and may be made only after public comment and consultation with interested organizations, including, but not limited to, patients, health care professionals, researchers, law enforcement, and local governments. Any recommended modification shall be consistent with the intent of this article and shall be based on currently available scientific research.

(f) A qualified patient or a person holding a valid identification card, or the designated primary caregiver of that qualified patient or person, may possess amounts of marijuana consistent with this article.

11362.775. 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.

11362.78. A state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently.

11362.785. (a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

11362.79. Nothing in this article shall authorize a qualified patient or person with an identification card to engage in the smoking of medical marijuana under any of the following circumstances:

(a) In any place where smoking is prohibited by law.

(b) In or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence.

(c) On a school bus.

(d) While in a motor vehicle that is being operated.

(e) While operating a boat.

11362.795. (a)(1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.

(2) The court's decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

(3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

(4) The court's consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

(b) (1) Any person who is to be released on parole from a jail, state prison, school, road camp, or other state or local institution of confinement and who is eligible to use medical marijuana pursuant to Section 11362.5 may request that he or she be allowed to use medical marijuana during the period he or she is released on parole. A parolee's written conditions of parole shall reflect whether or not a request for a modification of the conditions of his or her parole to use medical marijuana was made, and whether the request was granted or denied.

(2) During the period of the parole, where a physician recommends that the parolee use medical marijuana, the parolee may request a modification of the conditions of the parole to authorize the use of medical marijuana.

(3) Any parolee whose request to use medical marijuana while on parole was denied may pursue an administrative appeal of the decision. Any decision on the appeal shall be in writing and shall reflect the reasons for the decision.

(4) The administrative consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.

11362.8. No professional licensing board may impose a civil penalty or take other disciplinary action against a licensee based solely on the fact that the licensee has performed acts that are necessary or appropriate to carry out the licensee's role as a designated primary caregiver to a person who is a qualified patient or who possesses a lawful identification card issued pursuant to Section 11362.72. However, this section shall not apply to acts performed by a physician relating to the discussion or recommendation of the medical use of marijuana to a patient. These discussions or recommendations, or both, shall be governed by Section 11362.5.

11362.81. (a) A person specified in subdivision (b) shall be subject to the following penalties:

(1) For the first offense, imprisonment in the county jail for no more than six months or a fine not to exceed one thousand dollars ($1,000), or both.

(2) For a second or subsequent offense, imprisonment in the county jail for no more than one year, or a fine not to exceed one thousand dollars ($1,000), or both.

(b) Subdivision (a) applies to any of the following:

(1) A person who fraudulently represents a medical condition or fraudulently provides any material misinformation to a physician, county health department or the county's designee, or state or local law enforcement agency or officer, for the purpose of falsely obtaining an identification card.

(2) A person who steals or fraudulently uses any person's identification card in order to acquire, possess, cultivate, transport, use, produce, or distribute marijuana.

(3) A person who counterfeits, tampers with, or fraudulently produces an identification card.

(4) A person who breaches the confidentiality requirements of this article to information provided to, or contained in the records of, the department or of a county health department or the county's designee pertaining to an identification card program.

(c) In addition to the penalties prescribed in subdivision (a), any person described in subdivision (b) may be precluded from attempting to obtain, or obtaining or using, an identification card for a period of up to six months at the discretion of the court.

(d) In addition to the requirements of this article, the Attorney General shall develop and adopt appropriate guidelines to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996.

11362.82. If any section, subdivision, sentence, clause, phrase, or portion of this article is for any reason held invalid or unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, and independent provision, and that holding shall not affect the validity of the remaining portion thereof.

11362.83. Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

In addition, no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for other costs mandated by the state because this act includes additional revenue that is specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate, within the meaning of Section 17556 of the Government Code.

EDMUND G. BROWN JR.
Attorney General

DEPARTMENT OF JUSTICE
State of California

GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE

August 2008

In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana. In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statutes requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, § 11362.81(d).[1]) To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.

I. SUMMARY OF APPLICABLE LAW

A. California Penal Provisions Relating to Marijuana.

The possession, sale, cultivation, or transportation of marijuana is ordinarily a crime under California law. (See, e.g., § 11357 [possession of marijuana is a misdemeanor]; § 11358 [cultivation of marijuana is a felony]; Veh. Code, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; § 11359 [possession with intent to sell any amount of marijuana is a felony]; § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

B. Proposition 215 - The Compassionate Use Act of 1996.

On November 5, 1996, California voters passed Proposition 215, which decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) Proposition 215 was enacted 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," and to "ensure that patients and their primary caregivers who obtain and use marijuana for

[1] Unless otherwise noted, all statutory references are to the Health & Safety Code.

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5(b)(1)(A)-(B).)

The Act further states that "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 verbal recommendation or approval of a physician." (§ 11362.5(d).) Courts have found an implied defense to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.)

C. Senate Bill 420 - The Medical Marijuana Program Act.

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP), became law. (§§ 11362.7-11362.83.) The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. Medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. (§§ 11362.71(e), 11362.78.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (§ 11362.71(b).)

Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable online or via telephone, they represent one of the best ways to ensure the security and non-diversion of marijuana grown for medical use.

In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana. (§§ 11362.7, 11362.77, 11362.775.)

D. Taxability of Medical Marijuana Transactions.

In February 2007, the California State Board of Equalization (BOE) issued a Special Notice confirming its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a Seller's Permit. (http://www.boe.ca.gov/news/pdf/medseller2007.pdf.) According to the Notice, having a Seller's Permit does not allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due. BOE further clarified its policy in a

June 2007 Special Notice that addressed several frequently asked questions concerning taxation of medical marijuana transactions. (http://www.boe.ca.gov/news/pdf/173.pdf.)

E. Medical Board of California.

The Medical Board of California licenses, investigates, and disciplines California physicians. (Bus. & Prof. Code, § 2000, et seq.) Although state law prohibits punishing a physician simply for recommending marijuana for treatment of a serious medical condition (§ 11362.5(c)), the Medical Board can and does take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. In a May 13, 2004 press release, the Medical Board clarified that these accepted standards are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

(http://www.mbc.ca.gov/board/media/releases_2004_05-13_marijuana.html.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates and prosecutes alleged licensing violations in conjunction with the Attorney General's Office.

F. The Federal Controlled Substances Act.

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812(b)(1).) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense. (*Id.* at §§ 841(a)(1), 844(a).)

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 371-373, 381-382.)

In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

II. DEFINITIONS

A. **Physician's Recommendation:** Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (§ 11362.5(d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

B. **Primary Caregiver:** A primary caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ 11362.5(e).) California courts have emphasized the consistency element of the patient-caregiver relationship. Although a "primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient," someone who merely maintains a source of marijuana does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7(d)(2).) Primary caregivers also may receive certain compensation for their services. (§ 11362.765(c) ["A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided . . . to enable [a patient] to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, . . . shall not, on the sole basis of that fact, be subject to prosecution" for possessing or transporting marijuana].)

C. **Qualified Patient:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (§ 11362.5(b)(1)(A).)

D. **Recommending Physician:** A recommending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards (as described by the Medical Board of California in its May 13, 2004 press release) that a reasonable and prudent physician would follow when recommending or approving medical marijuana for the treatment of his or her patient.

III. GUIDELINES REGARDING INDIVIDUAL QUALIFIED PATIENTS AND PRIMARY CAREGIVERS

A. State Law Compliance Guidelines.

1. **Physician Recommendation**: Patients must have a written or verbal recommendation for medical marijuana from a licensed physician. (§ 11362.5(d).)

2. **State of California Medical Marijuana Identification Card**: Under the MMP, qualified patients and their primary caregivers may voluntarily apply for a card issued by DPH identifying them as a person who is authorized to use, possess, or transport marijuana grown for medical purposes. To help law enforcement officers verify the cardholder's identity, each card bears a unique identification number, and a verification database is available online (www.calmmp.ca.gov). In addition, the cards contain the name of the county health department that approved the application, a 24-hour verification telephone number, and an expiration date. (§§ 11362.71(a); 11362.735(a)(3)-(4); 11362.745.)

3. **Proof of Qualified Patient Status**: Although verbal recommendations are technically permitted under Proposition 215, patients should obtain and carry written proof of their physician recommendations to help them avoid arrest. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from arrest if certain conditions are met (see section III.B.4, below). The next best forms of proof are a city- or county-issued patient identification card, or a written recommendation from a physician.

4. **Possession Guidelines**:

a) **MMP**:[2] Qualified patients and primary caregivers who possess a state-issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77(a).) But, if "a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77(b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medical marijuana for purposes of the MMP. (§ 11362.77(d).)

b) **Local Possession Guidelines:** Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess

[2] On May 22, 2008, California's Second District Court of Appeal severed Health & Safety Code § 11362.77 from the MMP on the ground that the statute's possession guidelines were an unconstitutional amendment of Proposition 215, which does not quantify the marijuana a patient may possess. (See *People v. Kelly* (2008) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390.) The Third District Court of Appeal recently reached a similar conclusion in *People v. Phomphakdy* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2931369. The California Supreme Court has granted review in *Kelly* and the Attorney General intends to seek review in *Phomphakdy*.

medical marijuana in amounts that exceed the MMP's possession guidelines. (§ 11362.77(c).)

c) **Proposition 215**: Qualified patients claiming protection under Proposition 215 may possess an amount of marijuana that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. **Enforcement Guidelines**.

1. **Location of Use**: Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79.)

2. **Use of Medical Marijuana in the Workplace or at Correctional Facilities:** The medical use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785(a); *Ross v. RagingWire Telecomms., Inc.* (2008) 42 Cal.4th 920, 933 [under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for marijuana use].)

3. **Criminal Defendants, Probationers, and Parolees:** Criminal defendants and probationers may request court approval to use medical marijuana while they are released on bail or probation. The court's decision and reasoning must be stated on the record and in the minutes of the court. Likewise, parolees who are eligible to use medical marijuana may request that they be allowed to continue such use during the period of parole. The written conditions of parole must reflect whether the request was granted or denied. (§ 11362.795.)

4. **State of California Medical Marijuana Identification Cardholders**: When a person invokes the protections of Proposition 215 or the MMP and he or she possesses a state medical marijuana identification card, officers should:

a) Review the identification card and verify its validity either by calling the telephone number printed on the card, or by accessing DPH's card verification website (http://www.calmmp.ca.gov); and

b) If the card is valid and not being used fraudulently, there are no other indicia of illegal activity (weapons, illicit drugs, or excessive amounts of cash), and the person is within the state or local possession guidelines, the individual should be released and the marijuana should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid state medical marijuana identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana." (§ 11362.71(e).) Further, a "state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer

has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78.)

5. **Non-Cardholders:** When a person claims protection under Proposition 215 or the MMP and only has a locally-issued (i.e., non-state) patient identification card, or a written (or verbal) recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medical-use claim:

a) Officers need not abandon their search or investigation. The standard search and seizure rules apply to the enforcement of marijuana-related violations. Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest.

b) Officers should review any written documentation for validity. It may contain the physician's name, telephone number, address, and license number.

c) If the officer reasonably believes that the medical-use claim is valid based upon the totality of the circumstances (including the quantity of marijuana, packaging for sale, the presence of weapons, illicit drugs, or large amounts of cash), and the person is within the state or local possession guidelines or has an amount consistent with their current medical needs, the person should be released and the marijuana should not be seized.

d) Alternatively, if the officer has probable cause to doubt the validity of a person's medical marijuana claim based upon the facts and circumstances, the person may be arrested and the marijuana may be seized. It will then be up to the person to establish his or her medical marijuana defense in court.

e) Officers are not obligated to accept a person's claim of having a verbal physician's recommendation that cannot be readily verified with the physician at the time of detention.

6. **Exceeding Possession Guidelines**: If a person has what appears to be valid medical marijuana documentation, but exceeds the applicable possession guidelines identified above, all marijuana may be seized.

7. **Return of Seized Medical Marijuana:** If a person whose marijuana is seized by law enforcement successfully establishes a medical marijuana defense in court, or the case is not prosecuted, he or she may file a motion for return of the marijuana. If a court grants the motion and orders the return of marijuana seized incident to an arrest, the individual or entity subject to the order must return the property. State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the CSA. (21 U.S.C. § 885(d).) Once the marijuana is returned, federal authorities are free to exercise jurisdiction over it. (21 U.S.C. §§ 812(c)(10), 844(a); *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes. The following are guidelines to help cooperatives and collectives operate within the law, and to help law enforcement determine whether they are doing so.

1. **Statutory Cooperatives:** A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (Corp. Code, § 12201, 12300.) No business may call itself a "cooperative" (or "co-op") unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. (*Id.* at § 12311(b).) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." (*Id.* at § 12201.) The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. (See *id.* at § 12200, et seq.) Agricultural cooperatives are likewise nonprofit corporate entities "since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." (Food & Agric. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002, et seq.) Cooperatives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.

2. **Collectives:** California law does not define collectives, but the dictionary defines them as "a business, farm, etc., jointly owned and operated by the members of a group." (*Random House Unabridged Dictionary*; Random House, Inc. © 2006.) Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.

B. **Guidelines for the Lawful Operation of a Cooperative or Collective:** Collectives and cooperatives should be organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all state and local laws. The following are some suggested guidelines and practices for operating collective growing operations to help ensure lawful operation.

1. **Non-Profit Operation**: Nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana. (See, e.g., § 11362.765(a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].

2. **Business Licenses, Sales Tax, and Seller's Permits**: The State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit, and those engaging in transactions involving medical marijuana must obtain a Seller's Permit. Some cities and counties also require dispensing collectives and cooperatives to obtain business licenses.

3. **Membership Application and Verification**: When a patient or primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion of marijuana for non-medical use by having potential members complete a written membership application. The following application guidelines should be followed to help ensure that marijuana grown for medical use is not diverted to illicit markets:

a) Verify the individual's status as a qualified patient or primary caregiver. Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any;

b) Have the individual agree not to distribute marijuana to non-members;

c) Have the individual agree not to use the marijuana for other than medical purposes;

d) Maintain membership records on-site or have them reasonably available;

e) Track when members' medical marijuana recommendation and/or identification cards expire; and

f) Enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use.

4. **Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana**: Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

5. **Distribution and Sales to Non-Members are Prohibited**: State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

6. **Permissible Reimbursements and Allocations:** Marijuana grown at a collective or cooperative for medical purposes may be:

a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;
b) Provided in exchange for services rendered to the entity;
c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or
d) Any combination of the above.

7. **Possession and Cultivation Guidelines**: If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may aggregate the possession and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants. Similarly, collectives and cooperatives may cultivate and transport marijuana in aggregate amounts tied to its membership numbers. Any patient or primary caregiver exceeding individual possession guidelines should have supporting records readily available when:

a) Operating a location for cultivation;
b) Transporting the group's medical marijuana; and
c) Operating a location for distribution to members of the collective or cooperative.

8. **Security**: Collectives and cooperatives should provide adequate security to ensure that patients are safe and that the surrounding homes or businesses are not negatively impacted by nuisance activity such as loitering or crime. Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep accurate records and follow accepted cash handling practices, including regular bank runs and cash drops, and maintain a general ledger of cash transactions.

C. **Enforcement Guidelines**: Depending upon the facts and circumstances, deviations from the guidelines outlined above, or other indicia that marijuana is not for medical use, may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

1. **Storefront Dispensaries:** Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§ 11362.775.) It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash "donations" – are likely unlawful. (*Peron*, *supra*, 59 Cal.App.4th at p. 1400 [cannabis club owner was not the primary caregiver to thousands of patients where he did not consistently assume responsibility for their housing, health, or safety].)

2. **Indicia of Unlawful Operation:** When investigating collectives or cooperatives, law enforcement officers should be alert for signs of mass production or illegal sales, including (a) excessive amounts of marijuana, (b) excessive amounts of cash, (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes, (d) weapons, (e) illicit drugs, (f) purchases from, or sales or distribution to, non-members, or (g) distribution outside of California.

Assembly Bill No. 2650

CHAPTER 603

An act to add Section 11362.768 to the Health and Safety Code, relating to medical marijuana.

[Approved by Governor September 30, 2010. Filed with Secretary of State September 30, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2650, Buchanan. Medical marijuana.

Existing law added by initiative, the Compassionate Use Act of 1996, prohibits any physician from being punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes. The act prohibits the provisions of law making unlawful the possession or cultivation of marijuana from applying to a qualified patient, the qualified patient's primary caregiver, or an individual who provides assistance to the qualified patient or the qualified patient's primary caregiver, who possesses, cultivates, or distributes marijuana for the personal medical purposes of the qualified patient upon the written or oral recommendation or approval of a physician. Existing statutory law requires the State Department of Public Health to establish and maintain a voluntary program for the issuance of identification cards to qualified patients and establishes procedures under which a qualified patient with an identification card may use marijuana for medical purposes. Existing law regulates qualified patients, a qualified patient's primary caregiver, and individuals who provide assistance to the qualified patient or the qualified patient's primary caregiver, as specified. A violation of these provisions is generally a misdemeanor.

This bill would provide that no medical marijuana cooperative, collective, dispensary, operator, establishment, or provider authorized by law to possess, cultivate, or distribute medical marijuana that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. The bill also would provide that local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of these medical marijuana establishments would not be preempted by its provisions; and that nothing in the bill shall prohibit a city, county, or city and county from adopting ordinances that further restrict the location or establishment of these medical marijuana establishments. The bill would express a legislative finding and declaration that establishing a uniform standard regulating the proximity of these medical marijuana establishments to schools is a matter of statewide concern and not a municipal

affair and that, therefore, all cities and counties, including charter cities and charter counties, shall be subject to the provisions 92 of the bill. By creating a new crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 11362.768 is added to the Health and Safety Code,to read:
11362.768. (a) This section shall apply to individuals specified in subdivision (b) of Section 11362.765.

(b) No medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana pursuant to this article shall be located within a 600-foot radius of a school.

(c) The distance specified in this section shall be the horizontal distance measured in a straight line from the property line of the school to the closest property line of the lot on which the medical marijuana cooperative, collective, dispensary, operator, establishment, or provider is to be located without regard to intervening structures.

(d) This section shall not apply to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is also a licensed residential medical or elder care facility.

(e) This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license.

(f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

(h) For the purposes of this section, “school” means any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in private homes.

SEC. 2. The Legislature finds and declares that establishing a uniform standard regulating the proximity of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers to schools 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. Therefore, this act shall apply to all cities and counties, including charter cities and charter counties.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

FREQUENTLY ASKED QUESTIONS- MMPA AND AG GUIDELINES
The following discussion provides an overview of the intention of the State rules and regulations as it relates to the consideration whether to allow MMDs in the city:

What medical conditions can medical marijuana relieve?
"Cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief' (State Health and Safety Code 11362.5).

How much marijuana can an individual have?
Qualified patients and primary caregivers may possess 8 oz. of dried marijuana, and may maintain no more than six mature or 12 immature plants per qualified patient.

How does a patient get recommendation from a doctor?
"Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition" (AG Guidelines). Also, the Medical Board of California provides standards for a physician recommending marijuana for medical conditions.

Who is a primary caregiver?
"A primary caregiver is a person who is designated by a qualified patient and 'has consistently assumed responsibility for the housing, health, or safety' of the patient" (AG Guidelines). The courts have decided that dispensary operators generally do not meet the definition of primary caregiver.

What is a medical marijuana ID card and how are they issued?
The AG Guidelines describe that it is mandatory for county health agencies to participate in the identification card program; however, participation by patients and primary caregivers in that program is voluntary. The purpose of the card is to help law enforcement officers to identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest. MMDs also issue their own ID cards to members to ensure they have a recommendation from a medical doctor before dispensing marijuana.

Can the sale of medical marijuana be taxed?
"In February 2007, the California State Board of Equalization (BOE) confirmed its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a Seller's Permit" (AG Guidelines).

How can medical marijuana be distributed?
Under State law, patients may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes" (1 1362.775). The AG Guidelines then provide a description of the types of acceptable business forms

that can cultivate and distribute marijuana for medical purposes, mainly describing cooperatives and collectives.

"Any group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes" (AG Guidelines).

What is a cooperative, collective or dispensary?
A cooperative must be properly organized and registered as such under the law. They must be "democratically controlled and not organized to make a profit for themselves or their members. Cooperatives should only provide a means for facilitating or coordinating transactions between members, and not purchase marijuana from, or sell to non-members" (AG Guidelines).

Although California law does not define a collective, the AG Guidelines applies the following definition: "a business, farm, etc., jointly owned and operated by the members of a group." A collective only facilitates collaborative efforts of patients and primary caregiver members- including the allocation of costs and revenues. They are not for-profit enterprises. Similar to a cooperative, collectives should only provide a means for facilitating or coordinating transactions between members, and not purchase marijuana from, or sell to non-members.

Dispensaries are not recognized under state law, but recent court cases have shown that a dispensary is allowed if it operates as a collective or cooperative. The AG Guidelines does state that, the storefront dispensaries "do not substantially comply with the guidelines of a Cooperative/Collective, unless they are organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all State and local laws." The Attorney General further opines, "Dispensaries that merely require patients to complete a form summarily designating a business owner as their primary caregiver- and then offering marijuana in exchange for cash 'donations'- are unlawful."

In December 2008, the California Supreme Court issued a landmark medical marijuana decision in People v. Mentch. The Supreme Court focused on the "patient-primary caregiver relationship." As to who qualifies as primary caregiver, the Court held: The primary caregiver who the patient designates must be one "who has consistently assumed responsibility for housing, health, or safety of the patient." The Court held that a defendant whose caregiving consisted principally of supplying marijuana and instruction on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Compassionate Use Act and was not entitled to an affirmative defense. The Medical Marijuana Program Act (MMPA), defines the role of a "primary caregiver-patient relationship." The MMPA indicates that primary caregivers may receive "reasonable compensation" for the services provided to enable the patient to use marijuana. They may also receive reasonable compensation for out of pocket expenses incurred in providing those

services (i.e. being reimbursed for costs incurred in growing marijuana). The misconception o f many collectives, cooperatives, and dispensary operators is that a medical marijuana collective/cooperative supplier and/or dispensary operators are entitled to immunity for selling marijuana to dispensaries or patients. That misconception is limited by a thorough review of the facts and records before the Supreme Court in Mentch. The case reflects summary rejection of MMPA compensation immunity to anyone other than primary caregivers. This immunity simply conveys the ability of the patient and primary caregivers to engage in group cultivation, such as in a community garden or community greenhouses. There is no immunity provided for any exchange of money for marijuana, and there is no immunity provided for any compensation to members of group cultivation or individuals paid to cultivate for other members of the group. The specific conduct of possession for sale of marijuana and the specific conduct of selling marijuana remain without immunity and are illegal.

The AG Guidelines list "indicia of unlawful operation", which include having law enforcement officers being alert for signs of mass production or illegal sales, including excessive amounts of marijuana, excessive amounts of cash, failure to follow state and local laws, and purchases from, or sale or distribution to, non-members.

Who can cultivate marijuana for medical purposes?
Any person with a recommendation from a doctor can cultivate their own marijuana pursuant to limitations listed above.

MMDs should acquire marijuana only from their constituent members, "because only marijuana grown by a qualified patient or their primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members." (AG Guidelines).

The guidelines also state that MMDs should document each member's contribution of labor, resources, or money to the effort, and they should track and record the source of their marijuana.

CITY OF SUNNYVALE

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MEMORANDUM

TO: Andrew Miner, Principal Planner

FROM: Rebecca L. Moon, Assistant City Attorney

DATE: November 3, 2010

RE: *Qualified Patients Association v. City of Anaheim*

Case Update

On August 18, 2010, the California Court of Appeal, Fourth District, issued its long-anticipated decision in *Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734. The case involved a legal challenge to the City of Anaheim's ordinance banning medical marijuana dispensaries.

The plaintiffs, Qualified Patients Association, sought to overturn the ordinance on the ground that it was preempted by the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA). The City of Anaheim filed a "demurrer," i.e. motion to dismiss the complaint, arguing, among other things, that the plaintiffs had no standing to bring a suit to overturn the ordinance because their planned activities would be illegal under federal law. "Standing" is a legal concept which means the right to file a lawsuit.

The trial court sustained the demurrer and dismissed the complaint. On appeal, the appellate court was asked to decide four key legal questions: (1) whether the MMPA unconstitutionally amended the CUA; (2) whether federal drug laws preempt the State of California's legalization of medical marijuana through the CUA and MMPA, (3) whether the CUA and MMPA preempt the City of Anaheim's ordinance totally banning medical marijuana dispensaries, and (4) whether prohibition of medical marijuana dispensaries violates California's Unruh Civil Rights Act.

The court ruled against the City's first two legal arguments, finding that the MMPA did not unconstitutionally amend the CUA and that California's decision to legalize marijuana for medical purposes is not preempted by federal law. The court basically found that the CUA and MMPA simply provide an immunity from prosecution under state drug laws, which is within the state's jurisdiction. The court also held that a City can permit medical marijuana dispensaries to operate without incurring criminal liability for "aiding and abetting" violations of federal law.

With regard to the third question, the court concluded that it was too early in the litigation to decide whether state law precludes cities from banning MMD's. The court specifically noted that it could not decide, on a demurrer, whether or not the Qualified Patients Association planned to open a "properly organized and operated collective or cooperative" as allowed by the MMPA or whether (as alleged by the city) its activities would be illegal. (*Id.* at 9.) On a demurrer, the court must assume that all properly pled allegations in the complaint are true. Therefore, the case must go back to the trial court for further proceedings and submission of evidence via a summary judgment motion or trial.

On the fourth question, the court found that banning medical marijuana dispensaries does not violate the plaintiffs' civil rights under the Unruh Act.

In the wake of *Qualified Patients Association*, medical marijuana advocates have continued to argue that the CUA and MMPA preempt the ability of cities and other local public entities to ban medical marijuana dispensaries. The court did note, "viewing the allegations of the complaint most favorably to the plaintiffs, as is required on demurrer, it appears incongruous at first glance to conclude a city may criminalize as a misdemeanor a particular use of property the state expressly has exempted from 'criminal liability'. . . ." (*Id.* at 754.) However, the court went on to say, "in supplemental briefing at our invitation, the city and its amici curiae demonstrate the issue of state preemption under the MMPA is by no means clear-cut or easily resolved on first impressions." (*Id.)* The court expressly states, "we express no opinion on . . . whether state law preempts the city's ordinance", emphasizing "[w]hether the MMPA bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined".

Unfortunately, the question may not be finally resolved by the courts for at least another 2 to 3 years, if not longer. Until a court rules otherwise, the city can exercise its traditional authority over zoning and land use to regulate or ban facilities that distribute medical marijuana in certain zones or in all zones in the city.

Review of approaches of other cities

Solano County Cities
Benicia – Moratorium
Dixon – Banned
Fairfield – Banned
Rio Vista – *none*
Vacaville – Moratorium
Vallejo – *none*
Solano County – 6 mature plants OR 12 immature plants AND 8 ounces of bud

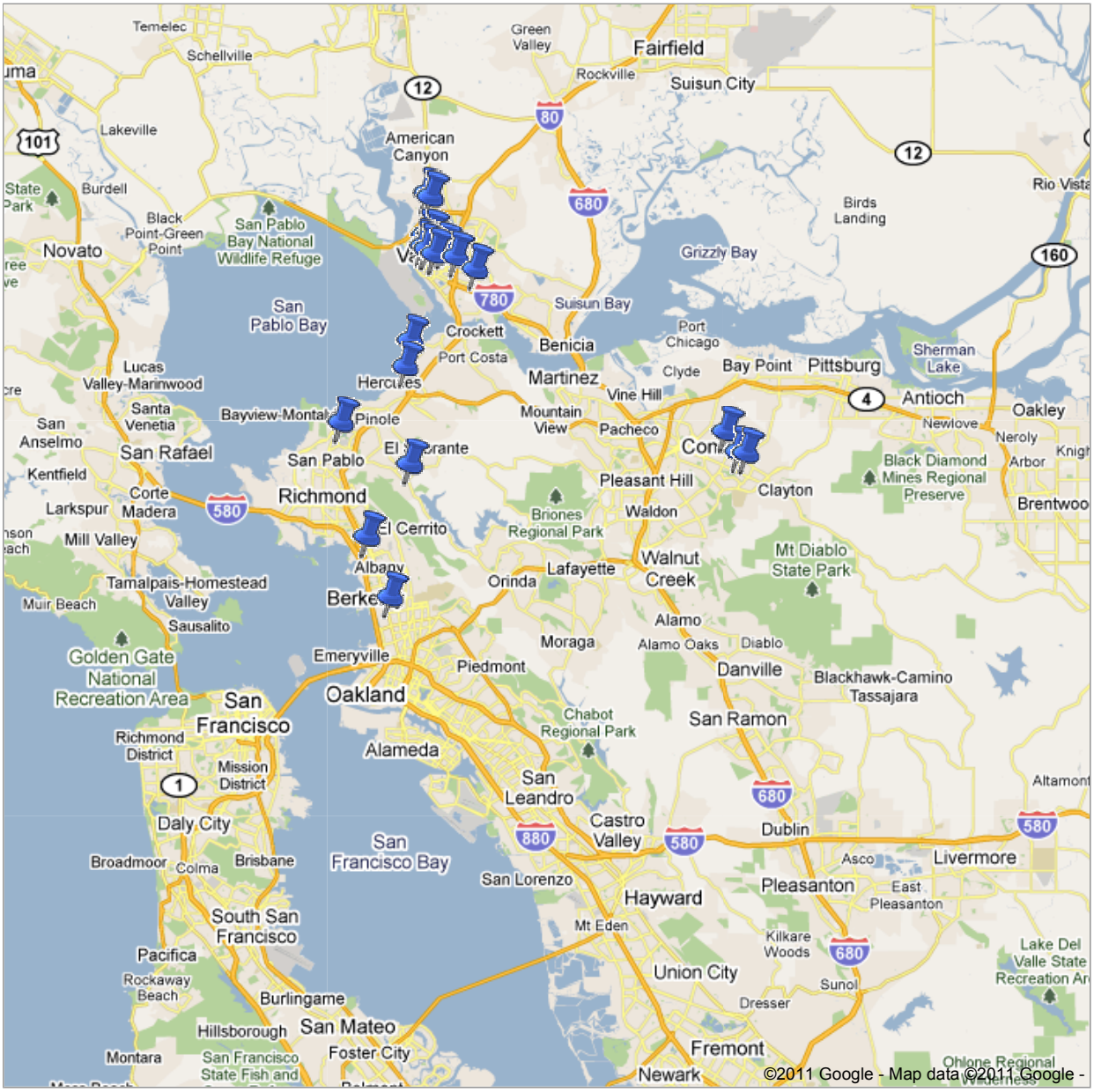
Cities with Medical Marijuana Codes in Place
Albany
Angels Camp
Arcata - ID card system maintained by Chief of Police.
Atascadero
Berkeley
Cotati
Fort Bragg
Laguna Woods
Long Beach
Los Angeles
Malibu
Martinez
Napa
Oakland
Palm Springs – Amended in June 2010 to not allow more than 3 MMDs within City limits
Plymouth
Redding
Ripon
Sacramento
San Carlos
San Francisco
San Mateo
Santa Barbara
Santa Cruz - No quantity guidelines; city ordinance regulates cannabis clubs, allows physician's diagnosis for recommendation.
Santa Rosa
Sebastopol
Sunnyvale
Sutter Creek
Tulare
Visalia
West Hollywood - operating w/o a business license is a misdemeanor

Cities with MMD Moratoria in Place
Daly City
Los Gatos
Millbrae
Mountain View
Placerville
Redwood City
San Jose
Santa Clara
Saratoga
Selma
South SF
Whittier

Cities with a Ban on MMDs
Elk Grove
Gilroy
Los Altos
Milpitas
Palo Alto

X = Ordinance in place

Google maps



Medical Marijuana Dispensaries

Distance from center of City (miles)	Dispensary Name	Address	Other
DELIVERY SERVICES	Greenticket Bakery (delivers to Benicia)	Vallejo, CA	(707) 731-1129 greenticketbakery.com
	Town & Country Cooperative (delivers to Solano County)	Concord, CA	(888) 420-GUYZ tandc.org
	Hollistic Essentials (delivers to Benicia)	Concord, CA	(925) 951-7453
	Delta's Finest (delivers to Solano County)	Vacaville, CA	(707) 639-7141 dfidelivery.com
	Holistic Hospice Solutions (delivers to Benicia)	El Sobrante, CA 94820	(510) 672-4683 holistichospicesolutions.org
5.0	Stan the Man's Collective	1235 Warren Ave Vallejo, CA 94591	(707) 557-5433
5.9	Life Enhancement Services	650 Benicia Rd Vallejo, CA 94591	(707) 552-1540
7.4	"101 North"	1409 Georgia St Vallejo, CA 94590	(707) 648-1386
7.8	Solace Wellness Collective	1614 Sonoma Blvd Vallejo, CA 94590	(707) 652-5474
8.1	Greenwell Cooperative	714 Marin St Vallejo, CA 94590	(707) 980-7774
8.1	Wellness Solutions Group Collective	721 Marin St Vallejo, CA 94590	(707) 655-6497
8.2	North Bay Alternative Healing	1516 Napa Street Vallejo, CA 94590	(707) 980-7221

8.5	Better Health Group Collective | MEDICAL MARIJUANA VALLEJO	432 Tennessee Street Vallejo, CA 94590-4453	(707) 643-3767 betterhealthgroup707.org
10.5	California Collective Care	1639 Lewis Brown Dr Vallejo, CA 94589	(707) 643-6313 calcareclub.org
10.6	Medicinal Revolution Collective	1914 Broadway St Vallejo, CA 94589	(707) 649-1022 medicinal revolution.com
12.9	Rodeo Natural Medicine	185 Parker Ave. Rodeo, CA 94572	(510) 396-9853 rodeonaturalmedicine.webs.com
12.9	Hercules Health Center	500 Alfred Nobel Dr Hercules, CA 94547	(510) 964-7216 herculeshealthcenter.com
14.9	Herbal Essence Holistic Healing Center	5065 Clayton Rd Concord, CA 94521	(925) 849-6750
17.3	GDP Collective	2924 Hilltop Mall Rd San Pablo, CA 94806	(510) 243-7575
22.4	Going Green	611 Soscol Ave # 102 Napa, CA 94559-3429	(707) 253-2646 organic-relief.com
22.6	7 Stars Holistic Healing Center	3288 Pierce St Ste M108 Richmond, CA 94804	(510) 527-7827 medicalmarijuanarichmond.com
27.3	Berkeley Patients Group	2747 San Pablo Avenue Berkeley, CA 94702-2239	(510) 540-6013

WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION'S
TASK FORCE ON MARIJUANA DISPENSARIES

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ACKNOWLEDGMENTS

Beyond any question, this White Paper is the product of a major cooperative effort among representatives of numerous law enforcement agencies and allies who share in common the goal of bringing to light the criminal nexus and attendant societal problems posed by marijuana dispensaries that until now have been too often hidden in the shadows. The critical need for this project was first recognized by the California Police Chiefs Association, which put its implementation in the very capable hands of CPCA's Executive Director Leslie McGill, City of Modesto Chief of Police Roy Wasden, and City of El Cerrito Chief of Police Scott Kirkland to spearhead. More than 30 people contributed to this project as members of CPCA's Medical Marijuana Dispensary Crime/Impact Issues Task Force, which has been enjoying the hospitality of Sheriff John McGinnis at regular meetings held at the Sacramento County Sheriff's Department's Headquarters Office over the past three years about every three months. The ideas for the White Paper's components came from this group, and the text is the collaborative effort of numerous persons both on and off the task force. Special mention goes to Riverside County District Attorney Rod Pacheco and Riverside County Deputy District Attorney Jacqueline Jackson, who allowed their Office's fine White Paper on Medical Marijuana: History and Current Complications to be utilized as a partial guide, and granted permission to include material from that document. Also, Attorneys Martin Mayer and Richard Jones of the law firm of Jones & Mayer are thanked for preparing the pending legal questions and answers on relevant legal issues that appear at the end of this White Paper. And, I thank recently retired San Bernardino County Sheriff Gary Penrod for initially assigning me to contribute to this important work.

Identifying and thanking everyone who contributed in some way to this project would be well nigh impossible, since the cast of characters changed somewhat over the years, and some unknown individuals also helped meaningfully behind the scenes. Ultimately, developing a *White Paper on Marijuana Dispensaries* became a rite of passage for its creators as much as a writing project. At times this daunting, and sometimes unwieldy, multi-year project had many task force members, including the White Paper's editor, wondering if a polished final product would ever really reach fruition. But at last it has! If any reader is enlightened and spurred to action to any degree by the White Paper's important and timely subject matter, all of the work that went into this collaborative project will have been well worth the effort and time expended by the many individuals who worked harmoniously to make it possible.

Some of the other persons and agencies who contributed in a meaningful way to this group venture over the past three years, and deserve acknowledgment for their helpful input and support, are:

George Anderson, California Department of Justice
Jacob Appelsmith, Office of the California Attorney General
John Avila, California Narcotics Officers Association
Phebe Chu, Office of San Bernardino County Counsel
Scott Collins, Los Angeles County District Attorney's Office
Cathy Coyne, California State Sheriffs' Association
Lorrac Craig, Trinity County Sheriff's Department
Jim Denney, California State Sheriffs' Association
Thomas Dewey, California State University—Humboldt Police Department
Dana Filkowski, Contra Costa County District Attorney's Office
John Gaines, California Department of Justice/Bureau of Narcotics Enforcement
Craig Gundlach, Modesto Police Department
John Harlan, Los Angeles County District Attorney's Office—Major Narcotics Division

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Nate Johnson, California State University Police
Mike Kanalakis, Monterey County Sheriff's Office
Bob Kochly, Contra Costa County Office of District Attorney
Tommy LaNier, The National Marijuana Initiative, HIDTA
Carol Leveroni, California Peace Officers Association
Kevin McCarthy, Los Angeles Police Department
Randy Mendoza, Arcata Police Department
Mike Nivens, California Highway Patrol
Rick Oules, Office of the United States Attorney
Mark Pazin, Merced County Sheriff's Department
Michael Regan, El Cerrito Police Department
Melissa Reisinger, California Police Chiefs Association
Kimberly Rios, California Department of Justice, Conference Planning Unit
Kent Shaw, California Department of Justice/Bureau of Narcotics Enforcement
Crystal Spencer, California Department of Justice, Conference Planning Unit
Sam Spiegel, Folsom Police Department
Valerie Taylor, ONDCP
Thomas Toller, California District Attorneys Association
Martin Vranicar, Jr., California District Attorneys Association

April 22, 2009

Dennis Tilton, Editor

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WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION'S
TASK FORCE ON MARIJUANA DISPENSARIES

EXECUTIVE SUMMARY

INTRODUCTION

Proposition 215, an initiative authorizing the limited possession, cultivation, and use of marijuana by patients and their care providers for certain medicinal purposes recommended by a physician without subjecting such persons to criminal punishment, was passed by California voters in 1996. This was supplemented by the California State Legislature's enactment in 2003 of the Medical Marijuana Program Act (SB 420) that became effective in 2004. The language of Proposition 215 was codified in California as the Compassionate Use Act, which added section 11362.5 to the California Health & Safety Code. Much later, the language of Senate Bill 420 became the Medical Marijuana Program Act (MMPA), and was added to the California Health & Safety Code as section 11362.7 *et seq.* Among other requirements, it purports to direct all California counties to set up and administer a voluntary identification card system for medical marijuana users and their caregivers. Some counties have already complied with the mandatory provisions of the MMPA, and others have challenged provisions of the Act or are awaiting outcomes of other counties' legal challenges to it before taking affirmative steps to follow all of its dictates. And, with respect to marijuana dispensaries, the reaction of counties and municipalities to these nascent businesses has been decidedly mixed. Some have issued permits for such enterprises. Others have refused to do so within their jurisdictions. Still others have conditioned permitting such operations on the condition that they not violate any state or federal law, or have reversed course after initially allowing such activities within their geographical borders by either limiting or refusing to allow any further dispensaries to open in their community. This White Paper explores these matters, the apparent conflicts between federal and California law, and the scope of both direct and indirect adverse impacts of marijuana dispensaries in local communities. It also recounts several examples that could be emulated of what some governmental officials and law enforcement agencies have already instituted in their jurisdictions to limit the proliferation of marijuana dispensaries and to mitigate their negative consequences.

FEDERAL LAW

Except for very limited and authorized research purposes, federal law through the Controlled Substances Act absolutely prohibits the use of marijuana for any legal purpose, and classifies it as a banned Schedule I drug. It cannot be legally prescribed as medicine by a physician. And, the federal regulation supersedes any state regulation, so that under federal law California medical marijuana statutes do not provide a legal defense for cultivating or possessing marijuana—even with a physician's recommendation for medical use.

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CALIFORNIA LAW

Although California law generally prohibits the cultivation, possession, transportation, sale, or other transfer of marijuana from one person to another, since late 1996 after passage of an initiative (Proposition 215) later codified as the Compassionate Use Act, it has provided a limited affirmative defense to criminal prosecution for those who cultivate, possess, or use limited amounts of marijuana for medicinal purposes as qualified patients with a physician's recommendation or their designated primary caregiver or cooperative. Notwithstanding these limited exceptions to criminal culpability, California law is notably silent on any such available defense for a storefront marijuana dispensary, and California Attorney General Edmund G. Brown, Jr. has recently issued guidelines that generally find marijuana dispensaries to be unprotected and illegal drug-trafficking enterprises except in the rare instance that one can qualify as a true cooperative under California law. A primary caregiver must consistently and regularly assume responsibility for the housing, health, or safety of an authorized medical marijuana user, and nowhere does California law authorize cultivating or providing marijuana—medical or non-medical—for profit.

California's Medical Marijuana Program Act (Senate Bill 420) provides further guidelines for mandated county programs for the issuance of identification cards to authorized medical marijuana users on a voluntary basis, for the chief purpose of giving them a means of certification to show law enforcement officers if such persons are investigated for an offense involving marijuana. This system is currently under challenge by the Counties of San Bernardino and San Diego and Sheriff Gary Penrod, pending a decision on review by the U.S. Supreme Court, as is California's right to permit any legal use of marijuana in light of federal law that totally prohibits any personal cultivation, possession, sale, transportation, or use of this substance whatsoever, whether for medical or non-medical purposes.

PROBLEMS POSED BY MARIJUANA DISPENSARIES

Marijuana dispensaries are commonly large money-making enterprises that will sell marijuana to most anyone who produces a physician's written recommendation for its medical use. These recommendations can be had by paying unscrupulous physicians a fee and claiming to have most any malady, even headaches. While the dispensaries will claim to receive only donations, no marijuana will change hands without an exchange of money. These operations have been tied to organized criminal gangs, foster large grow operations, and are often multi-million-dollar profit centers.

Because they are repositories of valuable marijuana crops and large amounts of cash, several operators of dispensaries have been attacked and murdered by armed robbers both at their storefronts and homes, and such places have been regularly burglarized. Drug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts of their operations. To repel store invasions, firearms are often kept on hand inside dispensaries, and firearms are used to hold up their proprietors. These dispensaries are either linked to large marijuana grow operations or encourage home grows by buying marijuana to dispense. And, just as destructive fires and unhealthful mold in residential neighborhoods are often the result of large indoor home grows designed to supply dispensaries, money laundering also naturally results from dispensaries' likely unlawful operations.

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LOCAL GOVERNMENTAL RESPONSES

Local governmental bodies can impose a moratorium on the licensing of marijuana dispensaries while investigating this issue; can ban this type of activity because it violates federal law; can use zoning to control the dispersion of dispensaries and the attendant problems that accompany them in unwanted areas; and can condition their operation on not violating any federal or state law, which is akin to banning them, since their primary activities will always violate federal law as it now exists—and almost surely California law as well.

LIABILITY

While highly unlikely, local public officials, including county supervisors and city council members, could potentially be charged and prosecuted for aiding and abetting criminal acts by authorizing and licensing marijuana dispensaries if they do not qualify as "cooperatives" under California law, which would be a rare occurrence. Civil liability could also result.

ENFORCEMENT OF MARIJUANA LAWS

While the Drug Enforcement Administration has been very active in raiding large-scale marijuana dispensaries in California in the recent past, and arresting and prosecuting their principals under federal law in selective cases, the new U.S. Attorney General, Eric Holder, Jr., has very recently announced a major change of federal position in the enforcement of federal drug laws with respect to marijuana dispensaries. It is to target for prosecution only marijuana dispensaries that are exposed as fronts for drug trafficking. It remains to be seen what standards and definitions will be used to determine what indicia will constitute a drug trafficking operation suitable to trigger investigation and enforcement under the new federal administration.

Some counties, like law enforcement agencies in the County of San Diego and County of Riverside, have been aggressive in confronting and prosecuting the operators of marijuana dispensaries under state law. Likewise, certain cities and counties have resisted granting marijuana dispensaries business licenses, have denied applications, or have 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.

Largely because the majority of their citizens have been sympathetic and projected a favorable attitude toward medical marijuana patients, and have been tolerant of the cultivation and use of marijuana, other local public officials in California cities and counties, especially in Northern California, have taken a "hands off" attitude with respect to prosecuting marijuana dispensary operators or attempting to close down such operations. But, because of the life safety hazards caused by ensuing fires that have often erupted in resultant home grow operations, and the violent acts that have often shadowed dispensaries, some attitudes have changed and a few political entities have reversed course after having previously licensed dispensaries and authorized liberal permissible amounts of marijuana for possession by medical marijuana patients in their jurisdictions. These "patients" have most often turned out to be young adults who are not sick at all, but have secured a physician's written recommendation for marijuana use by simply paying the required fee demanded for this document without even first undergoing a physical examination. Too often "medical marijuana" has been used as a smokescreen for those who want to legalize it and profit off it, and storefront dispensaries established as cover for selling an illegal substance for a lucrative return.

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WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION

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INTRODUCTION

In November of 1996, California voters passed Proposition 215. The initiative set out to make marijuana available to people with certain illnesses. The initiative was later supplemented by the Medical Marijuana Program Act. Across the state, counties and municipalities have varied in their responses to medical marijuana. Some have allowed businesses to open and provide medical marijuana. Others have disallowed all such establishments within their borders. Several once issued business licenses allowing medical marijuana stores to operate, but no longer do so. This paper discusses the legality of both medical marijuana and the businesses that make it available, and more specifically, the problems associated with medical marijuana and marijuana dispensaries, under whatever name they operate.

FEDERAL LAW

Federal law clearly and unequivocally states that all marijuana-related activities are illegal. Consequently, all people engaged in such activities are subject to federal prosecution. The United States Supreme Court has ruled that this federal regulation supersedes any state's regulation of marijuana – even California's. (*Gonzales v. Raich* (2005) 125 S.Ct. 2195, 2215.) "The Supremacy Clause unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." (*Gonzales v. Raich*, *supra*.) Even more recently, the 9th Circuit Court of Appeals found that there is no fundamental right under the United States Constitution to even use medical marijuana. (*Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 866.)

In *Gonzales v. Raich,* the High Court declared that, despite the attempts of several states to partially legalize marijuana, it continues to be wholly illegal since it is classified as a Schedule I drug under federal law. As such, there are no exceptions to its illegality. (21 USC secs. 812(c), 841(a)(1).) Over the past thirty years, there have been several attempts to have marijuana reclassified to a different schedule which would permit medical use of the drug. All of these attempts have failed. (*See Gonzales v. Raich* (2005) 125 S.Ct. 2195, fn 23.) The mere categorization of marijuana as "medical" by some states fails to carve out any legally recognized exception regarding the drug. Marijuana, in any form, is neither valid nor legal.

Clearly the United States Supreme Court is the highest court in the land. Its decisions are final and binding upon all lower courts. The Court invoked the United States Supremacy Clause and the Commerce Clause in reaching its decision. The Supremacy Clause declares that all laws made in pursuance of the Constitution shall be the "supreme law of the land" and shall be legally superior to any conflicting provision of a state constitution or law.[1] The Commerce Clause states that "the

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Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2]

Gonzales v. Raich addressed the concerns of two California individuals growing and using marijuana under California's medical marijuana statute. The Court explained that under the Controlled Substances Act marijuana is a Schedule I drug and is strictly regulated.[3] "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment."[4] (21 USC sec. 812(b)(1).) The Court ruled that the Commerce Clause is applicable to California individuals growing and obtaining marijuana for their own personal, medical use. Under the Supremacy Clause, the federal regulation of marijuana, pursuant to the Commerce Clause, supersedes any state's regulation, including California's. The Court found that the California statutes did not provide any federal defense if a person is brought into federal court for cultivating or possessing marijuana.

Accordingly, there is no federal exception for the growth, cultivation, use or possession of marijuana and all such activity remains illegal.[5] California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 do not create an exception to this federal law. All marijuana activity is absolutely illegal and subject to federal regulation and prosecution. This notwithstanding, on March 19, 2009, U.S. Attorney General Eric Holder, Jr. announced that under the new Obama Administration the U.S. Department of Justice plans to target for prosecution only those marijuana dispensaries that use medical marijuana dispensing as a front for dealers of illegal drugs.[6]

CALIFORNIA LAW

Generally, the possession, cultivation, possession for sale, transportation, distribution, furnishing, and giving away of marijuana is unlawful under California state statutory law. (See Cal. Health & Safety Code secs. 11357-11360.) But, on November 5, 1996, California voters adopted Proposition 215, an initiative statute authorizing the medical use of marijuana.[7] The initiative added California Health and Safety code section 11362.5, which allows "seriously ill Californians the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . . ."[8] The codified section is known as the Compassionate Use Act of 1996.[9] Additionally, the State Legislature passed Senate Bill 420 in 2003. It became the Medical Marijuana Program Act and took effect on January 1, 2004.[10] This act expanded the definitions of "patient" and "primary caregiver"[11] and created guidelines for identification cards.[12] It defined the amount of marijuana that "patients," and "primary caregivers" can possess.[13] It also created a limited affirmative defense to criminal prosecution for qualifying individuals that collectively gather to cultivate medical marijuana,[14] as well as to the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana for a person who qualifies as a "patient," a "primary caregiver," or as a member of a legally recognized "cooperative," as those terms are defined within the statutory scheme. Nevertheless, there is no provision in any of these laws that authorizes or protects the establishment of a "dispensary" or other storefront marijuana distribution operation.

Despite their illegality in the federal context, the medical marijuana laws in California are specific. The statutes craft narrow affirmative defenses for particular individuals with respect to enumerated marijuana activity. All conduct, and people engaging in it, that falls outside of the statutes' parameters remains illegal under California law. Relatively few individuals will be able to assert the affirmative defense in the statute. To use it a person must be a "qualified patient," "primary caregiver," or a member of a "cooperative." Once they are charged with a crime, if a person can prove an applicable legal status, they are entitled to assert this statutory defense.

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Former California Attorney General Bill Lockyer has also spoken about medical marijuana, and strictly construed California law relating to it. His office issued a bulletin to California law enforcement agencies on June 9, 2005. The office expressed the opinion that *Gonzales v. Raich* did not address the validity of the California statutes and, therefore, had no effect on California law. The office advised law enforcement to not change their operating procedures. Attorney General Lockyer made the recommendation that law enforcement neither arrest nor prosecute "individuals within the legal scope of California's Compassionate Use Act." Now the current California Attorney General, Edmund G. Brown, Jr., has issued guidelines concerning the handling of issues relating to California's medical marijuana laws and marijuana dispensaries. The guidelines are much tougher on storefront dispensaries—generally finding them to be unprotected, illegal drug-trafficking enterprises if they do not fall within the narrow legal definition of a "cooperative"—than on the possession and use of marijuana upon the recommendation of a physician.

When California's medical marijuana laws are strictly construed, it appears that the decision in *Gonzales v. Raich* does affect California law. However, provided that federal law does not preempt California law in this area, it does appear that the California statutes offer some legal protection to "individuals within the legal scope of" the acts. The medical marijuana laws speak to patients, primary caregivers, and true collectives. These people are expressly mentioned in the statutes, and, if their conduct comports to the law, they may have some state legal protection for specified marijuana activity. Conversely, all marijuana establishments that fall outside the letter and spirit of the statutes, including dispensaries and storefront facilities, are not legal. These establishments have no legal protection. Neither the former California Attorney General's opinion nor the current California Attorney General's guidelines present a contrary view. Nevertheless, without specifically addressing marijuana dispensaries, Attorney General Brown has sent his deputies attorney general to defend the codified Medical Marijuana Program Act against court challenges, and to advance the position that the state's regulations promulgated to enforce the provisions of the codified Compassionate Use Act (Proposition 215), including a statewide database and county identification card systems for marijuana patients authorized by their physicians to use marijuana, are all valid.

1. Conduct

California Health and Safety Code sections 11362.765 and 11362.775 describe the conduct for which the affirmative defense is available. If a person qualifies as a "patient," "primary caregiver," or is a member of a legally recognized "cooperative," he or she has an affirmative defense to possessing a defined amount of marijuana. Under the statutes no more than eight ounces of dried marijuana can be possessed. Additionally, either six mature or twelve immature plants may be possessed.[15] If a person claims patient or primary caregiver status, and possesses more than this amount of marijuana, he or she can be prosecuted for drug possession. The qualifying individuals may also cultivate, plant, harvest, dry, and/or process marijuana, but only while still strictly observing the permitted amount of the drug. The statute may also provide a limited affirmative defense for possessing marijuana for sale, transporting it, giving it away, maintaining a marijuana house, knowingly providing a space where marijuana can be accessed, and creating a narcotic nuisance.[16]

However, for anyone who cannot lay claim to the appropriate status under the statutes, all instances of marijuana possession, cultivation, planting, harvesting, drying, processing, possession for the purposes of sales, completed sales, giving away, administration, transportation, maintaining of marijuana houses, knowingly providing a space for marijuana activity, and creating a narcotic nuisance continue to be illegal under California law.

2. Patients and Cardholders

A dispensary obviously is not a patient or cardholder. A "qualified patient" is an individual with a physician's recommendation that indicates marijuana will benefit the treatment of a qualifying illness. (Cal. H&S Code secs. 11362.5(b)(1)(A) and 11362.7(f).) Qualified illnesses include cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or *any other illness for which marijuana provides relief.*[17] A physician's recommendation that indicates medical marijuana will benefit the treatment of an illness is required before a person can claim to be a medical marijuana patient. Accordingly, such proof is also necessary before a medical marijuana affirmative defense can be claimed.

A "person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card issued by the State Department of Health Services. (Cal. H&S Code secs. 11362.7(c) and 11362.7(g).)

3. Primary Caregivers

The only person or entity authorized to receive compensation for services provided to patients and cardholders is a primary caregiver. (Cal. H&S Code sec. 11362.77(c).) However, nothing in the law authorizes any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.765(a).) It is important to note that it is almost impossible for a storefront marijuana business to gain true primary caregiver status. Businesses that call themselves "cooperatives," but function like storefront dispensaries, suffer this same fate. In *People v. Mower,* the court was very clear that the defendant had to prove he was a primary caregiver in order to raise the medical marijuana affirmative defense. Mr. Mower was prosecuted for supplying two people with marijuana.[18] He claimed he was their primary caregiver under the medical marijuana statutes. This claim required him to prove he "**consistently** had assumed responsibility for either one's **housing, health, or safety**" before he could assert the defense.[19] (Emphasis added.)

The key to being a primary caregiver is not simply that marijuana is provided for a patient's health; the responsibility for the health must be consistent; it must be independent of merely providing marijuana for a qualified person; and such a primary caregiver-patient relationship must begin before or contemporaneously with the time of assumption of responsibility for assisting the individual with marijuana. (*People v. Mentch* (2008) 45 Cal.4th 274, 283.) Any relationship a storefront marijuana business has with a patient is much more likely to be transitory than consistent, and to be wholly lacking in providing for a patient's health needs beyond just supplying him or her with marijuana.

A "primary caregiver" is an individual or facility that has "consistently assumed responsibility for the housing, health, or safety of a patient" over time. (Cal. H&S Code sec. 11362.5(e).) "Consistency" is the key to meeting this definition. A patient can elect to patronize any dispensary that he or she chooses. The patient can visit different dispensaries on a single day or any subsequent day. The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. But, in light of the holding in *People v. Mentch*, *supra*, to qualify as a primary caregiver, more aid to a person's health must occur beyond merely dispensing marijuana to a given customer.

Additionally, if more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. And, in most circumstances the primary caregiver must be at least 18 years of age.

The courts have found that the act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. (*See People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390: "One maintaining a source of marijuana supply, from which all members of the public qualified as permitted medicinal users may or may not discretionarily elect to make purchases, does not thereby become the party 'who has consistently assumed responsibility for the housing, health, or safety' of that purchaser as section 11362.5(e) requires.")

The California Legislature had the opportunity to legalize the existence of dispensaries when setting forth what types of facilities could qualify as "primary caregivers." Those included in the list clearly show the Legislature's intent to restrict the definition to one involving a significant and long-term commitment to the patient's health, safety, and welfare. The only facilities which the Legislature authorized to serve as "primary caregivers" are clinics, health care facilities, residential care facilities, home health agencies, and hospices which actually provide medical care or supportive services to qualified patients. (Cal. H&S Code sec. 11362.7(d)(1).) Any business that cannot prove that its relationship with the patient meets these requirements is not a primary caregiver. Functionally, the business is a drug dealer and is subject to prosecution as such.

4. Cooperatives and Collectives

According to the California Attorney General's recently issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, unless they meet stringent requirements, dispensaries also cannot reasonably claim to be cooperatives or collectives. In passing the Medical Marijuana Program Act, the Legislature sought, in part, to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation programs. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 881.) The Act added section 11362.775, which provides that "Patients and caregivers 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" for the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana. However, there is no authorization for any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.77(a).) If a dispensary is only a storefront distribution operation open to the general public, and there is no indication that it has been involved with growing or cultivating marijuana for the benefit of members as a non-profit enterprise, it will not qualify as a cooperative to exempt it from criminal penalties under California's marijuana laws.

Further, the common dictionary definition of "collectives" is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; capital investment receives either no return or a limited return; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy, or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[20] Marijuana businesses, of any kind, do not normally meet this legal definition.

Based on the foregoing, it is clear that virtually all marijuana dispensaries are not legal enterprises under either federal **or** state law.

LAWS IN OTHER STATES

Besides California, at the time of publication of this White Paper, thirteen other states have enacted medical marijuana laws on their books, whereby to some degree marijuana recommended or prescribed by a physician to a specified patient may be legally possessed. These states are Alaska, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. And, possession of marijuana under one ounce has now been decriminalized in Massachusetts.[21]

STOREFRONT MARIJUANA DISPENSARIES AND COOPERATIVES

Since the passage of the Compassionate Use Act of 1996, many storefront marijuana businesses have opened in California.[22] Some are referred to as dispensaries, and some as cooperatives; but it is how they operate that removes them from any umbrella of legal protection. These facilities operate as if they are pharmacies. Most offer different types and grades of marijuana. Some offer baked goods that contain marijuana.[23] Monetary donations are collected from the patient or primary caregiver when marijuana or food items are received. The items are not technically sold since that would be a criminal violation of the statutes.[24] These facilities are able to operate because they apply for and receive business licenses from cities and counties.

Federally, all existing storefront marijuana businesses are subject to search and closure since they violate federal law.[25] Their mere existence violates federal law. Consequently, they have no right to exist or operate, and arguably cities and counties in California have no authority to sanction them.

Similarly, in California there is no apparent authority for the existence of these storefront marijuana businesses. The Medical Marijuana Program Act of 2004 allows *patients* and *primary caregivers* to grow and cultivate marijuana, and no one else.[26] Although California Health and Safety Code section 11362.775 offers some state legal protection for true collectives and cooperatives, no parallel protection exists in the statute for any storefront business providing any narcotic.

The common dictionary definition of collectives is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; *capital investment receives either no return or a limited return*; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[27] Marijuana businesses, of any kind, do not meet this legal definition.

Actual medical dispensaries are commonly defined as offices in hospitals, schools, or other institutions from which medical supplies, preparations, and treatments are dispensed. Hospitals, hospices, home health care agencies, and the like are specifically included in the code as primary caregivers as long as they have "consistently assumed responsibility for the housing, health, or safety" of a patient.[28] Clearly, it is doubtful that any of the storefront marijuana businesses currently

existing in California can claim that status. Consequently, they are not primary caregivers and are subject to prosecution under both California and federal laws.

HOW EXISTING DISPENSARIES OPERATE

Despite their clear illegality, some cities do have existing and operational dispensaries. Assuming, *arguendo*, that they may operate, it may be helpful to review the mechanics of the business. The former Green Cross dispensary in San Francisco illustrates how a typical marijuana dispensary works.[29]

A guard or employee may check for medical marijuana cards or physician recommendations at the entrance. Many types and grades of marijuana are usually available. Although employees are neither pharmacists nor doctors, sales clerks will probably make recommendations about what type of marijuana will best relieve a given medical symptom. Baked goods containing marijuana may be available and sold, although there is usually no health permit to sell baked goods. The dispensary will give the patient a form to sign declaring that the dispensary is their "primary caregiver" (a process fraught with legal difficulties). The patient then selects the marijuana desired and is told what the "contribution" will be for the product. The California Health & Safety Code specifically prohibits the sale of marijuana to a patient, so "contributions" are made to reimburse the dispensary for its time and care in making "product" available. However, if a calculation is made based on the available evidence, it is clear that these "contributions" can easily add up to millions of dollars per year. That is a very large cash flow for a "non-profit" organization denying any participation in the retail sale of narcotics. Before its application to renew its business license was denied by the City of San Francisco, there were single days that Green Cross sold $45,000 worth of marijuana. On Saturdays, Green Cross could sell marijuana to forty-three patients an hour. The marijuana sold at the dispensary was obtained from growers who brought it to the store in backpacks. A medium-sized backpack would hold approximately $16,000 worth of marijuana. Green Cross used many different marijuana growers.

It is clear that dispensaries are running as if they are businesses, not legally valid cooperatives. Additionally, they claim to be the "primary caregivers" of patients. This is a spurious claim. As discussed above, the term "primary caregiver" has a very specific meaning and defined legal qualifications. A primary caregiver is an individual who has "consistently assumed responsibility for the housing, health, or safety of a patient." [30] The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. If more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. In most circumstances the primary caregiver must be at least 18 years of age.

It is almost impossible for a storefront marijuana business to gain true primary caregiver status. A business would have to prove that it "**consistently** had assumed responsibility for [a patient's] **housing, health, or safety**."[31] The key to being a primary caregiver is not simply that marijuana is provided for a patient's health: the responsibility for the patient's health must be **consistent**.

As seen in the Green Cross example, a storefront marijuana business's relationship with a patient is most likely transitory. In order to provide a qualified patient with marijuana, a storefront marijuana business must create an instant "primary caregiver" relationship with him. The very fact that the relationship is instant belies any consistency in their relationship and the requirement that housing, health, or safety is consistently provided. Courts have found that a patient's act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. The

consistent relationship demanded by the statute is mere fiction if it can be achieved between an individual and a business that functions like a narcotic retail store.

ADVERSE SECONDARY EFFECTS OF MARIJUANA DISPENSARIES AND SIMILIARLY OPERATING COOPERATIVES

Of great concern are the adverse secondary effects of these dispensaries and storefront cooperatives. They are many. Besides flouting federal law by selling a prohibited Schedule I drug under the Controlled Substances Act, marijuana dispensaries attract or cause numerous ancillary social problems as byproducts of their operation. The most glaring of these are other criminal acts.

ANCILLARY CRIMES

A. ARMED ROBBERIES AND MURDERS

Throughout California, many violent crimes have been committed that can be traced to the proliferation of marijuana dispensaries. These include armed robberies and murders. For example, as far back as 2002, two home occupants were shot in Willits, California in the course of a home-invasion robbery targeting medical marijuana.[32] And, a series of four armed robberies of a marijuana dispensary in Santa Barbara, California occurred through August 10, 2006, in which thirty dollars and fifteen baggies filled with marijuana on display were taken by force and removed from the premises in the latest holdup. The owner said he failed to report the first three robberies because "medical marijuana is such a controversial issue." [33]

On February 25, 2004, in Mendocino County two masked thugs committed a home invasion robbery to steal medical marijuana. They held a knife to a 65-year-old man's throat, and though he fought back, managed to get away with large amounts of marijuana. They were soon caught, and one of the men received a sentence of six years in state prison.[34] And, on August 19, 2005, 18-year-old Demarco Lowrey was "shot in the stomach" and "bled to death" during a gunfight with the business owner when he and his friends attempted a takeover robbery of a storefront marijuana business in the City of San Leandro, California. The owner fought back with the hooded home invaders, and a gun battle ensued. Demarco Lowery was hit by gunfire and "dumped outside the emergency entrance of Children's Hospital Oakland" after the shootout.[35] He did not survive.[36]

Near Hayward, California, on September 2, 2005, upon leaving a marijuana dispensary, a patron of the CCA Cannabis Club had a gun put to his head as he was relieved of over $250 worth of pot. Three weeks later, another break-in occurred at the Garden of Eden Cannabis Club in September of 2005.[37]

Another known marijuana-dispensary-related murder occurred on November 19, 2005. Approximately six gun- and bat-wielding burglars broke into Les Crane's home in Laytonville, California while yelling, "This is a raid." Les Crane, who owned two storefront marijuana businesses, was at home and shot to death. He received gunshot wounds to his head, arm, and abdomen.[38] Another man present at the time was beaten with a baseball bat. The murderers left the home after taking an unknown sum of U.S. currency and a stash of processed marijuana.[39]

Then, on January 9, 2007, marijuana plant cultivator Rex Farrance was shot once in the chest and killed in his own home after four masked intruders broke in and demanded money. When the homeowner ran to fetch a firearm, he was shot dead. The robbers escaped with a small amount of

cash and handguns. Investigating officers counted 109 marijuana plants in various phases of cultivation inside the house, along with two digital scales and just under 4 pounds of cultivated marijuana.[40]

More recently in Colorado, Ken Gorman, a former gubernatorial candidate and dispenser of marijuana who had been previously robbed over twelve times at his home in Denver, was found murdered by gunshot inside his home. He was a prominent proponent of medical marijuana and the legalization of marijuana.[41]

B. BURGLARIES

In June of 2007, after two burglarizing youths in Bellflower, California were caught by the homeowner trying to steal the fruits of his indoor marijuana grow, he shot one who was running away, and killed him.[42] And, again in January of 2007, Claremont Councilman Corey Calaycay went on record calling marijuana dispensaries "crime magnets" after a burglary occurred in one in Claremont, California.[43]

On July 17, 2006, the El Cerrito City Council voted to ban all such marijuana facilities. It did so after reviewing a nineteen-page report that detailed a rise in crime near these storefront dispensaries in other cities. The crimes included robberies, assaults, burglaries, murders, and attempted murders.[44] Even though marijuana storefront businesses do not currently exist in the City of Monterey Park, California, it issued a moratorium on them after studying the issue in August of 2006.[45] After allowing these establishments to operate within its borders, the City of West Hollywood, California passed a similar moratorium. The moratorium was "prompted by incidents of armed burglary at some of the city's eight existing pot stores and complaints from neighbors about increased pedestrian and vehicle traffic and noise . . . ."[46]

C. TRAFFIC, NOISE, AND DRUG DEALING

Increased noise and pedestrian traffic, including nonresidents in pursuit of marijuana, and out of area criminals in search of prey, are commonly encountered just outside marijuana dispensaries,[47] as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marijuana centers regularly attract marijuana growers, drug users, and drug traffickers.[48] Sharing just purchased marijuana outside dispensaries also regularly takes place.[49]

Rather than the "seriously ill," for whom medical marijuana was expressly intended,[50] "'perfectly healthy' young people frequenting dispensaries" are a much more common sight.[51] Patient records seized by law enforcement officers from dispensaries during raids in San Diego County, California in December of 2005 "showed that 72 percent of patients were between 17 and 40 years old . . . ."[52] Said one admitted marijuana trafficker, "The people I deal with are the same faces I was dealing with 12 years ago but now, because of Senate Bill 420, they are supposedly legit. I can totally see why cops are bummed."[53]

Reportedly, a security guard sold half a pound of marijuana to an undercover officer just outside a dispensary in Morro Bay, California.[54] And, the mere presence of marijuana dispensaries encourages illegal growers to plant, cultivate, and transport ever more marijuana, in order to supply and sell their crops to these storefront operators in the thriving medical marijuana dispensary market, so that the national domestic marijuana yield has been estimated to be 35.8 billion dollars, of which a 13.8 billion dollar share is California grown.[55] It is a big business. And, although the operators of some dispensaries will claim that they only accept monetary contributions for the products they

dispense, and do not sell marijuana, a patron will not receive any marijuana until an amount of money acceptable to the dispensary has changed hands.

D. ORGANIZED CRIME, MONEY LAUNDERING, AND FIREARMS VIOLATIONS

Increasingly, reports have been surfacing about organized crime involvement in the ownership and operation of marijuana dispensaries, including Asian and other criminal street gangs and at least one member of the Armenian Mafia.[56] The dispensaries or "pot clubs" are often used as a front by organized crime gangs to traffic in drugs and launder money. One such gang whose territory included San Francisco and Oakland, California reportedly ran a multi-million dollar business operating ten warehouses in which vast amounts of marijuana plants were grown.[57] Besides seizing over 9,000 marijuana plants during surprise raids on this criminal enterprise's storage facilities, federal officers also confiscated three firearms,[58] which seem to go hand in hand with medical marijuana cultivation and dispensaries.[59]

Marijuana storefront businesses have allowed criminals to flourish in California. In the summer of 2007, the City of San Diego cooperated with federal authorities and served search warrants on several marijuana dispensary locations. In addition to marijuana, many weapons were recovered, including a stolen handgun and an M-16 assault rifle.[60] The National Drug Intelligence Center reports that marijuana growers are employing armed guards, using explosive booby traps, and murdering people to shield their crops. Street gangs of all national origins are involved in transporting and distributing marijuana to meet the ever increasing demand for the drug.[61] Active Asian gangs have included members of Vietnamese organized crime syndicates who have migrated from Canada to buy homes throughout the United States to use as grow houses.[62]

Some or all of the processed harvest of marijuana plants nurtured in these homes then wind up at storefront marijuana dispensaries owned and operated by these gangs. Storefront marijuana businesses are very dangerous enterprises that thrive on ancillary grow operations.

Besides fueling marijuana dispensaries, some monetary proceeds from the sale of harvested marijuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal business operations like prostitution, extortion, and drug trafficking.[63] Money from residential grow operations is also sometimes traded by criminal gang members for firearms, and used to buy drugs, personal vehicles, and additional houses for more grow operations,[64] and along with the illegal income derived from large-scale organized crime-related marijuana production operations comes widespread income tax evasion.[65]

E. POISONINGS

Another social problem somewhat unique to marijuana dispensaries is poisonings, both intentional and unintentional. On August 16, 2006, the Los Angeles Police Department received two such reports. One involved a security guard who ate a piece of cake extended to him from an operator of a marijuana clinic as a "gift," and soon afterward felt dizzy and disoriented.[66] The second incident concerned a UPS driver who experienced similar symptoms after accepting and eating a cookie given to him by an operator of a different marijuana clinic.[67]

OTHER ADVERSE SECONDARY IMPACTS IN THE IMMEDIATE VICINITY OF DISPENSARIES

Other adverse secondary impacts from the operation of marijuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marijuana to arriving patrons; marijuana smoking in public 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; an 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; an increase in traffic accidents and driving under the influence arrests in which marijuana is implicated; and the failure of marijuana dispensary operators to report robberies to police.[68]

SECONDARY ADVERSE IMPACTS IN THE COMMUNITY AT LARGE

A. UNJUSTIFIED AND FICTITIOUS PHYSICIAN RECOMMENDATIONS

California's legal requirement under California Health and Safety Code section 11362.5 that a physician's recommendation is required for a patient or caregiver to possess medical marijuana has resulted in other undesirable outcomes: wholesale issuance of recommendations by unscrupulous physicians seeking a quick buck, and the proliferation of forged or fictitious physician recommendations. Some doctors link up with a marijuana dispensary and take up temporary residence in a local hotel room where they advertise their appearance in advance, and pass out medical marijuana use recommendations to a line of "patients" at "about $150 a pop."[69] Other individuals just make up their own phony doctor recommendations,[70] which are seldom, if ever, scrutinized by dispensary employees for authenticity. Undercover DEA agents sporting fake medical marijuana recommendations were readily able to purchase marijuana from a clinic.[71] Far too often, California's medical marijuana law is used as a smokescreen for healthy pot users to get their desired drug, and for proprietors of marijuana dispensaries to make money off them, without suffering any legal repercussions.[72]

On March 11, 2009, the Osteopathic Medical Board of California adopted the proposed decision revoking Dr. Alfonso Jimenez's Osteopathic Physician's and Surgeon's Certificate and ordering him to pay $74,323.39 in cost recovery. Dr. Jimenez operated multiple marijuana clinics and advertised his services extensively on the Internet. Based on information obtained from raids on marijuana dispensaries in San Diego, in May of 2006, the San Diego Police Department ran two undercover operations on Dr. Jimenez's clinic in San Diego. In January of 2007, a second undercover operation was conducted by the Laguna Beach Police Department at Dr. Jimenez's clinic in Orange County. Based on the results of the undercover operations, the Osteopathic Medical Board charged Dr. Jimenez with gross negligence and repeated negligent acts in the treatment of undercover operatives posing as patients. After a six-day hearing, the Administrative Law Judge (ALJ) issued her decision finding that Dr. Jimenez violated the standard of care by committing gross negligence and repeated negligence in care, treatment, and management of patients when he, among other things, issued medical marijuana recommendations to the undercover agents without conducting adequate medical examinations, failed to gain proper informed consent, and failed to consult with any primary care and/or treating physicians or obtain and review prior medical records before issuing medical marijuana recommendations. The ALJ also found Dr. Jimenez engaged in dishonest behavior by preparing false and/or misleading medical records and disseminating false and misleading advertising to the public, including representing himself as a "Cannabis Specialist" and "Qualified Medical Marijuana Examiner" when no such formal specialty or qualification existed. Absent any

requested administrative agency reconsideration or petition for court review, the decision was to become effective April 24, 2009.

B. PROLIFERATION OF GROW HOUSES IN RESIDENTIAL AREAS

In recent years the proliferation of grow houses in residential neighborhoods has exploded. This phenomenon is country wide, and ranges from the purchase for purpose of marijuana grow operations of small dwellings to "high priced McMansions . . . ."[73] Mushrooming residential marijuana grow operations have been detected in California, Connecticut, Florida, Georgia, New Hampshire, North Carolina, Ohio, South Carolina, and Texas.[74] In 2007 alone, such illegal operations were detected and shut down by federal and state law enforcement officials in 41 houses in California, 50 homes in Florida, and 11 homes in New Hampshire.[75] Since then, the number of residences discovered to be so impacted has increased exponentially. Part of this recent influx of illicit residential grow operations is because the "THC-rich 'B.C. bud' strain" of marijuana originally produced in British Columbia "can be grown only in controlled indoor environments," and the Canadian market is now reportedly saturated with the product of "competing Canadian gangs," often Asian in composition or outlaw motorcycle gangs like the Hells Angels.[76] Typically, a gutted house can hold about 1,000 plants that will each yield almost half a pound of smokable marijuana; this collectively nets about 500 pounds of usable marijuana per harvest, with an average of three to four harvests per year.[77] With a street value of $3,000 to $5,000 per pound" for high-potency marijuana, and such multiple harvests, "a successful grow house can bring in between $4.5 million and $10 million a year . . . ."[78] The high potency of hydroponically grown marijuana can command a price as much as six times higher than commercial grade marijuana.[79]

C. LIFE SAFETY HAZARDS CREATED BY GROW HOUSES

In Humboldt County, California, structure fires caused by unsafe indoor marijuana grow operations have become commonplace. The city of Arcata, which sports four marijuana dispensaries, was the site of a house fire in which a fan had fallen over and ignited a fire; it had been turned into a grow house by its tenant. Per Arcata Police Chief Randy Mendosa, altered and makeshift "no code" electrical service connections and overloaded wires used to operate high-powered grow lights and fans are common causes of the fires. Large indoor marijuana growing operations can create such excessive draws of electricity that PG&E power pole transformers are commonly blown. An average 1,500-square-foot tract house used for growing marijuana can generate monthly electrical bills from $1,000 to $3,000 per month. From an environmental standpoint, the carbon footprint from greenhouse gas emissions created by large indoor marijuana grow operations should be a major concern for every community in terms of complying with Air Board AB-32 regulations, as well as other greenhouse gas reduction policies. Typically, air vents are cut into roofs, water seeps into carpeting, windows are blacked out, holes are cut in floors, wiring is jury-rigged, and electrical circuits are overloaded to operate grow lights and other apparatus. When fires start, they spread quickly.

The May 31, 2008 edition of the *Los Angeles Times* reported, "Law enforcement officials estimate that as many as 1,000 of the 7,500 homes in this Humboldt County community are being used to cultivate marijuana, slashing into the housing stock, spreading building-safety problems and sowing neighborhood discord." Not surprisingly, in this bastion of liberal pot possession rules that authorized the cultivation of up to 99 plants for medicinal purpose, most structural fires in the community of Arcata have been of late associated with marijuana cultivation.[80] Chief of Police Mendosa clarified that the actual number of marijuana grow houses in Arcata has been an ongoing subject of public debate. Mendosa added, "We know there are numerous grow houses in almost every neighborhood in and around the city, which has been the source of constant citizen complaints." House fires caused by

grower-installed makeshift electrical wiring or tipped electrical fans are now endemic to Humboldt County.[81]

Chief Mendosa also observed that since marijuana has an illicit street value of up to $3,000 per pound, marijuana grow houses have been susceptible to violent armed home invasion robberies. Large-scale marijuana grow houses have removed significant numbers of affordable houses from the residential rental market. When property owners discover their rentals are being used as grow houses, the residences are often left with major structural damage, which includes air vents cut into roofs and floors, water damage to floors and walls, and mold. The June 9, 2008 edition of the *New York Times* shows an unidentified Arcata man tending his indoor grow; the man claimed he can make $25,000 every three months by selling marijuana grown in the bedroom of his rented house.[82] Claims of ostensible medical marijuana growing pursuant to California's medical marijuana laws are being advanced as a mostly false shield in an attempt to justify such illicit operations.

Neither is fire an uncommon occurrence at grow houses elsewhere across the nation. Another occurred not long ago in Holiday, Florida.[83] To compound matters further, escape routes for firefighters are often obstructed by blocked windows in grow houses, electric wiring is tampered with to steal electricity, and some residences are even booby-trapped to discourage and repel unwanted intruders.[84]

D. INCREASED ORGANIZED GANG ACTIVITIES

Along with marijuana dispensaries and the grow operations to support them come members of organized criminal gangs to operate and profit from them. Members of an ethnic Chinese drug gang were discovered to have operated 50 indoor grow operations in the San Francisco Bay area, while Cuban-American crime organizations have been found to be operating grow houses in Florida and elsewhere in the South. A Vietnamese drug ring was caught operating 19 grow houses in Seattle and Puget Sound, Washington.[85] In July of 2008, over 55 Asian gang members were indicted for narcotics trafficking in marijuana and ecstasy, including members of the Hop Sing Gang that had been actively operating marijuana grow operations in Elk Grove and elsewhere in the vicinity of Sacramento, California.[86]

E. EXPOSURE OF MINORS TO MARIJUANA

Minors who are exposed to marijuana at dispensaries or residences where marijuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it. In grow houses, children are exposed to dangerous fire and health conditions that are inherent in indoor grow operations.[87] Dispensaries also sell marijuana to minors.[88]

F. IMPAIRED PUBLIC HEALTH

Indoor marijuana grow operations emit a skunk-like odor,[89] and foster generally unhealthy conditions like allowing chemicals and fertilizers to be placed in the open, an increased carbon dioxide level within the grow house, and the accumulation of mold, [90] all of which are dangerous to any children or adults who may be living in the residence,[91] although many grow houses are uninhabited.

G. LOSS OF BUSINESS TAX REVENUE

When business suffers as a result of shoppers staying away on account of traffic, blight, crime, and the undesirability of a particular business district known to be frequented by drug users and traffickers, and organized criminal gang members, a city's tax revenues necessarily drop as a direct consequence.

H. DECREASED QUALITY OF LIFE IN DETERIORATING NEIGHBORHOODS, BOTH BUSINESS AND RESIDENTIAL

Marijuana dispensaries bring in the criminal element and loiterers, which in turn scare off potential business patrons of nearby legitimate businesses, causing loss of revenues and deterioration of the affected business district. Likewise, empty homes used as grow houses emit noxious odors in residential neighborhoods, project irritating sounds of whirring fans,[92] and promote the din of vehicles coming and going at all hours of the day and night. Near harvest time, rival growers and other uninvited enterprising criminals sometimes invade grow houses to beat "clip crews" to the site and rip off mature plants ready for harvesting. As a result, violence often erupts from confrontations in the affected residential neighborhood.[93]

ULTIMATE CONCLUSIONS REGARDING ADVERSE SECONDARY EFFECTS

On balance, any utility to medical marijuana patients in care giving and convenience that marijuana dispensaries may appear to have on the surface is enormously outweighed by a much darker reality that is punctuated by the many adverse secondary effects created by their presence in communities, recounted here. These drug distribution centers have even proven to be unsafe for their own proprietors.

POSSIBLE LOCAL GOVERNMENTAL RESPONSES TO MARIJUANA DISPENSARIES

A. IMPOSED MORATORIA BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While in the process of investigating and researching the issue of licensing marijuana dispensaries, as an interim measure city councils may enact date-specific moratoria that expressly prohibit the presence of marijuana dispensaries, whether for medical use or otherwise, and prohibiting the sale of marijuana in any form on such premises, anywhere within the incorporated boundaries of the city until a specified date. Before such a moratorium's date of expiration, the moratorium may then either be extended or a city ordinance enacted completely prohibiting or otherwise restricting the establishment and operation of marijuana dispensaries, and the sale of all marijuana products on such premises.

County supervisors can do the same with respect to marijuana dispensaries sought to be established within the unincorporated areas of a county. 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 a novel approach, the City of Arcata issued a moratorium on any new dispensaries in the downtown area, based on no agricultural activities being permitted to occur there.[94]

B. IMPOSED BANS BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While the Compassionate Use Act of 1996 permits seriously ill persons to legally obtain and use marijuana for medical purposes upon a physician's recommendation, it is silent on marijuana dispensaries and does not expressly authorize the sale of marijuana to patients or primary caregivers.

Neither Proposition 215 nor Senate Bill 420 specifically authorizes the dispensing of marijuana in any form from a storefront business. And, no state statute presently exists that expressly permits the licensing or operation of marijuana dispensaries.[95] Consequently, approximately 39 California cities, including the Cities of Concord and San Pablo, and 2 counties have prohibited marijuana dispensaries within their respective geographical boundaries, while approximately 24 cities, including the City of Martinez, and 7 counties have allowed such dispensaries to do business within their jurisdictions. Even the complete prohibition of marijuana dispensaries within a given locale cannot be found to run afoul of current California law with respect to permitted use of marijuana for medicinal purposes, so long as the growing or use of medical marijuana by a city or county resident in conformance with state law is not proscribed.[96]

In November of 2004, the City of Brampton in Ontario, Canada passed The Grow House Abatement By-law, which authorized the city council to appoint inspectors and local police officers to inspect suspected grow houses and render safe hydro meters, unsafe wiring, booby traps, and any violation of the Fire Code or Building Code, and remove discovered controlled substances and ancillary equipment designed to grow and manufacture such substances, at the involved homeowner's cost.[97] And, after state legislators became appalled at the proliferation of for-profit residential grow operations, the State of Florida passed the Marijuana Grow House Eradication act (House Bill 173) in June of 2008. The governor signed this bill into law, making owning a house for the purpose of cultivating, packaging, and distributing marijuana a third-degree felony; growing 25 or more marijuana plants a second-degree felony; and growing "25 or more marijuana plants in a home with children present" a first-degree felony.[98] It has been estimated that approximately 17,500 marijuana grow operations were active in late 2007.[99] To avoid becoming a dumping ground for organized crime syndicates who decide to move their illegal grow operations to a more receptive legislative environment, California and other states might be wise to quickly follow suit with similar bills, for it may already be happening.[100]

C. IMPOSED RESTRICTED ZONING AND OTHER REGULATION BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

If so inclined, rather than completely prohibit marijuana dispensaries, through their zoning power city and county officials have the authority to restrict owner operators to locate and operate so-called "medical marijuana dispensaries" in prescribed geographical areas of a city or designated unincorporated areas of a county, and require them to meet prescribed licensing requirements before being allowed to do so. This is a risky course of action though for would-be dispensary operators, and perhaps lawmakers too, since federal authorities do not recognize any lawful right for the sale, purchase, or use of marijuana for medical use or otherwise anywhere in the United States, including California. Other cities and counties have included as a condition of licensure for dispensaries that the operator shall "violate no federal or state law," which puts any applicant in a "Catch-22" situation since to federal authorities any possession or sale of marijuana is automatically a violation of federal law.

Still other municipalities have recently enacted or revised comprehensive ordinances that address a variety of medical marijuana issues. For example, according to the City of Arcata Community

Development Department in Arcata, California, in response to constant citizen complaints from what had become an extremely serious community problem, the Arcata City Council revised its Land Use Standards for Medical Marijuana Cultivation and Dispensing. In December of 2008, City of Arcata Ordinance #1382 was enacted. It includes the following provisions:

"Categories:

1. Personal Use
2. Cooperatives or Collectives

Medical Marijuana for Personal Use: An individual qualified patient shall be allowed to cultivate medical marijuana within his/her private residence in conformance with the following standards:

1. Cultivation area shall not exceed 50 square feet and not exceed ten feet (10') in height.
    a. Cultivation lighting shall not exceed 1200 watts;
    b. Gas products (CO_2, butane, etc.) for medical marijuana cultivation or processing is prohibited.
    c. Cultivation and sale is prohibited as a Home Occupation (sale or dispensing is prohibited).
    d. Qualified patient shall reside in the residence where the medical marijuana cultivation occurs;
    e. Qualified patient shall not participate in medical marijuana cultivation in any other residence.
    f. Residence kitchen, bathrooms, and primary bedrooms shall not be used primarily for medical marijuana cultivation;
    g. Cultivation area shall comply with the California Building Code § 1203.4 Natural Ventilation or § 402.3 Mechanical Ventilation.
    h. The medical marijuana cultivation area shall not adversely affect the health or safety of the nearby residents.
2. City Zoning Administrator my approve up to 100 square foot:
    a. Documentation showing why the 50 square foot cultivation area standard is not feasible.
    b. Include written permission from the property owner.
    c. City Building Official must inspect for California Building Code and Fire Code.
    d. At a minimum, the medical marijuana cultivation area shall be constructed with a 1-hour firewall assembly of green board.
    e. Cultivation of medical marijuana for personal use is limited to detached single family residential properties, or the medical marijuana cultivation area shall be limited to a garage or self-contained outside accessory building that is secured, locked, and fully enclosed.

Medical Marijuana Cooperatives or Collectives.

1. Allowed with a Conditional Use Permit.
2. In Commercial, Industrial, and Public Facility Zoning Districts.
3. Business form must be a cooperative or collective.
4. Existing cooperative or collective shall be in full compliance within one year.
5. Total number of medical marijuana cooperatives or collectives is limited to four and ultimately two.
6. Special consideration if located within
    a. A 300 foot radius from any existing residential zoning district,
    b. Within 500 feet of any other medical marijuana cooperative or collective.

c. Within 500 feet from any existing public park, playground, day care, or school.

7. Source of medical marijuana.
   a. Permitted Cooperative or Collective. On-site medical marijuana cultivation shall not exceed twenty-five (25) percent of the total floor area, but in no case greater than 1,500 square feet and not exceed ten feet (10') in height.
   b. Off-site Permitted Cultivation. Use Permit application and be updated annually.
   c. Qualified Patients. Medical marijuana acquired from an individual qualified patient shall received no monetary remittance, and the qualified patient is a member of the medical marijuana cooperative or collective. Collective or cooperative may credit its members for medical marijuana provided to the collective or cooperative, which they may allocate to other members.
8. Operations Manual at a minimum include the following information:
   a. Staff screening process including appropriate background checks.
   b. Operating hours.
   c. Site, floor plan of the facility.
   d. Security measures located on the premises, including but not limited to, lighting, alarms, and automatic law enforcement notification.
   e. Screening, registration and validation process for qualified patients.
   f. Qualified patient records acquisition and retention procedures.
   g. Process for tracking medical marijuana quantities and inventory controls including on-site cultivation, processing, and/or medical marijuana products received from outside sources.
   h. Measures taken to minimize or offset energy use from the cultivation or processing of medical marijuana.
   i. Chemicals stored, used and any effluent discharged into the City's wastewater and/or storm water system.
9. Operating Standards**.**
   a. No dispensing medical marijuana more than twice a day.
   b. Dispense to an individual qualified patient who has a valid, verified physician's recommendation. The medical marijuana cooperative or collective shall verify that the physician's recommendation is current and valid.
   c. Display the client rules and/or regulations at each building entrance.
   d. Smoking, ingesting or consuming medical marijuana on the premises or in the vicinity is prohibited.
   e. Persons under the age of eighteen (18) are precluded from entering the premises.
   f. No on-site display of marijuana plants.
   g. No distribution of live plants, starts and clones on through Use Permit.
   h. Permit the on-site display or sale of marijuana paraphernalia only through the Use Permit.
   i. Maintain all necessary permits, and pay all appropriate taxes. Medical marijuana cooperatives or collectives shall also provide invoices to vendors to ensure vendor's tax liability responsibility;
   j. Submit an "Annual Performance Review Report" which is intended to identify effectiveness of the approved Use Permit, Operations Manual, and Conditions of Approval, as well as the identification and implementation of additional procedures as deemed necessary.
   k. Monitoring review fees shall accompany the "Annual Performance Review Report" for costs associated with the review and approval of the report.
10. Permit Revocation or Modification**.** A use permit may be revoked or modified for non-compliance with one or more of the items described above."

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LIABILITY ISSUES

With respect to issuing business licenses to marijuana storefront facilities a very real issue has arisen: counties and cities are arguably aiding and abetting criminal violations of federal law. Such actions clearly put the counties permitting these establishments in very precarious legal positions. Aiding and abetting a crime occurs when someone commits a crime, the person aiding that crime knew the criminal offender intended to commit the crime, and the person aiding the crime intended to assist the criminal offender in the commission of the crime.

The legal definition of aiding and abetting could be applied to counties and cities allowing marijuana facilities to open. A county that has been informed about the *Gonzales v. Raich* decision knows that all marijuana activity is federally illegal. Furthermore, such counties know that individuals involved in the marijuana business are subject to federal prosecution. When an individual in California cultivates, possesses, transports, or uses marijuana, he or she is committing a federal crime.

A county issuing a business license to a marijuana facility knows that the people there are committing federal crimes. The county also knows that those involved in providing and obtaining marijuana are intentionally violating federal law.

This very problem is why some counties are re-thinking the presence of marijuana facilities in their communities. There is a valid fear of being prosecuted for aiding and abetting federal drug crimes. Presently, two counties have expressed concern that California's medical marijuana statutes have placed them in such a precarious legal position. Because of the serious criminal ramifications involved in issuing business permits and allowing storefront marijuana businesses to operate within their borders, San Diego and San Bernardino Counties filed consolidated lawsuits against the state seeking to prevent the State of California from enforcing its medical marijuana statutes which potentially subject them to criminal liability, and squarely asserting that California medical marijuana laws are preempted by federal law in this area. After California's medical marijuana laws were all upheld at the trial level, California's Fourth District Court of Appeal found that the State of California could mandate counties to adopt and enforce a voluntary medical marijuana identification card system, and the appellate court bypassed the preemption issue by finding that San Diego and San Bernardino Counties lacked standing to raise this challenge to California's medical marijuana laws. Following this state appellate court decision, independent petitions for review filed by the two counties were both denied by the California Supreme Court.

Largely because of the quandary that county and city peace officers in California face in the field when confronted with alleged medical marijuana with respect to enforcement of the total federal criminal prohibition of all marijuana, and state exemption from criminal penalties for medical marijuana users and caregivers, petitions for a writ of certiorari were then separately filed by the two counties seeking review of this decision by the United States Supreme Court in the consolidated cases of *County of San Diego, County of San Bernardino, and Gary Penrod, as Sheriff of the County of San Bernardino v. San Diego Norml, State of California, and Sandra Shewry, Director of the California Department of Health Services in her official capacity,* Ct.App. Case No. D-5-333.) The High Court has requested the State of California and other interested parties to file responsive briefs to the two counties' and Sheriff Penrod's writ petitions before it decides whether to grant or deny review of these consolidated cases. The petitioners would then be entitled to file a reply to any filed response. It is anticipated that the U.S. Supreme Court will formally grant or deny review of these consolidated cases in late April or early May of 2009.

In another case, *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, although the federal preemption issue was not squarely raised or addressed in its decision, California's Fourth District Court of Appeal found that public policy considerations allowed a city standing to challenge a state trial court's order directing the return by a city police department of seized medical marijuana to a person determined to be a patient. After the court-ordered return of this federally banned substance was upheld at the intermediate appellate level, and not accepted for review by the California Supreme Court, a petition for a writ of certiorari was filed by the City of Garden Grove to the U.S. Supreme Court to consider and reverse the state appellate court decision. But, that petition was also denied. However, the case of *People v. Kelly* (2008) 163 Cal.App.4th 124—in which a successful challenge was made to California's Medical Marijuana Program's maximum amounts of marijuana and marijuana plants permitted to be possessed by medical marijuana patients (Cal. H&S Code sec. 11362.77 *et seq.*), which limits were found at the court of appeal level to be without legal authority for the state to impose—has been accepted for review by the California Supreme Court on the issue of whether this law was an improper amendment to Proposition 215's Compassionate Use Act of 1996.

A SAMPLING OF EXPERIENCES WITH MARIJUANA DISPENSARIES

1. MARIJUANA DISPENSARIES-THE SAN DIEGO STORY

After the passage of Proposition 215 in 1996, law enforcement agency representatives in San Diego, California met many times to formulate a comprehensive strategy of how to deal with cases that may arise out of the new law. In the end it was decided to handle the matters on a case-by-case basis. In addition, questionnaires were developed for patient, caregiver, and physician interviews. At times patients without sales indicia but large grows were interviewed and their medical records reviewed in making issuing decisions. In other cases where sales indicia and amounts supported a finding of sales the cases were pursued. At most, two cases a month were brought for felony prosecution.

In 2003, San Diego County's newly elected District Attorney publicly supported Prop. 215 and wanted her newly created Narcotics Division to design procedures to ensure patients were not caught up in case prosecutions. As many already know, law enforcement officers rarely arrest or seek prosecution of a patient who merely possesses personal use amounts. Rather, it is those who have sales amounts in product or cultivation who are prosecuted. For the next two years the District Attorney's Office proceeded as it had before. But, on the cases where the patient had too many plants or product but not much else to show sales—the DDAs assigned to review the case would interview and listen to input to respect the patient's and the DA's position. Some cases were rejected and others issued but the case disposition was often generous and reflected a "sin no more" view.

All of this changed after the passage of SB 420. The activists and pro-marijuana folks started to push the envelope. Dispensaries began to open for business and physicians started to advertise their availability to issue recommendations for the purchase of medical marijuana. By spring of 2005 the first couple of dispensaries opened up—but they were discrete. This would soon change. By that summer, 7 to 10 dispensaries were open for business, and they were selling marijuana openly. In fact, the local police department was doing a small buy/walk project and one of its target dealers said he was out of pot but would go get some from the dispensary to sell to the undercover officer (UC); he did. It was the proliferation of dispensaries and ancillary crimes that prompted the San Diego Police Chief (the Chief was a Prop. 215 supporter who sparred with the Fresno DEA in his prior job over this issue) to authorize his officers to assist DEA.

The Investigation

San Diego DEA and its local task force (NTF) sought assistance from the DA's Office as well as the U.S. Attorney's Office. Though empathetic about being willing to assist, the DA's Office was not sure how prosecutions would fare under the provisions of SB 420. The U.S. Attorney had the easier road but was noncommittal. After several meetings it was decided that law enforcement would work on using undercover operatives (UCs) to buy, so law enforcement could see exactly what was happening in the dispensaries.

The investigation was initiated in December of 2005, after NTF received numerous citizen complaints regarding the crime and traffic associated with "medical marijuana dispensaries." The City of San Diego also saw an increase in crime related to the marijuana dispensaries. By then approximately 20 marijuana dispensaries had opened and were operating in San Diego County, and investigations on 15 of these dispensaries were initiated.

During the investigation, NTF learned that all of the business owners were involved in the transportation and distribution of large quantities of marijuana, marijuana derivatives, and marijuana food products. In addition, several owners were involved in the cultivation of high grade marijuana. The business owners were making significant profits from the sale of these products and not properly reporting this income.

Undercover Task Force Officers (TFO's) and SDPD Detectives were utilized to purchase marijuana and marijuana food products from these businesses. In December of 2005, thirteen state search warrants were executed at businesses and residences of several owners. Two additional follow-up search warrants and a consent search were executed the same day. Approximately 977 marijuana plants from seven indoor marijuana grows, 564.88 kilograms of marijuana and marijuana food products, one gun, and over $58,000 U.S. currency were seized. There were six arrests made during the execution of these search warrants for various violations, including outstanding warrants, possession of marijuana for sale, possession of psilocybin mushrooms, obstructing a police officer, and weapons violations. However, the owners and clerks were not arrested or prosecuted at this time—just those who showed up with weapons or product to sell.

Given the fact most owners could claim mistake of law as to selling (though not a legitimate defense, it could be a jury nullification defense) the DA's Office decided not to file cases at that time. It was hoped that the dispensaries would feel San Diego was hostile ground and they would do business elsewhere. Unfortunately this was not the case. Over the next few months seven of the previously targeted dispensaries opened, as well as a slew of others. Clearly prosecutions would be necessary.

To gear up for the re-opened and new dispensaries prosecutors reviewed the evidence and sought a second round of UC buys wherein the UC would be buying for themselves and they would have a second UC present at the time acting as UC1's caregiver who also would buy. This was designed to show the dispensary was not the caregiver. There is no authority in the law for organizations to act as primary caregivers. Caregivers must be individuals who care for a marijuana patient. A primary caregiver is defined by Proposition 215, as codified in H&S Code section 11362.5(e), as, "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 goal was to show that the stores were only selling marijuana, and not providing care for the hundreds who bought from them.

In addition to the caregiver-controlled buys, another aim was to put the whole matter in perspective for the media and the public by going over the data that was found in the raided dispensary records, as well as the crime statistics. An analysis of the December 2005 dispensary records showed a breakdown of the purported illness and youthful nature of the patients. The charts and other PR aspects played out after the second take down in July of 2006.

The final attack was to reveal the doctors (the gatekeepers for medical marijuana) for the fraud they were committing. UCs from the local PD went in and taped the encounters to show that the pot docs did not examine the patients and did not render care at all; rather they merely sold a medical MJ recommendation whose duration depended upon the amount of money paid.

In April of 2006, two state and two federal search warrants were executed at a residence and storage warehouse utilized to cultivate marijuana. Approximately 347 marijuana plants, over 21 kilograms of marijuana, and $2,855 U.S. currency were seized.

Due to the pressure from the public, the United States Attorney's Office agreed to prosecute the owners of the businesses with large indoor marijuana grows and believed to be involved in money laundering activities. The District Attorney's Office agreed to prosecute the owners in the other investigations.

In June of 2006, a Federal Grand Jury indicted six owners for violations of Title 21 USC, sections 846 and 841(a)(1), Conspiracy to Distribute Marijuana; sections 846 and 841(a), Conspiracy to Manufacture Marijuana; and Title 18 USC, Section 2, Aiding and Abetting.

In July of 2006, 11 state and 11 federal search warrants were executed at businesses and residences associated with members of these businesses. The execution of these search warrants resulted in the arrest of 19 people, seizure of over $190,000 in U.S. currency and other assets, four handguns, one rifle, 405 marijuana plants from seven grows, and over 329 kilograms of marijuana and marijuana food products.

Following the search warrants, two businesses reopened. An additional search warrant and consent search were executed at these respective locations. Approximately 20 kilograms of marijuana and 32 marijuana plants were seized.

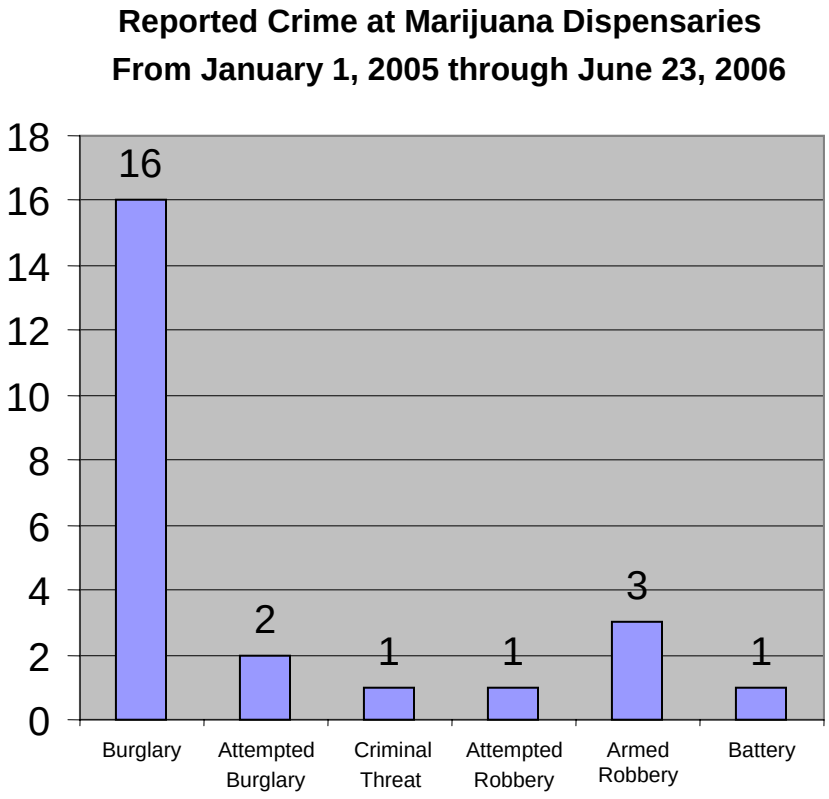
As a result, all but two of the individuals arrested on state charges have pled guilty. Several have already been sentenced and a few are still awaiting sentencing. All of the individuals indicted federally have also pled guilty and are awaiting sentencing.

After the July 2006 search warrants a joint press conference was held with the U.S. Attorney and District Attorney, during which copies of a complaint to the medical board, photos of the food products which were marketed to children, and the charts shown below were provided to the media.

Directly after these several combined actions, there were no marijuana distribution businesses operating in San Diego County. Law enforcement agencies in the San Diego region have been able to successfully dismantle these businesses and prosecute the owners. As a result, medical marijuana advocates have staged a number of protests demanding DEA allow the distribution of marijuana. The closure of these businesses has reduced crime in the surrounding areas.

The execution of search warrants at these businesses sent a powerful message to other individuals operating marijuana distribution businesses that they are in violation of both federal law **and** California law.

Press Materials:



Information showing the dispensaries attracted crime:

The marijuana dispensaries were targets of violent crimes because of the amount of marijuana, currency, and other contraband stored inside the businesses. From January 1, 2005 through June 23, 2006, 24 violent crimes were reported at marijuana dispensaries. An analysis of financial records seized from the marijuana dispensaries showed several dispensaries were grossing over $300,000 per month from selling marijuana and marijuana food products. The majority of customers purchased marijuana with cash.

Crime statistics inadequately reflect the actual number of crimes committed at the marijuana dispensaries. These businesses were often victims of robberies and burglaries, but did not report the crimes to law enforcement on account of fear of being arrested for possession of marijuana in excess of Prop. 215 guidelines. NTF and the San Diego Police Department (SDPD) received numerous citizen complaints regarding every dispensary operating in San Diego County.

Because the complaints were received by various individuals, the exact number of complaints was not recorded. The following were typical complaints received:

- high levels of traffic going to and from the dispensaries
- people loitering in the parking lot of the dispensaries
- people smoking marijuana in the parking lot of the dispensaries

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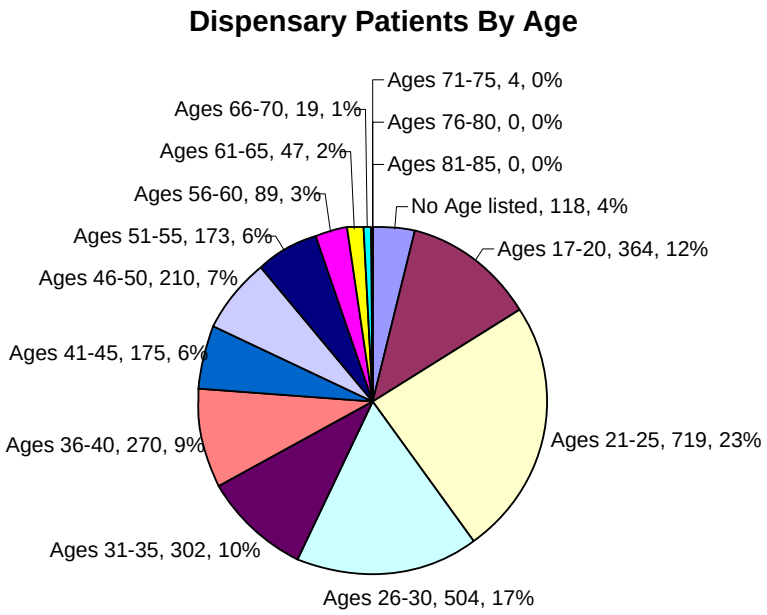
- vandalism near dispensaries
- threats made by dispensary employees to employees of other businesses
- citizens worried they may become a victim of crime because of their proximity to dispensaries

In addition, the following observations (from citizen activists assisting in data gathering) were made about the marijuana dispensaries:

- Identification was not requested for individuals who looked under age 18
- Entrance to business was not refused because of lack of identification
- Individuals were observed loitering in the parking lots
- Child-oriented businesses and recreational areas were situated nearby
- Some businesses made no attempt to verify a submitted physician's recommendation



An analysis of patient records seized during search warrants at several dispensaries show that 52% of the customers purchasing marijuana were between the ages of 17 to 30. 63% of primary caregivers purchasing marijuana were between the ages of 18 through 30. Only 2.05% of customers submitted a physician's recommendation for AIDS, glaucoma, or cancer.

Why these businesses were deemed to be criminal--not compassionate:

The medical marijuana businesses were deemed to be criminal enterprises for the following reasons:

- Many of the business owners had histories of drug and violence-related arrests.
- The business owners were street-level marijuana dealers who took advantage of Prop. 215 in an attempt to legitimize marijuana sales for profit.
- Records, or lack of records, seized during the search warrants showed that all the owners were not properly reporting income generated from the sales of marijuana. Many owners were involved in money laundering and tax evasion.
- The businesses were selling to individuals without serious medical conditions.
- There are no guidelines on the amount of marijuana which can be sold to an individual. For

example, an individual with a physician's recommendation can go to as many marijuana distribution businesses and purchase as much marijuana as he/she wants.

- California law allows an individual to possess 6 mature or 12 immature plants per qualified person. However, the San Diego Municipal Code states a "caregiver" can only provide care to 4 people, including themselves; this translates to 24 mature or 48 immature plants total. Many of these dispensaries are operating large marijuana grows with far more plants than allowed under law. Several of the dispensaries had indoor marijuana grows inside the businesses, with mature and/or immature marijuana plants over the limits.
- State law allows a qualified patient or primary caregiver to possess no more than eight ounces of dried marijuana per qualified patient. However, the San Diego Municipal Code allows primary caregivers to possess no more than two pounds of processed marijuana. Under either law, almost every marijuana dispensary had over two pounds of processed marijuana during the execution of the search warrants.
- Some marijuana dispensaries force customers to sign forms designating the business as their primary caregiver, in an attempt to circumvent the law.

2. EXPERIENCES WITH MARIJUANA DISPENSARIES IN RIVERSIDE COUNTY

There were some marijuana dispensaries operating in the County of Riverside until the District Attorney's Office took a very aggressive stance in closing them. In Riverside, anyone that is not a "qualified patient" or "primary caregiver" under the Medical Marijuana Program Act who possesses, sells, or transports marijuana is being prosecuted.

Several dispensary closures illustrate the impact this position has had on marijuana dispensaries. For instance, the Palm Springs Caregivers dispensary (also known as Palm Springs Safe Access Collective) was searched after a warrant was issued. All materials inside were seized, and it was closed down and remains closed. The California Caregivers Association was located in downtown Riverside. Very shortly after it opened, it was also searched pursuant to a warrant and shut down. The CannaHelp dispensary was located in Palm Desert. It was searched and closed down early in 2007. The owner and two managers were then prosecuted for marijuana sales and possession of marijuana for the purpose of sale. However, a judge granted their motion to quash the search warrant and dismissed the charges. The District Attorney's Office then appealed to the Fourth District Court of Appeal. Presently, the Office is waiting for oral arguments to be scheduled.

Dispensaries in the county have also been closed by court order. The Healing Nations Collective was located in Corona. The owner lied about the nature of the business in his application for a license. The city pursued and obtained an injunction that required the business to close. The owner appealed to the Fourth District Court of Appeal, which ruled against him. (*City of Corona v. Ronald Naulls et al.*, Case No. E042772.)

3. MEDICAL MARIJUANA DISPENSARY ISSUES IN CONTRA COSTA COUNTY CITIES AND IN OTHER BAY AREA COUNTIES

Several cities in Contra Costa County, California have addressed this issue by either banning dispensaries, enacting moratoria against them, regulating them, or taking a position that they are simply not a permitted land use because they violate federal law. Richmond, El Cerrito, San Pablo, Hercules, and Concord have adopted permanent ordinances banning the establishment of marijuana dispensaries. Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill have imposed moratoria against dispensaries. Clayton, San Ramon, and Walnut Creek have not taken any formal action regarding the establishment of marijuana dispensaries but have indicated that marijuana dispensaries

are not a permitted use in any of their zoning districts as a violation of federal law. Martinez has adopted a permanent ordinance regulating the establishment of marijuana dispensaries.

The Counties of Alameda, Santa Clara, and San Francisco have enacted permanent ordinances regulating the establishment of marijuana dispensaries. The Counties of Solano, Napa, and Marin have enacted neither regulations nor bans. A brief overview of the regulations enacted in neighboring counties follows.

A. Alameda County

Alameda County has a nineteen-page regulatory scheme which allows the operation of three permitted dispensaries in unincorporated portions of the county. Dispensaries can only be located in commercial or industrial zones, or their equivalent, and may not be located within 1,000 feet of other dispensaries, schools, parks, playgrounds, drug recovery facilities, or recreation centers. Permit issuance is controlled by the Sheriff, who is required to work with the Community Development Agency and the Health Care Services agency to establish operating conditions for each applicant prior to final selection. Adverse decisions can be appealed to the Sheriff and are ruled upon by the same panel responsible for setting operating conditions. That panel's decision may be appealed to the Board of Supervisors, whose decision is final (subject to writ review in the Superior Court per CCP sec. 1094.5). Persons violating provisions of the ordinance are guilty of a misdemeanor.

B. Santa Clara County

In November of 1998, Santa Clara County passed an ordinance permitting dispensaries to exist in unincorporated portions of the county with permits first sought and obtained from the Department of Public Health. In spite of this regulation, neither the County Counsel nor the District Attorney's Drug Unit Supervisor believes that Santa Clara County has had *any* marijuana dispensaries in operation at least through 2006.

The only permitted activities are the on-site cultivation of medical marijuana and the distribution of medical marijuana/medical marijuana food stuffs. No retail sales of any products are permitted at the dispensary. Smoking, ingestion or consumption is also prohibited on site. All doctor recommendations for medical marijuana must be verified by the County's Public Health Department.

C. San Francisco County

In December of 2001, the Board of Supervisors passed Resolution No. 012006, declaring San Francisco to be a "Sanctuary for Medical Cannabis." City voters passed Proposition S in 2002, directing the city to explore the possibility of establishing a medical marijuana cultivation and distribution program run by the city itself.

San Francisco dispensaries must apply for and receive a permit from the Department of Public Health. They may only operate as a collective or cooperative, as defined by California Health and Safety Code section 11362.7 (see discussion in section 4, under "California Law" above), and may only sell or distribute marijuana to members. Cultivation, smoking, and making and selling food products may be allowed. Permit applications are referred to the Departments of Planning, Building Inspection, and Police. Criminal background checks are required but exemptions could still allow the operation of dispensaries by individuals with prior convictions for violent felonies or who have had prior permits suspended or revoked. Adverse decisions can be appealed to the Director of

Public Health and the Board of Appeals. It is unclear how many dispensaries are operating in the city at this time.

D. Crime Rates in the Vicinity of MariCare

Sheriff's data have been compiled for "Calls for Service" within a half-mile radius of 127 Aspen Drive, Pacheco. However, in research conducted by the El Cerrito Police Department and relied upon by Riverside County in recently enacting its ban on dispensaries, it was recognized that not all crimes related to medical marijuana take place in or around a dispensary. Some take place at the homes of the owners, employees, or patrons. Therefore, these statistics cannot paint a complete picture of the impact a marijuana dispensary has had on crime rates.

The statistics show that the overall number of calls decreased (3,746 in 2005 versus 3,260 in 2006). However, there have been **increases** in the numbers of crimes which appear to be related to a business which is an attraction to a criminal element. Reports of commercial burglaries increased (14 in 2005, 24 in 2006), as did reports of residential burglaries (13 in 2005, 16 in 2006) and miscellaneous burglaries (5 in 2005, 21 in 2006).

Tender Holistic Care (THC marijuana dispensary formerly located on N. Buchanan Circle in Pacheco) was forcibly burglarized on June 11, 2006. $4,800 in cash was stolen, along with marijuana, hash, marijuana food products, marijuana pills, marijuana paraphernalia, and marijuana plants. The total loss was estimated to be $16,265.

MariCare was also burglarized within two weeks of opening in Pacheco. On April 4, 2006, a window was smashed after 11:00 p.m. while an employee was inside the business, working late to get things organized. The female employee called "911" and locked herself in an office while the intruder ransacked the downstairs dispensary and stole more than $200 worth of marijuana. Demetrio Ramirez indicated that since they were just moving in, there wasn't much inventory.

Reports of vehicle thefts increased (4 in 2005, 6 in 2006). Disturbance reports increased in nearly all categories (Fights: 5 in 2005, 7 in 2006; Harassment: 4 in 2005, 5 in 2006; Juveniles: 4 in 2005, 21 in 2006; Loitering: 11 in 2005, 19 in 2006; Verbal: 7 in 2005, 17 in 2006). Littering reports increased from 1 in 2005 to 5 in 2006. Public nuisance reports increased from 23 in 2005 to 26 in 2006.

These statistics reflect the complaints and concerns raised by nearby residents. Residents have reported to the District Attorney's Office, as well as to Supervisor Piepho's office, that when calls are made to the Sheriff's Department, the offender has oftentimes left the area before law enforcement can arrive. This has led to less reporting, as it appears to local residents to be a futile act and residents have been advised that law enforcement is understaffed and cannot always timely respond to all calls for service. As a result, Pacheco developed a very active, visible Neighborhood Watch program. The program became much more active in 2006, according to Doug Stewart. Volunteers obtained radios and began frequently receiving calls directly from local businesses and residents who contacted them **instead** of law enforcement. It is therefore significant that there has still been an increase in many types of calls for law enforcement service, although the overall number of calls has decreased.

Other complaints from residents included noise, odors, smoking/consuming marijuana in the area, littering and trash from the dispensary, loitering near a school bus stop and in the nearby church parking lot, observations that the primary patrons of MariCare appear to be individuals under age 25,

and increased traffic. Residents observed that the busiest time for MariCare appeared to be from 4:00 p.m. to 6:00 p.m. On a typical Friday, 66 cars were observed entering MariCare's facility; 49 of these were observed to contain additional passengers. The slowest time appeared to be from 1:00 p.m. to 3:00 p.m. On a typical Saturday, 44 cars were counted during this time, and 29 of these were observed to have additional passengers. MariCare has claimed to serve 4,000 "patients."

E. Impact of Proposed Ordinance on MedDelivery Dispensary, El Sobrante

It is the position of Contra Costa County District Attorney Robert J. Kochly that a proposed ordinance should terminate operation of the dispensary in El Sobrante because the land use of that business would be inconsistent with both state and federal law. However, the Community Development Department apparently believes that MedDelivery can remain as a "legal, non-conforming use."

F. Banning Versus Regulating Marijuana Dispensaries in Unincorporated Contra Costa County

It is simply bad public policy to allow the proliferation of any type of business which is illegal and subject to being raided by federal and/or state authorities. In fact, eight locations associated with the New Remedies dispensary in San Francisco and Alameda Counties were raided in October of 2006, and eleven Southern California marijuana clinics were raided by federal agents on January 18, 2007. The Los Angeles head of the federal Drug Enforcement Administration told CBS News after the January raids that "Today's enforcement operations show that these establishments are nothing more than drug-trafficking organizations bringing criminal activities to our neighborhoods and drugs near our children and schools." A Lafayette, California resident who owned a business that produced marijuana-laced foods and drinks for marijuana clubs was sentenced in federal court to five years and 10 months behind bars as well as a $250,000 fine. Several of his employees were also convicted in that case.

As discussed above, there is absolutely no exception to the federal prohibition against marijuana cultivation, possession, transportation, use, and distribution. Neither California's voters nor its Legislature authorized the existence or operation of marijuana dispensing businesses when given the opportunity to do so. These enterprises cannot fit themselves into the few, narrow exceptions that were created by the Compassionate Use Act and Medical Marijuana Program Act.

Further, the presence of marijuana dispensing businesses contributes substantially to the existence of a secondary market for illegal, street-level distribution of marijuana. This fact was even recognized by the United States Supreme Court: "The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." (*Gonzales v. Raich*, *supra*, 125 S.Ct. at p. 2214.)

As outlined below, clear evidence has emerged of such a secondary market in Contra Costa County.

- In September of 2004, police responded to reports of two men pointing a gun at cars in the parking lot at Monte Vista High School during an evening football game/dance. Two 19-year-old Danville residents were located in the parking lot (which was full of vehicles and pedestrians) and in possession of a silver Airsoft pellet pistol designed to replicate a

real Walther semi-automatic handgun. Marijuana, hash, and hash oil with typical dispensary packaging and labeling were also located in the car, along with a gallon bottle of tequila (1/4 full), a bong with burned residue, and rolling papers. The young men admitted to having consumed an unknown amount of tequila at the park next to the school and that they both pointed the gun at passing cars "as a joke." They fired several BBs at a wooden fence in the park when there were people in the area. The owner of the vehicle admitted that the marijuana was his and that he was **not** a medicinal marijuana user. He was able to buy marijuana from his friend "Brandon," who used a Proposition 215 card to purchase from a cannabis club in Hayward.

- In February of 2006, Concord police officers responded to a report of a possible drug sale in progress. They arrested a high school senior for two outstanding warrants as he came to buy marijuana from the cannabis club located on Contra Costa Boulevard. The young man explained that he had a cannabis club card that allowed him to purchase marijuana, and admitted that he planned to re-sell some of the marijuana to friends. He also admitted to possession of nearly 7 grams of cocaine which was recovered. A 21-year-old man was also arrested on an outstanding warrant. In his car was a marijuana grinder, a baggie of marijuana, rolling papers, cigars, and a "blunt" (hollowed out cigar filled with marijuana for smoking) with one end burned. The 21-year-old admitted that he did **not** have a physician's recommendation for marijuana.

- Also in February of 2006, a 17-year-old Monte Vista High School senior was charged with felony furnishing of marijuana to a child, after giving a 4-year-old boy a marijuana-laced cookie. The furnishing occurred on campus, during a child development class.

- In March of 2006, police and fire responded to an explosion at a San Ramon townhouse and found three young men engaged in cultivating and manufacturing "honey oil" for local pot clubs. Marijuana was also being sold from the residence. Honey oil is a concentrated form of cannabis chemically extracted from ground up marijuana with extremely volatile **butane** and a special "honey oil" extractor tube. The butane extraction operation ***exploded*** with such force that it blew the garage door partially off its hinges. Sprinklers in the residence kept the fire from spreading to the other homes in the densely packed residential neighborhood. At least one of the men was employed by Ken Estes, owner of the Dragonfly Holistic Solutions pot clubs in Richmond, San Francisco, and Lake County. They were making the "honey oil" with marijuana and butane that they brought up from one of Estes' San Diego pot clubs after it was shut down by federal agents.

- Also in March of 2006, a 16-year-old El Cerrito High School student was arrested after selling pot cookies to fellow students on campus, many of whom became ill. At least four required hospitalization. The investigation revealed that the cookies were made with a butter obtained outside a marijuana dispensary (a secondary sale). Between March of 2004 and May of 2006, the El Cerrito Police Department conducted seven investigations at the high school and junior high school, resulting in the arrest of eight juveniles for selling or possessing with intent to sell marijuana on or around the school campuses.

- In June of 2006, Moraga police officers made a traffic stop for suspected driving under the influence of alcohol. The car was seen drifting over the double yellow line separating north and southbound traffic lanes and driving in the bike lane. The 20-year-old driver denied having consumed any alcohol, as he was the "designated driver." When asked about his bloodshot, watery, and droopy eyes, the college junior explained that he had

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smoked marijuana earlier (confirmed by blood tests). The young man had difficulty performing field sobriety tests, slurred his speech, and was ultimately arrested for driving under the influence. He was in possession of a falsified California Driver's License, marijuana, hash, a marijuana pipe, a scale, and $12,288. The marijuana was in packaging from the Compassionate Collective of Alameda County, a Hayward dispensary. He explained that he buys the marijuana at "Pot Clubs," sells some, and keeps the rest. He only sells to close friends. About $3,000 to $4,000 of the cash was from playing high-stakes poker, but the rest was earned selling marijuana while a freshman at Arizona State University. The 18-year-old passenger had half an ounce of marijuana in her purse and produced a doctor's recommendation to a marijuana club in Oakland, the authenticity of which could not be confirmed.

Another significant concern is the proliferation of marijuana usage at community schools. In February of 2007, the Healthy Kids Survey for Alameda and Contra Costa Counties found that youthful substance abuse is more common in the East Bay's more affluent areas. These areas had higher rates of high school juniors who admitted having been high from drugs. The regional manager of the study found that the affluent areas had higher alcohol and marijuana use rates. *USA Today* recently reported that the percentage of 12th Grade students who said they had used marijuana has increased since 2002 (from 33.6% to 36.2% in 2005), and that marijuana was the most-used illicit drug among that age group in 2006. KSDK News Channel 5 reported that high school students are finding easy access to medical marijuana cards and presenting them to school authorities as a legitimate excuse for getting high. School Resource Officers for Monte Vista and San Ramon Valley High Schools in Danville have reported finding marijuana in prescription bottles and other packaging from Alameda County dispensaries. Marijuana has also been linked to psychotic illnesses.[101] A risk factor was found to be starting marijuana use in adolescence.

For all of the above reasons, it is advocated by District Attorney Kochly that a ban on land uses which violate state or federal law is the most appropriate solution for the County of Contra Costa.

4. SANTA BARBARA COUNTY

According to Santa Barbara County Deputy District Attorney Brian Cota, ten marijuana dispensaries are currently operating within Santa Barbara County. The mayor of the City of Santa Barbara, who is an outspoken medical marijuana supporter, has stated that the police must place marijuana **behind** every other police priority. This has made it difficult for the local District Attorney's Office. Not many marijuana cases come to it for filing. The District Attorney's Office would like more regulations placed on the dispensaries. However, the majority of Santa Barbara County political leaders and residents are very liberal and do not want anyone to be denied access to medical marijuana if they say they need it. Partly as a result, no dispensaries have been prosecuted to date.

5. SONOMA COUNTY

Stephan R. Passalocqua, District Attorney for the County of Sonoma, has recently reported the following information related to distribution of medical marijuana in Sonoma County. In 1997, the Sonoma County Law Enforcement Chiefs Association enacted the following medical marijuana guidelines: a qualified patient is permitted to possess three pounds of marijuana and grow 99 plants in a 100-square-foot canopy. A qualified caregiver could possess or grow the above-mentioned amounts for each qualified patient. These guidelines were enacted after Proposition 215 was overwhelmingly passed by the voters of California, and after two separate unsuccessful prosecutions in Sonoma County. Two Sonoma County juries returned "not guilty" verdicts for three defendants

who possessed substantially large quantities of marijuana (60 plants in one case and over 900 plants in the other) where they asserted a medical marijuana defense. These verdicts, and the attendant publicity, demonstrated that the community standards are vastly different in Sonoma County compared to other jurisdictions.

On November 6, 2006, and authorized by Senate Bill 420, the Sonoma County Board of Supervisors specifically enacted regulations that allow a qualified person holding a valid identification card to possess up to three pounds of dried cannabis a year and cultivate 30 plants per qualified patient. No individual from any law enforcement agency in Sonoma County appeared at the hearing, nor did any representative publicly oppose this resolution.

With respect to the *People v. Sashon Jenkins* case, the defendant provided verified medical recommendations for five qualified patients prior to trial. At the time of arrest, Jenkins said that he had a medical marijuana card and was a care provider for multiple people, but was unable to provide specific documentation. Mr. Jenkins had approximately 10 pounds of dried marijuana and was growing 14 plants, which number of plants is consistent with the 2006 Sonoma County Board of Supervisors' resolution.

At a preliminary hearing held In January of 2007, the defense called five witnesses who were proffered as Jenkins' "patients" and who came to court with medical recommendations. Jenkins also testified that he was their caregiver. After the preliminary hearing, the assigned prosecutor conducted a thorough review of the facts and the law, and concluded that a Sonoma County jury would not return a "guilty" verdict in this case. Hence, no felony information was filed. With respect to the return of property issue, the prosecuting deputy district attorney never agreed to release the marijuana despite dismissing the case.

Other trial dates are pending in cases where medical marijuana defenses are being alleged. District Attorney Passalacqua has noted that, given the overwhelming passage of proposition 215, coupled with at least one United States Supreme Court decision that has not struck it down to date, these factors present current challenges for law enforcement, but that he and other prosecutors will continue to vigorously prosecute drug dealers within the boundaries of the law.

6. ORANGE COUNTY .

There are 15 marijuana dispensaries in Orange County, and several delivery services. Many of the delivery services operate out of the City of Long Beach in Los Angeles County. Orange County served a search warrant on one dispensary, and closed it down. A decision is being made whether or not to file criminal charges in that case. It is possible that the United States Attorney will file on that dispensary since it is a branch of a dispensary that the federal authorities raided in San Diego County.

The Orange County Board of Supervisors has ordered a study by the county's Health Care Department on how to comply with the Medical Marijuana Program Act. The District Attorney's Office's position is that any activity under the Medical Marijuana Program Act beyond the mere issuance of identification cards violates federal law. The District Attorney's Office has made it clear to County Counsel that if any medical marijuana provider does not meet a strict definition of "primary caregiver" that person will be prosecuted.

PENDING LEGAL QUESTIONS

Law enforcement agencies throughout the state, as well as their legislative bodies, have been struggling with how to reconcile the Compassionate Use Act ("CUA"), Cal. Health & Safety Code secs. 11362.5, et seq., with the federal Controlled Substances Act ("CSA"), 21 U.S.C. sec. 801, et seq., for some time. Pertinent questions follow.

QUESTION

1. Is it possible for a storefront marijuana dispensary to be legally operated under the Compassionate Use Act of 1996 (Health & Saf. Code sec. 11362.5) and the Medical Marijuana Program Act (Health & Saf. Code secs. 11362.7-11362.83?

ANSWER

1. Storefront marijuana dispensaries may be legally operated under the CUA and the Medical Marijuana Program Act ("MMPA"), Cal. Health & Safety Code secs. 11362.7-11362.83, as long as they are "cooperatives" under the MMPA.

ANALYSIS

The question posed does not specify what services or products are available at a "storefront" marijuana dispensary. The question also does not specify the business structure of a "dispensary." A "dispensary" is often commonly used nowadays as a generic term for a facility that distributes medical marijuana.

The term "dispensary" is also used specifically to refer to marijuana facilities that are operated more like a retail establishment, that are open to the public and often "sell" medical marijuana to qualified patients or caregivers. By use of the term "store front dispensary," the question may be presuming that this type of facility is being operated. For purposes of this analysis, we will assume that a "dispensary" is a generic term that does not contemplate any particular business structure.[1] Based on that assumption, a "dispensary" might provide "assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person" and be within the permissible limits of the CUA and the MMPA. (Cal. Health & Safety Code sec. 11362.765 (b)(3).)

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[1] As the term "dispensary" is commonly used and understood, marijuana dispensaries would *not* be permitted under the CUA or the MMPA, since they "sell" medical marijuana and are not operated as true "cooperatives."

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The CUA permits a "patient" or a "patient's primary caregiver" to possess or cultivate marijuana for personal medical purposes with the recommendation of a physician. (Cal. Health & Safety Code sec. 11362.5 (d).) Similarly, the MMPA provides that "patients" or designated "primary caregivers" who have voluntarily obtained a valid medical marijuana identification card shall not be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in specified quantities. (Cal. Health & Safety Code sec. 11362.71 (d) & (e).) A "storefront dispensary" would not fit within either of these categories.

However, the MMPA also provides that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who *associate* within the State of California in order collectively or *cooperatively* to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under section 11357 [possession], 11358 [planting, harvesting or processing], 11359 [possession for sale], 11360 [unlawful transportation, importation, sale or gift], 11366 [opening or maintaining place for trafficking in controlled substances], 11366.5 [providing place for manufacture or distribution of controlled substance; Fortifying building to suppress law enforcement entry], or 11570 [Buildings or places deemed nuisances subject to abatement]." (Cal. Health & Safety Code sec. 11362.775.) (Emphasis added).)

Since medical marijuana cooperatives are permitted pursuant to the MMPA, a "storefront dispensary" that would qualify as a cooperative *would* be permissible under the MMPA. (Cal. Health & Safety Code sec. 11362.775. See also *People v. Urziceanu* (2005) 132 Cal. App. 4th 747 (finding criminal defendant was entitled to present defense relating to operation of medical marijuana cooperative).) In granting a re-trial, the appellate court in *Urziceanu* found that the defendant could present evidence which might entitle him to a defense under the MMPA as to the operation of a medical marijuana cooperative, including the fact that the "cooperative" verified physician recommendations and identities of individuals seeking medical marijuana and individuals obtaining medical marijuana paid membership fees, reimbursed defendant for his costs in cultivating the medical marijuana by way of donations, and volunteered at the "cooperative." (*Id.* at p. 785.)

Whether or not "sales" are permitted under *Urziceanu* and the MMPA is unclear. The *Urziceanu* Court did note that the incorporation of section 11359, relating to marijuana "sales," in section 11362.775, allowing the operation of cooperatives, "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." Whether "reimbursement" may be in the form only of donations, as were the facts presented in *Urziceanu*, or whether "purchases" could be made for medical marijuana, it does seem clear that a medical marijuana "cooperative" may not make a "profit," but may be restricted to being reimbursed for actual costs in providing the marijuana to its members and, if there are any "profits," these may have to be reinvested in the "cooperative" or shared by its members in order for a dispensary to

be truly considered to be operating as a "cooperative."[2] If these requirements are satisfied as to a "storefront" dispensary, then it will be permissible under the MMPA. Otherwise, it will be a violation of both the CUA and the MMPA.

QUESTION

2. If the governing body of a city, county, or city and county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, can an individual board or council member be found to be acting illegally and be subject to federal criminal charges, including aiding and abetting, or state criminal charges?

ANSWER

2. If a city, county, or city and county authorizes and regulates marijuana dispensaries, individual members of the legislative bodies may be held criminally liable under state or federal law.[3]

ANALYSIS

A. *Federal Law*

Generally, legislators of federal, state, and local legislative bodies are absolutely immune from liability for legislative acts. (U.S. Const., art. I, sec. 6 (Speech and Debate Clause, applicable to members of Congress); Fed. Rules Evid., Rule 501 (evidentiary privilege against admission of legislative acts); *Tenney v. Brandhove* (1951) 341 U.S. 367 (legislative immunity applicable to state legislators); *Bogan v. Scott-Harris* (1998) 523 U.S. 44 (legislative immunity applicable to local legislators).) However, while federal legislators are absolutely immune from *both* criminal *and* civil liability for purely legislative acts, local legislators are *only* immune from *civil* liability under federal law. (*United States v. Gillock* (1980) 445 U.S. 360.)

Where the United States Supreme Court has held that federal regulation of marijuana by way of the CSA, including any "medical" use of marijuana, is within Congress' Commerce Clause power, federal law stands as a bar to local action in direct violation of the CSA. (*Gonzales v. Raich* (2005) 545 U.S. 1.) In fact, the CSA itself provides that federal regulations do not

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[2] A "cooperative" is defined as follows: An enterprise or organization that is owned or managed jointly by those who use its facilities or services. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, by Houghton Mifflin Company (4th Ed. 2000).

[3] Indeed, the same conclusion would seem to result from the adoption by state legislators of the MMPA itself, in authorizing the issuance of medical marijuana identification cards. (Cal. Health & Safety Code secs. 11362.71, et seq.)

exclusively occupy the field of drug regulation "unless there is a positive conflict between that provision of this title [the CSA] and that state law so that the two cannot consistently stand together." (21 U.S.C. sec. 903.)

Based on the above provisions, then, legislative action by local legislators *could* subject the individual legislators to federal criminal liability. Most likely, the only violation of the CSA that could occur as a result of an ordinance approved by local legislators authorizing and regulating medical marijuana would be aiding and abetting a violation of the CSA.

The elements of the offense of aiding and abetting a criminal offense are: (1) specific intent to facilitate commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of an offense. (*United States v. Raper* (1982) 676 F.2d 841; *United States v. Staten* (1978) 581 F.2d 878.)

Criminal aiding and abetting liability, under 18 U.S.C. section 2, requires proof that the defendants in some way associated themselves with the illegal venture; that they participated in the venture as something that they wished to bring about; and that they sought by their actions to make the venture succeed. (*Central Bank, N.A. v. First Interstate Bank, N.A.* (1994) 511 U.S. 164.) Mere furnishing of company to a person engaged in a crime does not render a companion an aider or abettor. (*United States v. Garguilo* (2d Cir. 1962) 310 F.2d 249.) In order for a defendant to be an aider and abettor he must know that the activity condemned by law is actually occurring and must intend to help the perpetrator. (*United States v. McDaniel* (9th Cir. 1976) 545 F.2d 642.) To be guilty of aiding and abetting, the defendant must willfully seek, by some action of his own, to make a criminal venture succeed. (*United States v. Ehrenberg* (E.D. Pa. 1973) 354 F. Supp. 460 *cert. denied* (1974) 94 S. Ct. 1612.)

The question, as posed, may presume that the local legislative body has acted in a manner that affirmatively supports marijuana dispensaries. As phrased by Senator Kuehl, the question to be answered by the Attorney General's Office assumes that a local legislative body has adopted an ordinance that "authorizes" medical marijuana facilities. What if a local public entity adopts an ordinance that explicitly indicates that it does *not* authorize, legalize, or permit any dispensary that is in violation of federal law regarding controlled substances? If the local public entity grants a permit, regulates, or imposes locational requirements on marijuana dispensaries with the announced understanding that it does not thereby allow any *illegal* activity and that dispensaries are required to comply with all applicable laws, including federal laws, then the public entity should be entitled to expect that all laws will be obeyed.

It would seem that a public entity is not intentionally acting to encourage or aid acts in violation of the CSA merely because it has adopted an ordinance which regulates dispensaries; even the issuance of a "permit," if it is expressly *not* allowing violations of federal law, cannot necessarily support a charge or conviction of aiding and abetting violation of the CSA. A public entity should be entitled to presume that dispensaries will obey all applicable laws and that lawful business will be conducted at dispensaries. For instance, dispensaries could very well *not* engage in actual medical marijuana distribution, but instead engage in education and awareness activities as to the medical effects of marijuana; the sale of other, legal products that aid in the suffering of

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ailing patients; or even activities directed at effecting a change in the federal laws relating to regulation of marijuana as a Schedule I substance under the CSA.

These are examples of legitimate business activities, and First Amendment protected activities at that, in which dispensaries could engage relating to medical marijuana, but *not* apparently in violation of the CSA. Public entities should be entitled to presume that legitimate activities can and will be engaged in by dispensaries that are permitted and/or regulated by local regulations. In fact, it seems counterintuitive that local public entities within the state should be expected to be the watchdogs of federal law; in the area of controlled substances, at least, local public entities do not have an affirmative obligation to discern whether businesses are violating federal law.

The California Attorney General's Office will note that the State Board of Equalization ("BOE") has already done precisely what has been suggested in the preceding paragraph. In a special notice issued by the BOE this year, it has indicated that sellers of medical marijuana must obtain a seller's permit. (See http://www.boe.ca.gov/news/pdf/medseller2007.pdf (Special Notice: Important Information for Sellers of Medical Marijuana).) As the Special Notice explicitly indicates to medical marijuana facilities, "[h]aving a seller's permit does not mean you have authority to make unlawful sales. The permit only provides a way to remit any sales and use taxes due. The permit states, 'NOTICE TO PERMITTEE: You are required to obey all federal and state laws that regulate or control your business. This permit does not allow you to do otherwise.'"

The above being said, however, there is no guarantee that criminal charges would not actually be brought by the federal government or that persons so charged could not be successfully prosecuted. It does seem that arguments contrary to the above conclusions could be persuasive in convicting local legislators. By permitting and/or regulating marijuana dispensaries by local ordinance, some legitimacy and credibility may be granted by governmental issuance of permits or authorizing and allowing dispensaries to exist or locate within a jurisdiction.[4]

All of this discussion, then, simply demonstrates that individual board or council members can, indeed, be found criminally liable under federal law for the adoption of an ordinance authorizing and regulating marijuana dispensaries that promote the use of marijuana as medicine. The actual likelihood of prosecution, and its potential success, may depend on the particular facts of the regulation that is adopted.

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[4] Of course, the question arises as to how far any such liability be taken. Where can the line be drawn between any permit or regulation adopted specifically with respect to marijuana dispensaries and other permits or approvals routinely, and often *ministerially*, granted by local public entities, such as building permits or business licenses, which are discussed *infra*? If local public entities are held responsible for adopting an ordinance authorizing and/or regulating marijuana dispensaries, cannot local public entities also be subject to liability for providing general public services for the illegal distribution of "medical" marijuana? Could a local public entity that knew a dispensary was distributing "medical" marijuana in compliance with state law be criminally liable if it provided electricity, water, and trash services to that dispensary? How can such actions really be distinguished from the adoption of an ordinance that authorizes and/or regulates marijuana dispensaries?

B. *State Law*

Similarly, under California law, aside from the person who directly commits a criminal offense, no other person is guilty as a principal unless he aids and abets. (*People v. Dole* (1898) 122 Cal. 486; *People v. Stein* (1942) 55 Cal. App. 2d 417.) A person who innocently aids in the commission of the crime cannot be found guilty. (*People v. Fredoni* (1910) 12 Cal. App. 685.)

To authorize a conviction as an aider and abettor of crime, it must be shown not only that the person so charged aided and assisted in the commission of the offense, but also that he abetted the act— that is, that he criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act. (*People v. Terman* (1935) 4 Cal. App. 2d 345.) To "abet" another in commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of the offense. (*People v. Be*st (1941) 43 Cal. App. 2d 100.) "Abet" implies knowledge of the wrongful purpose of the perpetrator of the crime. (*People v. Stein*, *supra*.)

To be guilty of an offense committed by another person, the accused must not only aid such perpetrator by assisting or supplementing his efforts, but must, with knowledge of the wrongful purpose of the perpetrator, abet by inciting or encouraging him. (*People v. Le Grant* (1946) 76 Cal. App. 2d 148, 172; *People v. Carlson* (1960) 177 Cal. App. 2d 201.)

The conclusion under state law aiding and abetting would be similar to the analysis above under federal law. Similar to federal law immunities available to local legislators, discussed above, state law immunities provide some protection for local legislators. Local legislators are certainly immune from civil liability relating to legislative acts; it is unclear, however, whether they would also be immune from criminal liability. (*Steiner v. Superior Court*, 50 Cal.App.4th 1771 (assuming, but finding no California authority relating to a "criminal" exception to absolute immunity for legislators under state law).)[5] Given the apparent state of the law, local legislators could only be certain that they would be immune from civil liability and could not be certain that

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[5] Although the *Steiner* Court notes that "well-established federal law supports the exception," when federal case authority is applied in a state law context, there may be a different outcome. Federal authorities note that one purpose supporting criminal immunity as to federal legislators from federal prosecution is the separation of powers doctrine, which does not apply in the context of *federal* criminal prosecution of *local* legislators. However, if a state or county prosecutor brought criminal charges against a local legislator, the separation of powers doctrine may bar such prosecution. (Cal. Const., art. III, sec. 3.) As federal authorities note, bribery, or other criminal charges that do not depend upon evidence of, and cannot be said to further, any legislative acts, can still be prosecuted against legislators. (See *Bruce v. Riddle* (4th Cir. 1980) 631 F.2d 272, 279 ["Illegal acts such as bribery are obviously not in aid of legislative activity and legislators can claim no immunity for illegal acts."]; *United States v. Brewster*, 408 U.S. 501 [indictment for bribery not dependent upon how legislator debated, voted, or did anything in chamber or committee; prosecution need only show acceptance of money for promise to vote, not carrying through of vote by legislator]; *United States v. Swindall* (11th Cir. 1992) 971 F.2d

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they would be at all immune from criminal liability under state law. However, there would not be any criminal violation if an ordinance adopted by a local public entity were in compliance with the CUA and the MMPA. An ordinance authorizing and regulating medical marijuana would not, by virtue solely of its subject matter, be a violation of state law; only if the ordinance itself permitted some activity inconsistent with state law relating to medical marijuana would there be a violation of state law that could subject local legislators to criminal liability under state law.

QUESTION

3. If the governing body of a city, city and county, or county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, and subsequently a particular dispensary is found to be violating state law regarding sales and trafficking of marijuana, could an elected official on the governing body be guilty of state criminal charges?

ANSWER

3. After adoption of an ordinance authorizing or regulating marijuana dispensaries, elected officials could not be found criminally liable under state law for the subsequent violation of state law by a particular dispensary.

ANALYSIS

Based on the state law provisions referenced above relating to aiding and abetting, it does not seem that a local public entity would be liable for any actions of a marijuana dispensary in violation of state law. Since an ordinance authorizing and/or regulating marijuana dispensaries would necessarily only be authorizing and/or regulating to the extent already *permitted* by state law, local elected officials could not be found to be aiding and abetting a *violation* of state law. In fact, the MMPA clearly contemplates local regulation of dispensaries. (Cal. Health & Safety Code sec. 11362.83 ("Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.").) Moreover, as discussed above, there may be legislative immunity applicable to the legislative acts of individual elected officials in adopting an ordinance, especially where it is consistent with state law regarding marijuana dispensaries that dispense crude marijuana as medicine.

1531, 1549 [evidence of legislative acts was essential element of proof and thus immunity applies].) Therefore, a criminal prosecution that relates *solely* to legislative acts cannot be maintained under the separation of powers rationale for legislative immunity.

QUESTION

4. Does approval of such an ordinance open the jurisdictions themselves to civil or criminal liability?

ANSWER

4. Approving an ordinance authorizing or regulating marijuana dispensaries may subject the jurisdictions to civil or criminal liability.

ANALYSIS

Under federal law, criminal liability is created solely by statute. (*Dowling v. United States* (1985) 473 U.S. 207, 213.) Although becoming more rare, municipalities have been, and still may be, criminally prosecuted for violations of federal law, where the federal law provides not just a penalty for imprisonment, but a penalty for monetary sanctions. (See Green, Stuart P., *The Criminal Prosecution of Local Governments*, 72 N.C. L. Rev. 1197 (1994) (discussion of history of municipal criminal prosecution).)

The CSA prohibits persons from engaging in certain acts, including the distribution and possession of Schedule I substances, of which marijuana is one. (21 U.S.C. sec. 841.) A person, for purposes of the CSA, includes "any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or other legal entity." (21 C.F.R. sec. 1300.01 (34). See also 21 C.F.R. sec. 1301.02 ("Any term used in this part shall have the definition set forth in section 102 of the Act (21 U.S.C. 802) or part 1300 of this chapter.").) By its very terms, then, the CSA may be violated by a local public entity. If the actions of a local public entity otherwise satisfy the requirements of aiding and abetting a violation of the CSA, as discussed above, then local public entities may, indeed, be subject to criminal prosecution for a violation of federal law.

Under either federal or state law, local public entities would not be subject to civil liability for the mere adoption of an ordinance, a legislative act. As discussed above, local legislators are absolutely immune from civil liability for legislative acts under both federal and state law. In addition, there is specific immunity under state law relating to any issuance or denial of permits.

QUESTION

5. Does the issuance of a business license to a marijuana dispensary involve any additional civil or criminal liability for a city or county and its elected governing body?

ANSWER

5. Local public entities will likely *not* be liable for the issuance of business licenses to marijuana dispensaries that plan to dispense crude marijuana as medicine.

ANALYSIS

Business licenses are imposed by cities within the State of California oftentimes solely for revenue purposes, but are permitted by state law to be imposed for revenue, regulatory, or for both revenue and regulatory purposes. (Cal. Gov. Code sec. 37101.) Assuming a business license ordinance is for revenue purposes only, it seems that a local public entity would not have any liability for the mere collection of a tax, whether on legal or illegal activities. However, any liability that would attach would be analyzed the same as discussed above. In the end, a local public entity could hardly be said to have aided and abetted the distribution or possession of marijuana in violation of the CSA by its mere collection of a generally applicable tax on all business conducted within the entity's jurisdiction.

OVERALL FINDINGS

All of the above further exemplifies the catch-22 in which local public entities are caught, in trying to reconcile the CUA and MMPA, on the one hand, and the CSA on the other. In light of the existence of the CUA and the MMPA, and the resulting fact that medical marijuana *is* being used by individuals in California, local public entities have a need and desire to regulate the location and operation of medical marijuana facilities within their jurisdiction.[6] [102]

However, because of the divergent views of the CSA and California law regarding whether there is any accepted "medical" use of marijuana, state and local legislators, as well as local public entities themselves, could be subject to criminal liability for the adoption of statutes or ordinances furthering the possession, cultivation, distribution, transportation (and other act prohibited under the CSA) as to marijuana. Whether federal prosecutors would pursue federal criminal charges against state and/or local legislators or local public entities remains to be seen. But, based on past practices of locally based U.S. Attorneys who have required seizures of large amounts of marijuana before federal filings have been initiated, this can probably be considered unlikely.

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[6] Several compilations of research regarding the impacts of marijuana dispensaries have been prepared by the California Police Chiefs Association and highlight some of the practical issues facing local public entities in regulating these facilities. Links provided are as follows: "Riverside County Office of the District Attorney," [White Paper, Medical Marijuana: History and Current Complications, September 2006];"Recent Information Regarding Marijuana and Dispensaries [El Cerrito Police Department Memorandum, dated January 12, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Marijuana Memorandum" [El Cerrito Police Department Memorandum, dated April 18, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Law Enforcement Concerns to Medical Marijuana Dispensaries" [Impacts of Medical Marijuana Dispensaries on communities between 75,000 and 100,000 population: Survey and council agenda report, City of Livermore].

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CONCLUSIONS

In light of the United States Supreme Court's decision and reasoning in *Gonzales v. Raich*, the United States Supremacy Clause renders California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 suspect. No state has the power to grant its citizens the right to violate federal law. People have been, and continue to be, federally prosecuted for marijuana crimes. The authors of this White Paper conclude that medical marijuana is not legal under federal law, despite the current California scheme, and wait for the United States Supreme Court to ultimately rule on this issue.

Furthermore, storefront marijuana businesses are prey for criminals and create easily identifiable victims. The people growing marijuana are employing illegal means to protect their valuable cash crops. Many distributing marijuana are hardened criminals.[103] Several are members of stepped criminal street gangs and recognized organized crime syndicates, while others distributing marijuana to the businesses are perfect targets for thieves and robbers. They are being assaulted, robbed, and murdered. Those buying and using medical marijuana are also being victimized. Additionally, illegal so-called "medical marijuana dispensaries" have the potential for creating liability issues for counties and cities. All marijuana dispensaries should generally be considered illegal and should not be permitted to exist and engage in business within a county's or city's borders. Their presence poses a clear violation of federal and state law; they invite more crime; and they compromise the health and welfare of law-abiding citizens.

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ENDNOTES

[1] U.S. Const.. art. VI, cl. 2.
[2] U.S. Const., art. I, sec. 8, cl. 3.
[3] *Gonzales v. Raich* (2005) 125 S.Ct. 2195 at p. 2204.
[4] *Gonzales v. Raich*. See also *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 121 S.Ct. 1711, 1718.
[5] *Gonzales v. Raich* (2005) 125 S.Ct. 2195; see also *United States v. Oakland Cannabis Buyers' Cooperative* 121 S.Ct. 1711.
[6] Josh Meyer & Scott Glover, "U.S. won't prosecute medical pot sales," *Los Angeles Times*, 19 March 2009, available at http://www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story
[7]See *People v. Mower* (2002) 28 Cal.4th 457, 463.
[8] Health and Safety Code section 11362.5(b) (1) (A). All references hereafter to the Health and Safety Code are by section number only.
[9] H&S Code sec. 11362.5(a).
[10] H&S Code sec. 11362.7 *et. seq.*
[11] H&S Code sec. 11362.7.
[12] H&S Code secs. 11362.71–11362.76.
[13] H&S Code sec. 11362.77.
[14] H&S Code secs. 11362.765 and 11362.775; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 at p. 786.
[15] H&S Code sec. 11362.77; whether or not this section violates the California Constitution is currently under review by the California Supreme Court. See *People v. Kelly* (2008) 82 Cal.Rptr.3d 167 and *People v. Phomphakdy* (2008) 85 Cal.Rptr. 3d 693.
[16] H&S Code secs. 11357, 11358, 11359, 11360, 11366, 11366.5, and 11570.
[17] H&S Code sec. 11362.7(h) gives a more comprehensive list – AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, and any other chronic or persistent medical symptom that either substantially limits the ability of a person to conduct one or more life activities (as defined in the ADA) or may cause serious harm to the patient's safety or physical or mental health if not alleviated.
[18] *People v.* Mower (2002) 28 Cal.4th 457 at p. 476.
[19] *Id.* Emphasis added.
[20] Packel, *Organization and Operation of Cooperatives*, 5th ed. (Philadelphia: American Law Institute, 1970), 4-5.
[21] Sam Stanton, "Pot Clubs, Seized Plants, New President—Marijuana's Future Is Hazy," *Sacramento Bee*, 7 December 2008, 19A.
[22] For a statewide list, see http://canorml.org/prop/cbclist.html.
[23] Laura McClure, "Fuming Over the Pot Clubs," *California Lawyer Magazine*, June 2006.
[24] H&S Code sec. 11362.765(c); see, e.g., *People v.Urziceanu*, 132 Cal.App.4th 747 at p. 764.
[25] *Gonzales v. Raich, supra,* 125 S.Ct. at page 2195.
[26] *People v. Urziceanu* (2005) 132 Cal.App.4th 747; see also H&S Code sec. 11362.765.
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Adverse Secondary Effects

The California Police Chiefs Association Task Force on Marijuana Dispensaries prepared a report that clearly outlined the adverse secondary effects of storefront dispensaries and similarly operated cooperatives. See Attachment K. Most notable of these effects are the criminal acts that stem from medical marijuana, ranging from murder, robbery, burglary, organized crime, to tax evasion. The California Police Chiefs Association compiled a list of medical marijuana related crimes including seven homicides from April 2008 to March 2009.

Data and supporting documentation from other cities indicates that the opening of the dispensaries have coincided with increases in calls for public safety services. Most cities have reported an increase in crime. See the September 2, 2010 Los Angeles Times article, for example. http://articles.latimes.com/2010/sep/02/local/la-me-0902-baca-pot-20100902 Increased calls for service include calls related to fire alarms, medical calls, crimes ranging from loitering to homicide, driving under the influence, and traffic collisions (resulting from Driving Under the Influence).

A 2010 study by Al Crancer Jr., a retired research analyst for the National Highway Traffic Safety Administration, showed the largest increases in fatalities in fatal crashes where the driver tested positive for marijuana occurred over the 5 years following the legalization of medical marijuana in January 2004. There were 1,240 fatalities in fatal crashes where the driver tested positive for marijuana for the following five years, compared to the 631 fatalities for the five years before 2004; an increase of almost 100%. Based on the data from 2008 there were eight counties in California with 16% or more of the drivers in fatal crashes testing positive for marijuana and five of the eight counties had 20% or more.
http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/Accident_MJ_Study_June_2010AAA.pdf

The California Department of Motor Vehicles website describes the effect of marijuana by saying that it lessens coordination, distorts sense of distance, and causes hallucinations, panic, depression, and fear.
http://www.dmv.ca.gov/teenweb/crazy_btn3/ability.htm

Data from other cities also indicate increases in the reported number of white-collar crimes, including embezzlement and tax evasion.

Fire Suppression Issues

Destructive fires from unsafe indoor marijuana grows have become commonplace. On December 26, 2010 a fire was reported at an apartment where marijuana was alleged to have grown.
http://www.kron.com/News/ArticleView/tabid/298/smid/1126/ArticleID/7757/reftab/536/t/Fire%20Breaks%20Out%20in%20Apartment%20Allegedly%20Used%20to%20Grow%20Marijuana/Default.aspx
On December 28, 2010 a house fire lead to the discovery of hundreds of marijuana plants in Sacramento.
http://www.youtube.com/watch?v=40nwCHL6Ulk

Growers seem to commonly use numerous 1000 watt bulbs from the same circuit which can result in fires, along with faulty wiring (not up to code), the use of extension cords, and illegally bypassing PG&E meters, which can all cause fires.

Arsons have also been reported at dispensaries. On January 12, 2011 a two-alarm fire broke out at the Herb Appeal collective in San Jose. KGO reported that the blaze may have been arson.
http://abclocal.go.com/kgo/story?section=news/local/south_bay&id=7893694

It is legal to grow up to six mature or 12 immature marijuana plants for personal medical use, and it is possible that limiting grows to that amount would be less likely to create dangerous fire hazards. However, growers commonly use numerous 1000 watt bulbs from the same circuit which can result in fires, along with faulty wiring (not up to code), the use of extension cords, and illegally bypassing PG&E meters, which can all cause fires.

Mexican Drug Cartels are the leading producers of marijuana in the U.S. The "Botello" Cartel is responsible for grows in California, Oregon, Washington, and Arizona. These Drug Cartels have been directly implicated in a recent California wildfire. In August 2009, an illegal marijuana operation being operated by Mexican drug cartel burned more than 88,650 acres (Santa Barbara County Wildfire).

Negative Effects on Our Youth

There are numerous studies that report the negative effects associated with adolescent use of marijuana. The effects include lower education and graduation rates, lower college attendance, lower employment, increased treatment for addiction/dependency, teen pregnancy, increased involvement in criminal activity, and an increased use of other addictive substances.

In June 2008, the National Center on Addiction and Substance Abuse at Columbia University reported that over the prior 15 years, there had been a 188% increase in the proportion of teen treatment admissions with a medical diagnosis of marijuana dependence, compared with a 54% decline for all other

substances of abuse.
http://www.casacolumbia.org/templates/PressReleases.aspx?articleid=527&zoneid=68

Several recent studies discuss the correlation of marijuana and mental illness. http://www.sciencedaily.com/news/mind_brain/marijuana/ Recent brain imaging research by UCLA and Childrens' Hospital of Philadelphia helps explain why marijuana is a cause of the problem. The studies found that marijuana use, particularly during adolescence, interrupts the white matter development in the brain and is a major cause of schizophrenia in youth.

COALITION FOR A DRUG FREE CALIFORNIA

FOR IMMEDIATE RELEASE January 5, 2011

Contact: Lori Green, 909.457.4229

CA Leads Nation in Marijuana Admissions with 117% Increase: pot as so-called "medicine" to blame says coalition

Sacramento, CA. A recent study shows California leading the nation in marijuana treatment admissions. The failure of California political leaders to address marijuana as a harmful substance, along with the proliferation of pot shops and the belief that marijuana is medicine, is leading to this sad rise among California youth. The Washington Times reported on this issue (click here) stating, *"...California provided the most eye-popping statistic â€" **a 117 percent increase** in its marijuana admissions rate, growing from 52 admissions per 100,000 population in 1998 to 113 per 100,000 in 2008.*"

Roger Morgan, the Executive Director of Coalition for a Drug Free California (CDFC) stated, *"With regard to the Washington Times article, the 117% increase in marijuana admissions for treatment in California that occurred from 1998 to 2008 is the tip of the iceberg. The potency of marijuana has more than doubled in the same period of time, and with what we know today about the cellular damage of marijuana to brains and bodies, we can expect a surge in treatment demands as well as more mental illness, more health problems, more crime, worse academic standards, more welfare and more traffic deaths .... in all, much greater demands for public services and less money to pay for them."*

Dr. Paul Chabot, founder of the Inland Valley Drug Free Community Coalition and the CDFC stated, *"This is precisely the reason we have fought so hard to keep pot shops out of our communities. Too many children truly believe pot is some kind of magical medicine with no health consequences. Our volunteers who speak to students hear about it every day. Unless California's politicians take on the problem of so-called medical pot, we will continue to see communities decline and kids enter rehab. Our state leaders should be absolutely ashamed."*

Morgan stated*, "While the California Department of Alcohol and Drug Programs feels it is good that more people are seeking treatment, it would be highly desirable that they focus on preventing the problem to begin with. The brain is not fully developed until age 25 and marijuana can cause permanent brain damage until then, particularly during adolescence. A damaged teenage brain doesn't get better as an adult. If we keep wasting our young, we have no future as a nation, and we will never solve the root cause of the budget problem: substance abuse."*

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Attachment N
Excerpt of December 16, 2010 Sunnyvale City Council Report

"The land use concerns for MMDs are briefly discussed below:
• Compatibility. The MMDs observed by staff tended to be in multi-tenant Class C industrial buildings, near other office and R&D businesses. Two of the 15 MMDs visited were located near commercial uses, as well. In general, the facilities were low-key, with no obvious sign of activity beyond the typical use. At the large MMD that staff toured, however, there was constant turnover of cars, with people congregating at the entrance and waiting in cars. Staff visited two businesses adjacent to that MMD, and asked if they had any concern about the MMD. Those adjacent tenants complained of an increase in traffic, loitering, and crime since the MMD began operation.
• Odors. Marijuana has a distinctive smell: as a plant, a bud and while smoked. MMDs tend to have large ventilation systems in place to remove odors from the premises. Even with those systems, odors can still be pervasive. This has been an issue described by other cities and businesses near existing MMDs.
• Traffic and parking. At the MMD at which staff was given a tour, the manager of the business stated there were 30,000 members at that facility. That number is not typical, but many operators mention they have 1,000 or more members. What is not known, nor easily controlled, is whether members use the MMD daily, weekly or monthly. If the MMD has a high turnover rate where clients spend little time on site and pick up what they need and leave, then a high turnover would have less parking concerns, but may have greater traffic and circulation issues may arise depending on whether the members use the MMD during peak periods. Sometimes high turnover creates more parking concerns, not less (e.g. fast food restaurants versus sit down restaurants).

After visiting 15 MMDs, and touring one large MMD, staff concluded that, although large, well-trafficked facilities have the potential to negatively impact surrounding uses and areas, it is possible that smaller MMDs can exist with little impact to nearby businesses with proper regulations. This use is relatively new, and use patterns are not well known. It is possible that MMDs have similar impacts as any other business in an area. It is also possible that an MMD could disrupt an existing neighborhood with more traffic and a possible increase in crime due to the presence of an illegal drug (when not used for medical purposes).

Proponents claim that those cities with safety and compatibility concerns are typically those without adequate regulations in place (e.g. Los Angeles and San Jose). Proponents claim that cities like Oakland, which has concise regulations in place, have fewer safety and compatibility problems.

POTENTIAL REGULATORY OUTLINE AND OPTIONS
If Council decides to allow and regulate MMDs in Benicia, an ordinance would be required. Included in this attachment is a brief discussion of options, an outline of the ordinance, and a list of options that can be considered.

Limiting the Number and Time Period for MMDs in the City
If Council decides to allow MMDs in the city, it would be prudent to restrict the number allowed to receive permits. Options for this include limiting the number to one or two initially, which allows the City to work with a reasonable number while ensuring the uses do not increase crime or create land use incompatibilities, operate pursuant to all regulations, and do not become too difficult to regulate and enforce conditions. One option is to have a first come, first served process; however, this could be difficult to manage if applications were submitted at the same time

It may also prudent to limit the permit time frame to a short period of time (i.e. one year) in order to ensure the MMDs operate according to their permit, and to ensure the City does not commit to a long-term and expensive enforcement operation.

An option used in other cities in the State (i.e. Napa and Eureka) is to require a competitive bid process to determine which MMDs could apply for the limited number of permits allowed in the City. Factors to consider as part of that process could include details of the operation, location, size, adherence to compassionate use considerations, etc. City staff or Council could consider each proposal and make the decision as to which will be allowed to submit a planning application.

If MMDs are allowed to apply for a permit, a Use Permit with a one-year limitation should be required, after which time a new permit will be required.

Standard Submittal Requirements
Applications for MMDs would likely be more technical and complex than typical land use projects. This is because of the complex information necessary for this unique use. An ordinance should provide several key requirements as part of an application, including:

- Permit fee to cover cost of processing applications, specifically for the Public Works and Community Development, Police and Fire Departments' efforts;
- Background information for those owning, operating or working at a MMD, including criminal, employment and tax records. This information would assist in determining the credibility of the applicant, and whether the MMD would be likely to meet the intent of the City;
- Plan of operations showing:

1. Where marijuana is grown and transported,
2. How membership will be managed to ensure work towards the MMD meets the definition of a collective or cooperative,
3. Security Plan, site plan, floor plans, odor control plan, cultivation plan, financial plan;

- Application sign-off from adjacent tenants, if use is located in a multi-tenant building.

The required amount of information necessary will depend on the detail in which Council decides staff should go in reviewing each application. A future ordinance should include a thorough list of items necessary to review an application. It is possible to reduce the amount of information necessary to submit, but the consequence of that would be to have fewer controls in place regarding MMD's meeting the intent of the CUA.

Fees

The permit fee to cover the costs of this review is intended to be a cost-recovering amount. It is difficult at the time to determine the amount of the fee until the final decision is made regarding the level of requirements.

Currently the City of Oakland is charging $30,000 for annual medical marijuana permit plus a $5,000 one-time non-refundable application fee, and in November 2011, they will decide whether to raise the annual medical marijuana permit to $60,000 per year. The application fee is used to pay for City staff to conduct background checks, review security, review of business and building checks. The City of San Jose is proposing an annual fee of $95,016. These fees are used to hire administrative, financial, and code enforcement staff to monitor, audit, and regulate the dispensaries. This oversight is to ensure there is no diversion of marijuana sales and that the business functions of the dispensaries operate as permitted.

Distance Requirements

A key aspect to determining appropriate locations is to decide where MMDs should be allowed. Many cities, and the new State law, require a specific distance from schools, parks and other sensitive uses. The first step in determining this distance is to define "sensitive use" in this context. A future ordinance can include the following uses in the definition of "sensitive use": residential, school, park, places of assembly, and child-care uses. Different cities have used different definitions for sensitive uses; some include residential uses, while others exclude that use.

Those that include residential uses in the distance limitations use different distances for residential uses (typically 300-1,000 feet).

An option that can be used is to follow a newly passed State law (AB 2650), which requires a 600-foot radius to any public or private school providing instruction in kindergarten or grades 1 to 12. This law took effect January 1, 2011, and cities may adopt regulations more restrictive, but not less restrictive than the new law. It is suggested that a 600 foot buffer of MMDs from sensitive uses, including residential would be appropriate, but would need to be mapped out if the Council desires this option.

Another distance requirement is to control the distance between each MMD facility. Cities take different approaches, from no limit to 1,000-foot requirements.

The purpose of the distance requirements is to ensure MMDs are not near locations where the general public congregate, and are not near locations where young people are present.

Because of the lay-out of the City, a 1,000-foot buffer between these sensitive uses and other MMDs may not be realistic if the use is desired. The 1,000 foot buffer would probably eliminate MMDs. As noted above, it should be mapped out if this option is desired. Other factors to consider are whether the resulting locations are well-served by transit, which many patients would use to access the MMDs and whether the locations are more remote, and would have less police presence than areas in the heart of the City.

On-site Cultivation

The issue of where the marijuana should be cultivated is complex and contradictory. If the City encourages MMDs to obtain all its marijuana from its members, then that requires specific standards on how and where it can be grown, and will require a permit for that cultivation (residential or otherwise). A proposed ordinance could include both residential and non-residential cultivation requirements, should this option be taken.

On-site cultivation can increase the danger to those at or near the property because the large presence of marijuana can become a target for crime. Allowing the purchase of marijuana from outside sources, however, is contradictory to State law, and can result in the involvement of criminal elements.

Decision-maker

If Council chooses to allow MMDs to locate in the city, any necessary permit would be reviewed by a decision-maker. That body could be staff, the City Manager, Planning Commission, or City Council. There can be public hearing requirements, or administrative allowances for decision. A reasonable requirement is to require any MMD application to be considered at a noticed

public hearing, with appeal possible to the Council. This would give the public ample opportunity to participate in the process.

Path Forward

Included in this attachment is a general outline of an ordinance, should Council ask staff to return with options to allow MMDs. Also included is a list of possible processes and requirements that can be included in a future ordinance.

An ordinance would detail the review process and standards, findings for approval, and operating standards necessary to ensure the use is compatible in the community, does not increase crime, and ensures it meets the strict requirements of State law.

The suggested outline of the ordinance provides an approach that can be considered "aggressive." There are other less aggressive approaches possible, and other options beyond that which can be considered. Included in this attachment is a checklist of other options. The Council can direct staff to include other elements in a future ordinance, should that be their decision.

PROPOSED ORDINANCE SHOULD BENICIA ALLOW MEDICAL MARIJUANA DISTRIBUTION FACILITIES

A. Purpose, Scope and Intent

1. Basic text for purpose of ordinance

B. Applicability

1. Nothing in code is intended to make legal what is otherwise prohibited by California law

C. Definitions

1. Include in Municipal Code clear definitions of use and associated aspects of the distribution

D. Covered Projects

1. Facilities defined as Medical Marijuana Distribution facilities in the code

2. Cultivation for non-personal use, residential or nonresidential

E. Process

1. Use Permit or Special Development Permit with noticed public hearing

2. Allow appeals of any permit to Planning Commission and Council

3. Limit permit to one year in length

4. Selection process for multiple proposals

5. If changes to surrounding uses places a sensitive uses (park, school, day care center, place of assembly) within the required distance limitation, permit will not be extended

6. If zoning changes to a Residential or Public Facility zoning designation within the required distance limitation, permit shall not be extended

7. If changes occur to federal policy on enforcement of marijuana for medical purposes, permit will not be approved or extended

8. Once planning review is completed, the Police Department will be required to approve operator's background checks, security plans, etc.

F. Prohibited Activities

1. Shall not accessory to any other permitted use

2. Commercial sale of any product, good, or service is prohibited

3. No alcohol or tobacco sold or consumed on site

4. Marijuana shall not be smoked, ingested or otherwise consumed on site or in public places

5. Attending physicians shall not be on premises

6. No off-site sale of marijuana

7. Any other type of project that does not meet the covered project definition is prohibited

G. Applications and Permit Requirements

1. Standard Submittal Requirements section

2. Require a statement of qualifications, including business plan, salary, wages, etc.

3. Require applications to include sign-off from adjacent tenants of a multi-tenant building

4. All MMD operators and employees must pass background checks by the Police Department prior to operation and must be updated yearly

5. A security plan must be approved by the Police Department and in place before operation, and must be updated yearly

6. MMDs shall provide the City with the name, location and operator of each cultivator and/or processing facility

7. Allow holistic services as part of MMD in order to assure the MMD is a compassionate care facility and not a profit center

H. Fees

1. Require fees for permit processing to cover City review costs

2. Require fees for on-going operations to cover City costs

I. Noticing

1. Notification to properties owners and residents/tenants within 1,000-foot radius of subject property line

J. Permit Findings

1. Facility meets zoning requirements

2. Facility meets all requirements of State laws

3. Operator has demonstrated the ability and commitment to provide

4. Facility will not be detrimental to public health, safety or welfare

5. Facility will be compatible with surrounding land uses

K. Standards for Compliance/Specific MMD Requirements

1. Location, Size and Number
   a. No MMDs facility shall exceed 5,000 square feet in size
   b. Don't allow in locations identified by the Police Department as "increased or high crime areas"
   c. Specify in Municipal Code where MMDs are allowed and where they are precluded
   d. Require distance limitations of 1,000 feet from residential uses, schools, places of assembly, recovery centers, day care centers
   e. Use straight-line measurement option for determining the method of determining distance requirements
   f. Require a 1,000-foot distance from another MMD
   g. Limit zoning district options to M-S, MP-I, MP-TOD
   h. Interior floor plan, to ensure employees can see their surroundings and that there is visibility into the MMD

2. Operating Standards and Restrictions
   a. No MMD can operate for profit. All costs must go towards actual expenses for growth, cultivation and processing
   b. Dispense medical needs monthly to discourage daily/weekly visits to MMD
   c. Each MMD shall be required to identify a community communications contact, who shall be available during normal business hours
   d. No physicians on site can provide medical recommendations necessary to obtain medical marijuana card from MMD
   e. All MMD facilities must include odor control mechanisms

f. MMD must obtain a Benicia business license
g. MMDs must be registered by the State of California as a non-profit organization
h. MMD must provide a lobby to ensure there is no loitering outside facility
i. Limited hours of operation of 10 am to 8 pm, Monday-Saturday
j. Sale of edibles would require permit from County Health Department
k. Money collected by MMD shall cover overhead costs and operating expenses only
l. Reasonable compensation for directors, officers and staff is allowed, subject to approval by collective members, and shall be reported to City
m. Memberships limited to residents of Benicia or County of Solano ("residents" as defined by IRS as primary residence)

3. Non-residential Cultivation
   a. Cultivation could occur on site with specific approval from City
   b. Permit for cultivation shall be limited to amount necessary for the MMD, and not for widespread distribution
   c. No more than 50% of marijuana can be obtained from non-member or off-site nursery
   d. On-site cultivation must not be visible from outside and must be stored in an area secured from public access
   e. A permit shall be obtained prior to any cultivation for purposes other than personal use, including a building permit for improvements
   f. Permit for cultivation shall be limited to specific amounts to ensure it is used by a specific MMD and not for wider distribution

4. Residential cultivation
   a. Residential cultivation shall be for personal use, or available for grower's collective or cooperative for no profit
   b. Outdoor cultivation shall not be visible from public areas
   c. Residential cultivators shall not sell product to cooperatives, collectives or MMDs
   d. Total on-site cultivation shall not exceed 50 square feet in total size
   e. Outdoor cultivation shall occur in rear or side yard, no less than 5 feet from property line

f. Indoor cultivation shall be used only if outside cultivation is not feasible, as determined through permit process
g. Indoor cultivation shall include lighting not to exceed 1,200 watts, not in kitchen, bathroom or primary bedroom
h. Residential cultivators for non-personal purposes shall maintain records showing amount grown and MMD to which it was distributed

5. On-going Requirements- Place of Distribution Limitations and Requirements
   a. Each MMD shall be required to identify a community communications contact, who shall be available during normal business hours
   b. Business sign shall be limited to business name, and shall not include graphics or text advertising marijuana
   c. No alcohol sold, consumed or present on site
   d. No smoking or consumption of marijuana on site or in parking lot of MMD
   e. MMDs shall provide and maintain parking spaces as required by the Zoning Code
   f. Security guard must on site whenever MMD is open or operating
   g. Storage areas must be away from locations open to general public and must be secured at all times
   h. Payment by check or credit card only, no cash sales
   i. No sales or "giveaways" allowed
   j. Limit number of members according to community need (no more than 150 members per MMD?)
   k. Restrict retail sales on site for pipes, vaporizers and drug paraphernalia
   l. No person under 18 years old are allowed in a MMD, unless accompanied by parent or legal guardian
   m. No reselling of product is allowed
   n. No deliveries allowed from MMDs
   o. Limit retail sales of items to ensure facility is maintained as a cooperative or collective, not a retail facility
   p. Ban use of cell phones in MMD facility
   q. Prohibit non-member from working in MMD
   r. Patients cannot belong to more than one MMD
   s. No advertising in local papers- focus on maintaining a reasonable membership, not maximizing number of members

6. Enforcement and Monitoring

a. All product shall include the MMD name, the location and operator of the product, the strain and species
b. MMDs must have process for tracking marijuana from source to member, which shall be available for inspection by the City
c. Source of marijuana, the cost to purchase and the amount sold
d. Maintain record of transactions of each cardholder using the County Medical Marijuana card or other entity approved by the Police Department
e. Issue quarterly earning statements to members of MMD and City

L. Conditions of Approval

1. Conditions may be imposed for any application

M. Appeals

1. Appeal of any decision shall follow Title 19 appeal requirements

N. Expiration

1. Permit shall expire one year after approval by hearing body

0. Renewal

1. An applicant can request a permit be renewed provided the decision on the renewal is made prior to expiration of prior permit

P. Business License

1. A business license is required

Q. Extension

1. No extension of any permit shall be made without an application for consideration of a new permit

R. Enforcement

1. All records associated with a MMD shall be available for inspection by the City with advanced notice

2. All inspection of records shall be made with confidentiality

3. Maintain books listing:

a. All members of the MMD
b. Amount of marijuana sold or given to each member per month
c. Salary and compensation for operators, employees and partners
d. All overhead costs

S. Violations

T. Revocation/Suspension

U. Non-transferability

V. Severability

CITY OF BENICIA

Medical Marijuana Study Issue

The following are lists of possible approaches to regulate medical marijuana distribution facilities.

PROCEDURES

1. Limit the number allowed in the City
2. Limit permit to one year in length
3. If changes to surrounding uses or zoning occurs, permit may not be extended
4. Require public hearings for MMDs
5. Restrict size allowance for MMDs facilities (square footage)
6. Create clear definitions of use and associated aspects of the distribution
7. Require significant permit fees to cover City review costs
8. Allow appeals to use to Council
9. Include provision for deviations from requirements as part of permit process
10. Require a two-step permit process- THE PUBLIC WORKS AND COMMUNITY DEVELOPMENT DEPARTMENT for use and the Police Department for operations
11. Require a fee to defray costs for enforcement
12. Application requires detailing where marijuana is grown and cultivated
13. Require a competitive RFP process with detailed list of expectations
14. Detail residential grow requirements and allowances
15. Require a permit for marijuana grown for medical purposes for non-personal use (residential and commercial)
16. Require applications to include sign-off from adjacent tenants of a multi-tenant building
17. Require a state of qualifications, including business plan, salary and wages, etc.

LOCATION REGULATIONS

1. Require distance limitations for MMDs from sensitive uses:
   -Options: 600 or 1,000 feet for schools, places of assembly, recovery centers, day care
   -Options: 300, 600 or 1,000 feet for residential
2. Provide options for determining the method o f determining distance requirements
   -Option: straight line
   -Option: As accessible from sensitive uses (amend distance if a barrier [e.g. freeway] separates uses)
3. Require a minimum distance from another MMD (600 or 1,000 feet)
4. Limit zoning district options
5. Specify locations in City to allow MMDs, not using distance requirements

6. Storefront locations must have visibility to street and parking areas
7. Require locations with easy access to transit options
8. Don't allow in locations identified by the Police Department as "increased or high crime areas"
9. Detail requirements if an identified "sensitive use" is located near permitted MMD- i.e. POA, day care, residential
10. Require in centralized locations
11. Make any code specific where MMDs are allowed and where they are precluded
12. Provide option for decision-makers to allow MMDs in areas discouraged or not meeting distance requirements

OPERATIONAL REQUIREMENTS

Compassionate care

1. No MMD can operate for profit. All costs must go towards actual expenses for growth, cultivation and processing
2. Dispense medical needs monthly to discourage daily/weekly visits to MMD

Place of distribution limitations and requirements

3. Limited hours of operation
4. Require community communications contact
5. Include odor control mechanisms
6. Business sign limited to business name, and shall not include graphics or text advertising marijuana
7. No physicians on site can provide medical recommendations necessary to obtain medical marijuana card from MMD
8. No alcohol sold, consumed or present on site
9. No smoking or consumption of marijuana on site or in parking lot of MMD
10. Must maintain required parking spaces
11. Sale of edibles would require permit from County Health Department
12. Payment by check or credit card only, no cash sales
13. Security guard must be on site whenever MMD is open or operating
14. No sales or "giveaways" allowed
15. Storage areas must be away from areas open to general public and secured at all times
16. All MMD operators and employees must pass background checks by the Police Department prior to operation and must be updated yearly
17. A security plan must be approved by the Police Department and in place before operation, and must be updated yearly
18. Limit number of members according to community need
19. Limit or restrict retail sales on site, especially for pipes, vaporizers and drug paraphernalia

20. MMD must obtain a Benicia business license
21. MMDs must be registered by a non-profit organization
22. MMD must provide a lobby to ensure there is no loitering outside facility

Cultivation business

23. Cultivation could occur at dispensary with specific approval from City
24. No more than 50% of marijuana can be obtained from non-member or nursery
25. MMDs shall provide the name, location and operator of cultivator and/or processing facility
26. All product shall include the MMD name, the location and operator of the product, the strain and species
27. MMDs must have process for tracking marijuana from source to member
28. Cultivation on-site must not be visible from outside and must be stored in an area secured from public access
29. MMD shall include cultivation in the permit for the use
30. Permit for cultivation shall be limited to specific amounts to ensure it is used by a specific MMD and not for widespread distribution

Cultivation- residential

31. A permit shall be obtained prior to any cultivation for purposes other than personal use, including a building permit for improvements
32. Residential cultivation shall be for personal use, or available for grower's collective or cooperative for no profit
33. Permit for cultivation shall be limited to specific amounts to ensure it is used by a specific MMD and not for wider distribution
34. -Outdoor cultivation shall not exceed 50 square feet in total size
    -Outdoor cultivation shall occur in rear or side yard, no less than 5 feet from property line and shall not be visible from public areas
35. Indoor cultivation shall be used only if outside cultivation is not feasible
36. Indoor cultivation shall include lighting not to exceed 1,200 watts, not in kitchen, bathroom or primary bedroom
37. Indoor cultivation shall not exceed 50 square feet in total size
38. Residential cultivators shall not sell product to cooperatives, collectives or dispensaries
39. Residential cultivators for non-personal purposes shall maintain records showing amount grown and MMD to which it was distributed

Enforcement and Monitoring

40. Maintain books listing:
    -All members of the MMD
    -Amount of marijuana
    -All overhead costs
    -Source A of marijuana its cost and t he amount sold

41. All records associated with a MMD shall be available for inspection with advanced notice
42. Maintain record of transactions of each cardholder using the County Medical Marijuana card or other entity approved by the Police Department
43. All inspection of records shall be made with confidentiality

BUSINESS REQUIREMENTS

1. Limit retail sales of items to ensure facility is maintained as a cooperative or collective, not a retail facility
2. Ban use of cell phones in MMD facility
3. Prohibit non-member from working in collective
4. Patients cannot belong to more than one collective or cooperative
5. No children allowed in MMD (may be allowed if accompanied by parent or guardian)
6. Money collected by MMD shall cover overhead costs and operating expenses only
7. Reasonable compensation for directors, officers and staff is allowed (subject to approval by collective members?)
8. Permissible reimbursements and allocations (from AG guidelines). Marijuana from an MMD may be:
    a. Provided free to qualified patients
    b. Provided in exchange for services rendered to the MMD
    c. Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses
    d. Any combination of the above.
9. Avoid profiteering by:
    a. No partners or investors of MMD
    b. Reasonable salaries
    c. Profits must be reinvested in MMD
10. Require quarterly earning statements to members of MMD and City of Benicia
11. No reselling of product is allowed
12. No deliveries allowed from MMDs
13. Memberships limited to residents of Benicia or County of Solano (as defined by IRS)
14. No advertising in local papers- focus on maintaining a reasonable membership, not maximizing number of members
15. Holistic services as part of MMD:
    a. Require in order to assure the MMD is a compassionate care facility and not a profit center, OR
    b. Disallow in order to minimize the size and scope of the facilities
16. Keep in mind AG Guidelines of "Indica of Unlawful operation":
    a. Excessive amounts of cash

b. Not following state and local laws
c. Presence of weapons and illegal drugs
d. Distribution to or from California

FEES (In dollars)				
City	**Permit Fee**	**Dispensary Fee**	**Preferred Application Fee**	**Other**
Oakland	5,000	30,000 (proposing 60,000)		211,000 Industrial cultivation fee
Stockton	3,500			
Napa	8,000	TBD	7,000	
Palm Springs	7,500			
Redding	800			
Sacramento	20,000 (approx.)	13,000 (approx.)		
San Carlos	2,311 (same as other uses)			