



OFFICE OF THE CITY ATTORNEY
CITY OF SAN BERNARDINO

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*REPORT TO THE MAYOR AND COMMON COUNCIL REGARDING MEDICAL
MARIJUANA DISPENSARIES:*

REQUESTED BY COUNCILMEMBER JAMES L. MULVIHILL

INTRODUCTION

In June of 2014, Council Member James L. Mulvihill requested a report to the Mayor and Common Council regarding the current status of medical marijuana dispensaries in the City of San Bernardino. Medical marijuana dispensaries remain an unauthorized use within the City of San Bernardino. Despite that, the demand for medical marijuana remains high within the City. The City continues to enforce its prohibition of medical marijuana dispensaries with the limited resources available using administrative, criminal, and civil remedies. This report seeks to provide background information regarding medical marijuana dispensaries, a summary of current enforcement activity, and a recommendation for future action.

BACKGROUND

In 1996, California voters approved Proposition 215, entitled "The Compassionate Use Act" (the "CUA"), which provides seriously ill Californians "the right to obtain and use marijuana for medical purposes" once a physician has deemed the use beneficial to the patient's health. The CUA regulates several forms through which marijuana can be distributed, such as "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." By its own terms, nothing in CUA prohibits a city from adopting policies further restricting the location or establishment of such operations. Accordingly, a city may impose such restrictions on any medical marijuana distributor, whether it operates via a storefront or via a mobile retail delivery.

In 2003, the State legislature enacted SB 420 to clarify the CUA's scope and to allow cities to adopt and enforce rules and regulations consistent with its provisions. SB 420 is also known as the "Medical Marijuana Program Act" ("MMP") and provides additional statutory guidance for those involved with medical marijuana use. The CUA and MMP allow for the use and operation of collectives or cooperatives by qualified medical marijuana patients and primary caregivers, and provide narrow affirmative defenses for criminal prosecutions of persons for drug possession. Notwithstanding the CUA and MMP, the Federal Controlled Substance Act makes it unlawful to manufacture, process, distribute or dispense marijuana. In fact, the United States Supreme Court, in both 2001 and 2005, held that Federal law continues to apply in California despite the CUA and that no medical necessity exceptions exist for violation of the FCSA.

After the initial passage of the CUA, some cities and counties across California began to experience a proliferation of storefront medical marijuana dispensaries claiming to be legal collectives or cooperatives. Aside from the fact that the use and distribution of marijuana in any form is illegal under federal law, the existence of storefront dispensaries is usually illegal under California law because it is nearly impossible to comply with the CUA and MMP while catering to a large membership. Moreover, it has been alleged that storefront dispensaries create significant crime, health, and safety concerns for the surrounding areas. After studying these concerns, some municipalities, including the City of San Bernardino, chose to adopt comprehensive bans on storefront medical marijuana dispensaries and collectives, based upon their knowledge of how these dispensaries operated at that time.

On March 19, 2007 the Mayor and Common Council unanimously adopted Ordinance No. MC-1243, an Urgency Interim Ordinance of the City of San Bernardino adding San Bernardino Municipal Code Section 19.06.026 (Development Code) and establishing a temporary moratorium on the establishment and operation of Medical Marijuana Dispensaries and other similar uses, declaring the urgency thereof, and taking effect immediately. On April 16, 2007, and February 19, 2008, the Mayor and Common Council unanimously adopted Ordinance No. MC-1244 and MC-1265 respectively, which extended the temporary moratorium. On June 21, 2010, the Mayor and Common Council adopted Ordinance No. MC-1328 prohibiting the issuance of development permits, conditional use permits, and similar building permits for the establishment and operation of medical marijuana dispensaries. On April 4, 2011 the Mayor and Common Council adopted Ordinance No. MC-1348, an Urgency Ordinance that added San Bernardino Municipal Code 5.05 prohibiting the establishment or operation of medical marijuana dispensaries. On April 18, 2011 the Mayor and Common Council adopted Ordinance No. MC-1349, an ordinance which also added San Bernardino Municipal Code Chapter 5.05 prohibiting the establishment and operation of medical marijuana dispensaries.

Concerns about recreational marijuana use in connection with medical marijuana distribution operations have been recognized by Federal and State courts. In the 2012 case of *People v. Leal*,

the Court noted, that the legal protection of State law “has proven irresistible to those illegally trafficking marijuana . . . that there is obviously widespread abuse of the CUA and the MMP identification card scheme by illicit sellers of marijuana. . . .[and] that many citizens, judges undoubtedly among them, believe the CUA has become a charade enabling the use of marijuana much more commonly for recreational than for genuine medical uses.” On May 6, 2013, in the case of *City of Riverside v. Inland Empire Patients Health and Wellness Center*, the California Supreme Court held that local governments can ban medical marijuana dispensaries because California’s marijuana laws do not expressly or impliedly limit a local jurisdiction’s land use authority, including the authority to prohibit facilities for the distribution of medical marijuana. In the opinion, the court ruled that the California Constitution grants cities and counties broad power to determine the permitted uses of land within their borders, that the CUA and MMP do not restrict that power, and that a local ban on Medical Marijuana Dispensaries (“MMDs”) does not conflict with these laws because they do no more than exempt certain activities from State criminal and nuisance laws. Given the clarity offered by this decision upholding a municipality’s ability to ban MMDs, several municipalities have chosen to ban MMDs or re-visit their existing bans of MMDs. Further, this decision has opened the door for discussion of a municipality’s ability to regulate MMDs instead of banning them altogether.

Despite the CUA and the MMP, the United States Attorneys in California have taken action to enforce the federal Controlled Substances Act against MMDs, and in the past have issued letters stating that California cities and officials face possible criminal prosecution for enabling MMDs to violate Federal law. In October 2011, the United States Attorneys for California held a press conference where they announced that they would be prosecuting large growers of marijuana. Aaron Sandusky of Rancho Cucamonga was sentenced to 10 years in federal prison for his three grow operations in the Inland Empire in 2013. Despite this, the federal government has recently backed off going after individual dispensaries and collectives.

Since the Supreme Court of California’s decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, other local municipalities have spent considerable resources to close down storefront dispensaries. Most have had success, with storefront dispensaries largely transforming into mobile operations. The two forms dispensaries have taken in local communities are “Hybrid” dispensaries that still operate from a fixed location and fully mobile dispensaries. Hybrid dispensaries operate to process membership applications, verify eligibility, receive payments, give out “vouchers” and perform all the elements of a dispensary operation with the exception of transacting marijuana. Fully mobile operations operate out of an unknown location, typically outside the jurisdiction, exist solely online or via telephone, and use personal vehicles to transport and deliver marijuana. The movement from storefront to mobile dispensaries has not cured all of the problems created by dispensary operations. There are numerous reports of mobile marijuana dispensary operations being targets for crime, including being the victims of robberies and other violent crime.

The State Legislature is currently considering SB1262, which would add additional state regulation to MMDs through the Department of Consumer Affairs. The bill also explicitly allows cities to maintain complete prohibitions of MMDs.

CURRENT CITY PROHIBITION

Section 19.02.070 of the Development Code requires all land and structures in the City shall be used and constructed in accordance with the Development Code, including obtaining applicable permits prior to the initiation of such use. For a specific use to be valid under the City's Development Code, the use must either be expressly permitted or be deemed a "similar use" to an expressly permitted use. Medical Marijuana Dispensaries are expressly prohibited by Section 19.06.026 of the Development Code and 5.05 of the Municipal Code. 19.06.026 provides a detailed definition of MMDs under the Code, and includes stationary storefront, hybrid models, and delivery models of dispensaries. The existing definition also does not expressly declare MMDs to be a public nuisance.

CURRENT ENFORCEMENT

Current enforcement of the City's prohibition of MMDs relies on a trifecta of administrative, criminal, and civil remedies, which are employed by Code Enforcement, the Police Department, and the City Attorney's Office.

The administrative process relies upon the issuance of Administrative Civil Penalties ("ACPs") against those individuals responsible for the operation of a MMD. The Responsible Parties may include the operators of the MMD (including owners, employees, and volunteers) or the landlord of the property being used to operate an MMD. The most successful ACPs are those issued to an individual with an interest in the property operating the MMD, as the fine can then be levied as a lien against the property. The City may issue the Notices of Violation to the landlord of the property where the MMD is located. This process has been effective in the recent past. The landlords use the Notice of Violation as evidence that the tenant MMD is operating a business in violation of law and is able to evict the MMD. When a landlord provides evidence that they are pursuing eviction against a MMD tenant, the City may stay further enforcement, such as an ACP citation, pending the outcome of the eviction proceeding. The ACP process has also had moderate success when issued against the operators themselves. These ACPs are issued by Code Enforcement or the Police Department, and prosecuted by the City Attorney's Office in front of an independent Hearing Officer. The fines are typically collected upon settlement of the ACP, transfer of the property, or an attempt by the owner to refinance the property.

The criminal process relies upon the issuance of a misdemeanor criminal citation to the operators of the MMD. This process is most effective when issued against the owners of the MMD as the termination of the MMD operation will typically be a prerequisite for any plea bargain. As with

all public nuisance level criminal behavior, the prospect of significant jail time has been dramatically reduced by AB109 Realignment as County-level jail space is taken by violent offenders that previously were incarcerated at the State-level. However, the prospect of a misdemeanor criminal record usually is sufficient to encourage operators to plea with the City. As written, the City's ordinance does not allow the misdemeanor to be reduced to an infraction, so beyond taking a misdemeanor, the City may elect to dismiss the case subject to payment of restitution to the City for enforcement costs and an additional fine.

The civil injunction process is the most costly in terms of time and resources, but also can be extremely effective at ending MMD operations at a specific location. Thus far, the City has only used this remedy against MMDs that are operating in such a fashion that they are a more significant public nuisance than other MMDs. Past actions have resulted in a Permanent Injunction, enforceable by criminal contempt of court against both the individual operators and the landlord. It is estimated that this type of action requires a minimum of 40 hours of attorney staff time. If additional resources were allocated, or additional sources of cost recovery created, the City could potentially pursue more of this type of action against MMDs.

Ultimately for some MMDs there is simply too much potential profit at stake to shut down at the first sign of a Code Enforcement Officer or letter from the City Attorney's Office. In those cases, a serious legal enforcement process must be initiated before the dispensary will close down. Additionally, operators may use legal tactics to delay enforcement action for a few months while they continue to operate. In the current framework, while the possession, use, and sale of marijuana remain unlawful under the Controlled Substances Act, the U.S. Attorney's Office and District Attorney's Office have largely abandoned prosecuting MMDs. These entities were primarily responsible for preventing MMDs from operating in the past. Without them, the City is typically only able to enforce the prohibition of MMDs from a public nuisance and land use standpoint. There is strong demand for marijuana within the community. In other cities, even after a large-scale initial crackdown, enforcement action remains necessary. That enforcement action comes with a cost, either in terms of actual dollars to a contracted entity, or from the opportunity cost of having Code Enforcement Officers and Deputy City Attorneys spending time performing this task in lieu of another.

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RECOMMENDATION

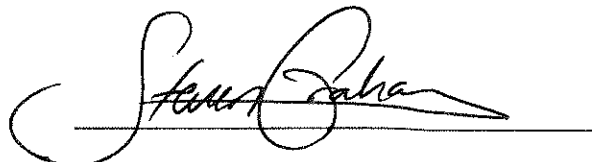
The recommendation of the City Attorney's Office is that the Mayor and Common Council create a Medical Cannabis Dispensary Ad Hoc Committee or refer the issue to another committee with the resources to study this issue. Our office has already conducted significant research into the methods other cities have employed to enforce bans on MMDs and legalize their operation. However, further action will require policy direction from the Mayor and Common Council after receiving input from the public, law enforcement, and our office. Some potential topics of discussion could include:

- Allocation of additional resources to enforcement efforts, such as contracting with an outside law firm capable of bringing simultaneous civil actions against large amounts of dispensaries.
- Directives for current enforcement efforts, such as focusing on those dispensaries operating in certain areas or near other specific uses, such as in residential neighborhoods or near schools.
- Research and reporting on the effect of upcoming State-wide legislation like SB1262, which may give the City additional resources or tools to enforce the MMD ban.
- Research and reporting on the potential for allowing MMDs to operate in limited areas of the City, similar to other cities such as San Diego, San Jose, and Palm Springs.
- Research and reporting on rules and regulations for MMDs, such as security, plant tracking, and patient screening requirements.
- Research and reporting on the possibility of revenue generation through business registration taxes, excise taxes, or fees.

The Committee could hear the research on these topics and more as presented by the City Attorney's Office, the Police Department, and interested members of the public, then after a comprehensive review, forward recommendations to the full Mayor and Common Council for consideration. Because of the amount of research and complexity of the issues, our office recommends the Committee be formed as soon as possible.

Respectfully,

GARY D. SAENZ, City Attorney

A handwritten signature in black ink, appearing to read "Steven P. Graham", is written over a horizontal line.

Steven P. Graham, Deputy City Attorney