



# ***Atascadero City Council***

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## ***Staff Report - City Attorney's Office***

### **Report on Moratorium on the Establishment and Operation of Medical Marijuana Facilities and Draft Ordinance Prohibiting Medical Marijuana Facilities**

#### **RECOMMENDATIONS:**

Council:

1. Adopt an Interim Urgency Ordinance extending the 45-day moratorium on the establishment and operation of medical marijuana facilities for a period of 10 months and 15 days through September 8, 2010; and,
2. Refer to the Planning Commission for consideration of a draft ordinance to repeal existing ordinances regarding medical marijuana and adopt an ordinance prohibiting the establishment and operation of medical marijuana facilities in the City.

#### **REPORT-IN-BRIEF:**

In 1996, the voters of California approved by initiative "The Compassionate Use Act of 1996," also known as Proposition 215. The purpose of Proposition 215 was to allow seriously ill Californians to obtain and use medical marijuana under certain specified circumstances. In 2003, the Legislature approved SB 420, which provided additional statutory guidance for those involved with medical marijuana use and also authorized cities to enact rules and regulations with regard to medical marijuana consistent with California law.

Despite the passage of Proposition 215, the United States Supreme Court in *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, held that the Federal Controlled Substances Act continues to prohibit marijuana use, distribution, and possession, and that no medical necessity exceptions exist to those prohibitions. And in 2005, the United States Supreme Court held that federal laws which ban the use of

marijuana for medical purposes are constitutional in the case of *Gonzales v. Raich* (2005) 545 U.S. 1.

Some cities where Medical Marijuana Facilities have been established report increases in illegal drug activity, illegal drug sales, robbery of persons leaving dispensaries, loitering around dispensaries, falsely obtaining "identification cards" to qualify for medical marijuana, and other increases in criminal activity.

On September 8, 2009, the City Council voted to adopt a 45-day moratorium on the establishment or operation of Medical Marijuana Facilities to enable planning and legal staff time to study the issues further.

California Government Code Section 65858(d) requires that ten days prior to the expiration of that interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.

This staff report is submitted to the Council pursuant to Government Code Section 65858(d) and to present to the City Council proposed motions to extend the moratorium 10 months and 15 days and refer to the Planning Commission for consideration of a draft ordinance to repeal existing ordinances regarding Medical Marijuana and adopt an ordinance prohibiting the establishment and operation of Medical Marijuana Facilities in the City.

## **DISCUSSION:**

Research Regarding Federal Law and Secondary Effects of Medical Marijuana Facilities  
Currently, the sale, possession, cultivation and distribution of cannabis is prohibited by federal law, specifically 21 U.S.C. sections 812 and 841, part of the Controlled Substances Act. Marijuana continues to be a prohibited Schedule I drug for which there is no legally accepted medical use. The U.S. Drug Enforcement Administration ("DEA") has raided several medical marijuana dispensaries in various California cities, despite the State's passage of the Compassionate Use Act. The DEA's Office of Chief Counsel's Opinion Letter, dated, March 31, 2006, provides that "the knowing or intentional manufacture, possession, or distribution of marijuana, or aiding and abetting or participating in conspiracy to engage in such conduct, violates federal law regardless of any state law authorizing such conduct." (Attachment 1, pg. 2)

Beyond the legal issues involved with medical marijuana, several California cities that have permitted the establishment of medical marijuana dispensaries have found that such medical marijuana dispensaries have resulted in negative secondary effects, including significant increases in traffic, crime and noise. (Attachments 2 pg. 1-19; 3, pg. 8-14; 4, pg. 7-8; 13, pg. 1-28; and 15, pg. 3)

"Of equal concern are the secondary effects of these dispensaries and store-front

cooperatives. Throughout the state, many violent crimes have been committed that can be traced to their proliferation.” (Attachment 4, pg. 7)

For example, there have been several reports of serious criminal activity, such as robberies, assaults, burglaries, the sale of illegal drugs, murder and attempted murder. Moreover, “[i]ncreased 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, as well as drug-related offenses in the vicinity ...” (Attachment 3, pg. 9)

The California Police Chief’s Association has also documented other secondary impacts in the immediate vicinity of dispensaries, such as street dealers lurking about dispensaries to offer a lower price for marijuana, marijuana smoking in public and in front of children, loitering and increased crime. (Attachment 3, pg. 11)

Moreover, the California Police Chief’s Association has reported adverse secondary impacts in the community at large, such as unjustified and fictitious physician recommendations, the proliferation of grow houses, increased gang activities, exposures of minors to marijuana, impaired public health, and decreased quality of life in deteriorating neighborhoods. (Attachment 3, pg. 11-14)

#### Municipal Liability

A city or county that allows the establishment and operation of dispensaries faces potential liability because they are arguably aiding and abetting in criminal violations of federal law. (Attachments 3, pg. 18-19 and 4, pg. 8) Although we are not aware of any cities or counties that have been prosecuted for aiding and abetting, this is a risk that needs to be recognized in evaluating the City’s options.

#### California Attorney General Guidelines

According to the California Attorney General’s Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, unless they meet stringent requirements, dispensaries cannot reasonably claim to be cooperatives or collectives. (Attachments 3, pg. 5 and 5, pg. 9-11) “Although medical marijuana dispensaries” have been operating in California for years, dispensaries, as such, are not recognized under the law ... a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but dispensaries that do not substantially comply with the guidelines set forth ... above are likely operating outside the protections of [the Compassionate Use Act] and the [Medical Marijuana Program], and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law.” (Attachment 3, pg. 11)

The exemption for state criminal prosecution only apply to three categories of persons: (a) qualified patients; (b) persons with valid identification cards, and (c) 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. CA Health & Safety Code § 11362.775. Moreover, the

Medical Marijuana Program Act specifies that collectives, cooperatives or other groups shall not profit from the sale of marijuana.

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.” (Attachment 3, pg. 5)

The Attorney General’s Guidelines provide that “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.” (Attachment 5, pg. 8) However, several reports have found that “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.” (Attachment 3, pg. 6-7)

#### Ordinances in San Luis Obispo County

Over the last three and a half years, six of the seven cities in San Luis Obispo County have passed ordinances prohibiting the establishment or operation of medical marijuana dispensaries. (Attachments 6-11)

The only city in the County which has not adopted an ordinance prohibiting the establishment or operation of medical marijuana dispensaries, is the City of Atascadero. The City of Atascadero’s Municipal Code Chapter 13, Title 5, does allow for the establishment of a medical marijuana dispensary, upon obtaining a conditional use permit.

The County of San Luis Obispo regulates medical marijuana dispensaries by requiring a Minor Use Permit and imposing design and operational standards on the establishment of such facilities. (Attachment 12)

#### The City of El Cerrito

The City of El Cerrito, in Contra Costa County, has studied medical marijuana dispensaries and its secondary effects. Over the past couple of years, the El Cerrito Police Department has studied the secondary effects of medical marijuana dispensaries, including criminal activity. (Attachment 13, pg. 1-28)

As a result of the negative secondary effects of medical marijuana dispensaries, the City of El Cerrito adopted a prohibition on medical marijuana dispensaries on July 17, 2006. (Attachment 14)

### The City of Norwalk

The City of Norwalk, in Los Angeles County, has also studied medical marijuana and its negative secondary effects. In its Staff Report of June 3, 2008, the City of Norwalk noted secondary impacts, including:

- Street level dealers trying to sell to those going to the dispensary at a lower price;
- People smoking marijuana in public around the facility;
- People coming into the community from out of town to obtain marijuana;
- Marijuana DUI by people who have obtained it from the dispensary;
- Burglary attempts into the dispensary building;
- Criminal element drawn to the dispensary location;
- Marijuana dealers who have a doctor's recommendation are purchasing from the dispensary and then conducting illegal street sales to those who do not have a doctor's recommendation;
- Street criminals in search of the drugs are robbing medical use patients for their marijuana as they leave the dispensary;
- Thefts and robberies around the location occur to support the illegal and legal drug commerce;
- Businesses next door to the facilities are negatively affected because of the concentration of criminals that sometimes associate with the dispensary; and
- Complaints of other illegal drugs that are being sold inside dispensaries. (Attachment 15, pg. 3)

Given the concerns from the secondary effects of medical marijuana dispensaries, the City of Norwalk adopted an ordinance prohibiting medical marijuana dispensaries in all zones in the city on June 17, 2008. (Attachment 16).

### Survey by City of Redding

The City received on October 1, 2009 a survey conducted by the City of Redding of several cities regarding their ordinances on medical marijuana dispensaries. See Attachment 19. As noted in the survey, the overwhelming majority of cities have ordinances which either ban medical marijuana dispensaries or they have a moratorium. This finding is consistent with the ordinances of the other 6 cities in San Luis Obispo County which have a ban on medical marijuana dispensaries.

## **CONCLUSION:**

The measures taken by the City Council to alleviate the condition which led to the adoption of the 45-day moratorium ordinance include a review and analysis of the Federal law and the negative secondary effects of medical marijuana dispensaries, as more fully described in this report.

Due to the conflict between federal law and California law, as well as the community and statewide concerns regarding the negative effects that follow the establishment of medical marijuana dispensaries, it is necessary for the City to extend the moratorium for a period of 10 months and 15 days to enable planning and legal staff to study the issues

further. A copy of the Extension Ordinance is included as Attachment 17. Because this is an urgency ordinance, a 4/5ths vote of the City Council is required. The findings necessary to adopt an urgency measure are set forth in Section 1 of the proposed Extension Ordinance.

In addition, it is recommended that the City Council refer to the Planning Commission for review and consideration of a Draft Ordinance to repeal existing ordinances regarding medical marijuana and adopt an ordinance prohibiting the establishment and operation of medical marijuana facilities in the City. A copy of the Draft Ordinance is included as Attachment 18.

### **FISCAL IMPACT:**

No Fiscal Impact.

### **ALTERNATIVES:**

1. Take no action.
2. Adopt the Moratorium Extension for a period of 10 months and 15 days without referral to the Planning Commission the Draft Ordinance on the Prohibition of the Establishment and Operation of Medical Marijuana Facilities in the City.
3. Adopt the Moratorium Extension for a period of 10 months and 15 days with referral to the Planning Commission of the Draft Ordinance on the Prohibition of the Establishment and Operation of Medical Marijuana Facilities in the City.

### **ATTACHMENTS:**

1. [U.S. Department of Justice, Drug Enforcement Administration, Office of Chief Counsel's Opinion Letter. March 31, 2006.](#)
2. [Medical Marijuana Dispensaries and Associated Issues. Presented to the California Police Chiefs Association. September to December 2007.](#)
3. [White Paper on Marijuana Dispensaries. California Police Chiefs Association's Task Force on Marijuana Dispensaries. 2009.](#)
4. [White Paper on Medical Marijuana: History and Current Complications. Riverside County District Attorney's Office. September 2006.](#)
5. [California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use. August 2008.](#)

6. [City of Grover Beach, Ord. No. 06-06. April 17, 2006.](#)
7. [City of Paso Robles, Ord. No. 926 N.S. February 6, 2007.](#)
8. [City of Pismo Beach, Ord. No. 2007-001. February 20, 2007.](#)
9. [City of Arroyo Grande, Ord. No. 599. May 27, 2008.](#)
10. [City of San Luis Obispo, Ord. No. 1466. April 27, 2009.](#)
11. [City of Morro Bay, Ord. No. 547. April 27, 2009.](#)
12. [County of San Luis Obispo, Ord. No. 3114. February 6, 2007.](#)
13. [El Cerrito Police Department Memorandum on Marijuana Information. April 18, 2007.](#)
14. [City of El Cerrito, Ord. No. 2006-8 \(2006\). July 17, 2006.](#)
15. [City of Norwalk City Council Agenda Report on Medical Marijuana Dispensaries. June 3, 2008.](#)
16. [City of Norwalk, Ord. No. 08-1610. June 17, 2008.](#)
17. [City of Atascadero. Draft Interim Urgency Ordinance Extending the 45-day Moratorium on the Establishment and Operation of Medical Marijuana Facilities for a period of 10 months and 15 days through September 8, 2010.](#)
18. [City of Atascadero. Draft Ordinance Prohibiting the Establishment and Operation of Medical Marijuana Facilities in the City.](#)
19. [Medical Marijuana Dispensaries Listserve Survey Results, Conducted by City of Redding and Received October 1, 2009](#)