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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).<sup>1</sup>) 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

<sup>1</sup> 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](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](http://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](http://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:**<sup>2</sup> 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

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<sup>2</sup> 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.

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45 Cal.4th 274, 195 P.3d 1061, 85 Cal.Rptr.3d 480, 08 Cal. Daily Op. Serv. 14,435, 2008 Daily Journal D.A.R. 17,357, 50 A.L.R.6th 673

(Cite as: 45 Cal.4th 274, 195 P.3d 1061, 85 Cal.Rptr.3d 480)

**H**

Supreme Court of California  
The PEOPLE, Plaintiff and Respondent,

v.

Roger William MENTCH, Defendant and Appellant.

No. S148204.

Nov. 24, 2008.

As Modified Dec. 17, 2008.

Motion to Recall Remittitur Denied Feb. 25, 2009.

**Background:** Defendant was convicted by jury in the Superior Court, Santa Cruz County, No. 07429, Samuel S. Stevens, J., of cultivation of marijuana and possession of marijuana for sale. Defendant appealed. The Court of Appeal reversed and remanded. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

**Holdings:** The Supreme Court, Werdegar, J., held that:

- (1) partial immunity as a "primary caregiver" requires consistent caregiving independent of any assistance in taking medical marijuana, at or before the time the defendant assisted with medical marijuana;
- (2) any evidence that a medical marijuana patient moved in with defendant did not require primary caregiver jury instruction;
- (3) evidence that defendant sporadically took patients to medical appointments did not require primary caregiver jury instruction;
- (4) evidence that defendant provided medical marijuana and marijuana-related advice and counseling did not require primary caregiver jury instruction; and
- (5) defendant's acts protected under Medical Marijuana Program (MMP) did not immunize him for other acts.

Opinion, 50 Cal.Rptr.3d 91, superseded.

Chin, J., filed concurring opinion, in which Corrigan, J., joined.

West Headnotes

**[1] Statutes 361 ↪325**

361 Statutes

361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. **Most Cited Cases**

Courts interpret voter initiatives using the same principles that govern construction of legislative enactments.

**[2] Statutes 361 ↪325**

361 Statutes

361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. **Most Cited Cases**

In construing a voter initiative, courts begin with the text as the first and best indicator of intent.

**[3] Statutes 361 ↪325**

361 Statutes

361IX Initiative

361k325 k. Constructions, Operation and Effect of Initiated Acts. **Most Cited Cases**

If the text of a voter initiative is ambiguous and supports multiple interpretations, courts may turn to extrinsic sources such as ballot summaries and arguments for insight into the voters' intent.

**[4] Controlled Substances 96H ↪51**

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. **Most Cited Cases**

Designation as a primary caregiver by a medicinal marijuana patient is necessary, but not sufficient, to qualify for partial immunity for the possession and

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45 Cal.4th 274, 195 P.3d 1061, 85 Cal.Rptr.3d 480, 08 Cal. Daily Op. Serv. 14,435, 2008 Daily Journal D.A.R. 17,357, 50 A.L.R.6th 673

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cultivation of marijuana as a primary caregiver under the Compassionate Use Act. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [5] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

A defendant claiming partial immunity for the possession and cultivation of marijuana as a "primary caregiver" under the Compassionate Use Act must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. West's Ann.Cal.Health & Safety Code § 11362.5(e).

*See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 70; Cal. Jur. 3d, Criminal Law: Crimes Against Administration of Justice and Public Order, § 122.*

#### [6] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

An after-the-fact caregiving relationship between a medical marijuana patient and a defendant who cultivated or provided marijuana for the patient does not immunize the defendant from prosecution for the previous cultivation or possession for sale under the Compassionate Use Act. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [7] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

Defendants who show they satisfied all other prerequisites for primary caregiver status for a given patient at some point after the onset of providing marijuana may avail themselves of the Compassionate Use Act defense going forward, even if they remain subject to prosecution for actions taken prior to assumption of a primary caregiver role. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [8] Controlled Substances 96H ↪77

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk77 k. Manufacture. Most Cited Cases

#### Controlled Substances 96H ↪80

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk80 k. Possessory Offenses. Most

Cited Cases

A defendant seeking to establish that he or she "consistently assumed responsibility for the housing, health, or safety" of a qualified medical marijuana patient, in claiming partial immunity for the possession and cultivation of marijuana as a "primary caregiver" under the Compassionate Use Act, must do so based on evidence independent of the administration of medical marijuana. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [9] Criminal Law 110 ↪772(6)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k772 Elements and Incidents of Offense, and Defenses in General

110k772(6) k. Defenses in General.

Most Cited Cases

A defendant has a right to have the trial court give a jury instruction on any affirmative defense for

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which the record contains substantial evidence, or evidence sufficient for a reasonable jury to find in favor of the defendant, unless the defense is inconsistent with the defendant's theory of the case.

#### [10] Criminal Law 110 ⚡772(6)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k772 Elements and Incidents of Offense, and Defenses in General

110k772(6) k. Defenses in General.

Most Cited Cases

In determining whether the evidence is sufficient to warrant a jury instruction on an affirmative defense, the trial court does not determine the credibility of the defense evidence, but only whether there is evidence which, if believed by the jury, is sufficient to raise a reasonable doubt.

#### [11] Controlled Substances 96H ⚡96

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk96 k. In General. Most Cited Cases

#### Controlled Substances 96H ⚡97

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk97 k. Possessory Offenses. Most Cited Cases

Any evidence that a qualified medical marijuana patient moved in with defendant shortly before police discovered marijuana in defendant's home was not sufficient to require a jury instruction on the affirmative defense that defendant was a "primary caregiver" entitled to partial immunity for possession and cultivation of marijuana under the Compassionate Use Act, absent evidence of any primary caregiving relationship at or before the time defendant assumed responsibility for assisting the pa-

tient with medical marijuana a year and a half earlier. West's Ann.Cal.Health & Safety Code § 11362.5 (e).

#### [12] Controlled Substances 96H ⚡96

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk96 k. In General. Most Cited Cases

#### Controlled Substances 96H ⚡97

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk97 k. Possessory Offenses. Most Cited Cases

Evidence that defendant took "a couple" of qualified medical marijuana patients to medical appointments "sporadically" was not sufficient to require a jury instruction on the affirmative defense that defendant was a "primary caregiver" entitled to partial immunity for possession and cultivation of marijuana under the Compassionate Use Act, since such sporadic care could not have been provided "consistently" as required by statute. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [13] Controlled Substances 96H ⚡96

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk96 k. In General. Most Cited Cases

#### Controlled Substances 96H ⚡97

96H Controlled Substances

96HIII Prosecutions

96Hk95 Instructions

96Hk97 k. Possessory Offenses. Most Cited Cases

Evidence that defendant provided medical marijuana and marijuana-related advice and counseling to qualified medical marijuana patients was not sufficient to require a jury instruction on the af-

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firmative defense that defendant was a “primary caregiver” entitled to partial immunity for possession and cultivation of marijuana under the Compassionate Use Act, since such evidence was not independent of any assistance in taking medical marijuana. West's Ann.Cal.Health & Safety Code § 11362.5(e).

#### [14] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

A defendant's provision of medical marijuana to qualified medical marijuana patients as a primary caregiver does not insulate from prosecution his cultivation of and sale of marijuana to those for whom he is not a primary caregiver, or his cultivation of and sale of marijuana to cannabis clubs. West's Ann.Cal.Health & Safety Code § 11362.5.

#### [15] Jury 230 ↪31.3(1)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k31.3 Practice and Procedure in Criminal Cases

230k31.3(1) k. In General. Most Cited

Cases

In a criminal trial, the right to a jury resolution of all disputed factual issues is to be jealously protected.

#### [16] Criminal Law 110 ↪772(6)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k772 Elements and Incidents of Offense, and Defenses in General

110k772(6) k. Defenses in General. Most Cited Cases

In considering whether to allow a jury instruction on an affirmative defense, trial courts are responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish the affirmative defense.

#### [17] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

Medical Marijuana Program (MMP) provision granting immunity to qualified patients or persons with Program identification cards who transport or process marijuana for their own personal use means that qualified patients and Program identification card holders may not be prosecuted under particular state laws for the specific conduct of transportation or processing for personal use, which otherwise might have been criminal. West's Ann.Cal.Health & Safety Code § 11362.765(b)(1).

#### [18] Controlled Substances 96H ↪51

96H Controlled Substances

96HII Offenses

96Hk48 Defenses

96Hk51 k. Medical Necessity. Most Cited

Cases

Even if defendant engaged in acts protected under the Medical Marijuana Program (MMP) of assisting in administering medical marijuana, or advising and counseling in the administration or cultivation of medical marijuana, and thus defendant could not be charged with cultivation or possession for sale on that sole basis, defendant's acts did not preclude him from being charged with cultivation or possession for sale to the extent he went beyond the immunized range of conduct. West's Ann.Cal.Health & Safety Code § 11362.765.

\*\*\*483 Lawrence A. Gibbs, Berkeley, under appointment by the Supreme Court, and Joseph M. Bochner, under appointment by the Court of Ap-

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peal, for Defendant and Appellant.

## GROUND

Drug Policy Alliance, Daniel Abrahamson, Tamar Todd and Theshia Naidoo for Marcus A. Conant, Robert J. Melamede and Gerald F. Uelmen as Amici Curiae on behalf of Defendant and Appellant.

In 2003, Roger Mentch was arrested and charged with the cultivation of marijuana **\*\*1064** (Health & Saf.Code, § 11358) <sup>FN1</sup> and its possession for sale (§ 11359).<sup>FN2</sup>

Joseph D. Elford for Americans for Safe Access as Amicus Curiae on behalf of Defendant and Appellant.

FN1. All further unlabeled statutory references are to the Health and Safety Code.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Donald E. de Nicola, Deputy State Solicitor General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Gerald A. Engler, Assistant Attorney General, Moona Nandi, Laurence K. Sullivan and Michele J. Swanson, Deputy Attorneys General, for Plaintiff and Respondent.

FN2. Mentch was also charged with manufacturing and possessing concentrated cannabis (also known as hash oil) (§§ 11357, subd. (a), 11379.6, subd. (a)), possessing psilocybin mushrooms (§ 11377, subd. (a)), and firearm enhancements for the marijuana and hash oil counts (Pen.Code, § 12022, subd. (a)(1)), but these additional counts have no bearing on the issues in this appeal, and we do not address them further.

WERDEGAR, J.

### *Prosecution Evidence*

**\*277 \*\*1063** The Compassionate Use Act of 1996 (Act) (Health & Saf.Code, § 11362.5, added by voter initiative, Prop. 215, Gen. Elec. (Nov. 5, 1996)) provides partial immunity for the possession and cultivation of marijuana to two groups of people: qualified medical marijuana patients and their primary caregivers. We consider here who may qualify as a primary caregiver. We hold that a defendant whose caregiving consisted principally of **\*278** supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Act and was not entitled to an instruction on the primary caregiver affirmative defense. We further conclude that nothing in the Legislature's subsequent 2003 Medical Marijuana Program (Health & Saf.Code, § 11362.7 et seq.) alters this conclusion or offers any additional defense on this record. Accordingly, we reverse the Court of Appeal.

Heidi Roth, a teller at Monterey Bay Bank, testified that she became familiar with Mentch over the period of February to April 2003. Mentch came to the bank on several occasions and made large deposits of cash in small bills, each deposit totaling over \$2,000. Roth noticed that some of the money Mentch deposited smelled so strongly of marijuana that the smell filled the bank, and the bank had to remove the money from circulation. The total amount Mentch deposited with the bank over a two-month period was \$10,750. On April 15, 2003, Roth filed a suspicious activity report with the Santa Cruz County **\*\*\*484** Sheriff's Office, relating the questionable nature of Mentch's deposits.

After further investigation, the sheriff's office obtained a warrant to search Mentch's house for marijuana. On June 6, 2003, Mark Yanez, a narcotics investigator, and four deputies went to Mentch's house to serve the warrant. When Mentch opened the door, Yanez told him they had a warrant to search his house for marijuana. Mentch told Yanez

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that he had a medical recommendation for marijuana. A search of Mentch's person turned up \$253 in cash and a small vial of hash oil, or concentrated cannabis. Yanez advised Mentch of his rights and interviewed him in a police vehicle parked outside Mentch's residence.

\*279 Mentch told Yanez he had a medical marijuana recommendation for colitis, dysphoria, and depression, and that he smoked about four marijuana cigarettes, totaling approximately one-sixteenth of an ounce, per day for medicinal purposes. When Yanez asked Mentch if he sold marijuana, Mentch responded that he sold it to five medical marijuana users.

A search of Mentch's residence revealed several elaborate marijuana growing setups. In various rooms of the house, the deputies found 82 marijuana plants in the flowering or budding stage, 57 "clone" marijuana plants, 48 marijuana plants in the growing or vegetative stage, and three "mother" plants, which Yanez opined were likely the female plants from which clippings were taken to make the clone plants. Considering the evidence seized from Mentch's bank and residence, as well as his statement to Yanez, Yanez opined that while Mentch may have personally consumed some of the marijuana he grew, his operation was primarily a for-profit commercial venture.

#### *Defense Evidence*

Leland Besson testified that he had known Mentch for two years. In June 2003, Besson was on disability and had a medical marijuana recommendation for a bad back, neck, and joints. At the time, he was smoking approximately two to three grams of marijuana a day. For about one year before Mentch was arrested, Besson purchased his marijuana exclusively from Mentch, who knew about Besson's medical marijuana recommendation. Mentch supplied medical marijuana through his business, the Hemporium. Besson gave Mentch \$150 to \$200 in cash every month for one and one-half ounces of

marijuana, the amount Besson usually consumed in a month.

Laura Eldridge testified she had known Mentch for about three years. In June 2003, she was working as a caretaker for Besson, cooking and cleaning for him, driving him to the grocery store, and driving him to medical appointments and to pick up his medications. Eldridge also drove Besson to Mentch's house to get him his marijuana. The only time Besson saw Mentch was when Eldridge took him to Mentch's house to get marijuana.

At the time, Eldridge herself had a medical marijuana recommendation for migraine headaches and posttraumatic stress disorder. She was smoking about five or six marijuana cigarettes a day and consuming about one \*\*1065 ounce of marijuana a month. Eldridge obtained marijuana exclusively from Mentch for approximately one and one-half years before his arrest. Mentch provided the marijuana through his medical marijuana business, the Hemporium. Eldridge obtained the marijuana from Mentch every month, paying him \$200 to \$250 \*280 in cash for one ounce and \$25 in cash for one-eighth of an ounce if she needed more.

\*\*\*485 Eldridge was at Mentch's house getting her daughter ready for school on the morning of Mentch's arrest. At the time, she and Mentch were not living together but were seeing each other romantically, and Eldridge had stayed over at Mentch's house the night before the search warrant was served.

Mentch took the stand in his own defense. In 2002, he obtained a medical marijuana recommendation and began growing marijuana. He learned how to grow marijuana from reading books, searching the Internet, and talking to people. He kept marijuana plants in all three stages of growth so that he was in a constant cycle of marijuana production, which produced a yield of four harvests a year. Mentch's medical marijuana recommendation was still current on the day the police searched his home. At that time, he smoked four to six marijuana cigar-

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ettes a day (approximately one-sixteenth of an ounce) and consumed between one and one-half to two ounces of marijuana a month.

Mentch opened the Hemporium, a caregiving and consultancy business, in March 2003. The purpose of the Hemporium was to give people safe access to medical marijuana. Mentch regularly provided marijuana to five other individuals, including Besson, Eldridge, and a man named Mike Manstock. Sometimes he did not charge them. All five individuals had valid medical marijuana recommendations. Mentch did not provide marijuana to anyone who did not have a medical marijuana recommendation. Occasionally, he took any extra marijuana he had to two different cannabis clubs, The Third Floor and another unnamed place. Although a majority of the marijuana plants in Mentch's home belonged to him, some belonged to Manstock. In addition, Mentch let Besson and Eldridge grow one or two plants.

Mentch provided marijuana to Besson about once every month and to Eldridge about once or twice every month. On average, they each gave him \$150 to \$200 for an ounce and a half of marijuana a month. Mentch considered his marijuana "high-grade" and provided it to Besson and Eldridge for less than street value. He used the money they paid him to pay for "nutrients, utilities, part of the rent." Mentch did not profit from his sales of marijuana, and sometimes he did not even recover his costs of growing it. Mentch counseled his patients/customers about the best strains of marijuana to grow for their ailments and the cleanest way to use the marijuana. He took a "couple of them" to medical appointments on a "sporadic" basis.

Although Mentch asked all five patients to come to court and testify on his behalf, only Besson and Eldridge showed up. He did not subpoena the others \*281 because one of them was out of state, another did not want to be involved because his father was an attorney, and the third did not want to testify.

### *The Primary Caregiver Defense*

Before trial, the prosecutor filed a motion in limine to exclude any references by counsel during voir dire, testimony, or closing argument to Mentch's being a "primary caregiver" for Eldridge or Besson. <sup>FN3</sup> The prosecutor asserted that Eldridge and Besson could testify to any care Mentch had provided them, but argued that the ultimate determination whether Mentch was a primary caregiver rested with the jury. The trial court granted the motion.

FN3. The Act extends limited immunity from state prosecution for cultivation or possession to both qualified patients and their designated "primary caregiver[s]." ( § 11362.5, subd. (d).)

\*\*\*486 After Eldridge and Besson testified, the court concluded the evidence was insufficient to show that Mentch had provided primary caregiver services. Mentch argued in a brief to the court that a person could qualify as a patient's primary caregiver whenever he or she consistently assumed responsibility for a patient's health by providing medical marijuana upon a doctor's recommendation or \*\*1066 approval. The trial court rejected the argument.

During the subsequent discussion of jury instructions after the close of evidence, Mentch requested the standard jury instruction for affirmative defenses under the Act (CALJIC No. 12.24.1) on the theory that he was both a qualified patient entitled to cultivate marijuana for himself and a primary caregiver entitled to cultivate marijuana and possess it for sale to others. The trial court agreed to give the instruction insofar as it articulated a qualified patient defense but, consistent with its prior rulings, omitted the optional portion of the instruction relating to the primary caregiver defense. <sup>FN4</sup>

FN4. At the time of trial, CALJIC No. 12.24.1 provided: "The [possession] [or] [cultivation] [or] [transportation] of



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#### A. The Meaning of “Primary Caregiver”

[1][2][3] We interpret voter initiatives using the same principles that govern construction of legislative enactments. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.) Thus, we begin with the text as the first and best indicator of intent. (*Ibid.*; *Elsner v. Uveges* (2005) 34 Cal.4th 915, 927, 22 Cal.Rptr.3d 530, 102 P.3d 915.) If the text is ambiguous and supports multiple interpretations, we may then turn to **\*\*1067** extrinsic sources such as ballot summaries and arguments for insight into the voters' intent. **\*283**(*Professional Engineers*, at p. 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226; *Legislature v. Eu* (1991) 54 Cal.3d 492, 504, 286 Cal.Rptr. 283, 816 P.2d 1309; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14, 194 Cal.Rptr. 781, 669 P.2d 17.)

Section 11362.5, subdivision (d) provides: “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.” In turn, section 11362.5, subdivision (e) defines “primary caregiver” as “the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.”

[4] This statutory definition has two parts: (1) a primary caregiver must have been designated as such by the medicinal marijuana patient; and (2) he or she must be a person “who has consistently assumed responsibility for the housing, health, or safety of” the patient. It is clear from the structure of subdivision (e) of section 11362.5 that this latter part of the definition has additional restrictive power, or else the subdivision would have ended with the phrase “by the person exempted under this section,” thereby allowing every patient to designate one person without limitation.

Thus, to qualify for exemption under this subdivision, a person must satisfy both halves—the “designee” clause and the “responsibility” clause. (See *People v. Mower* (2002) 28 Cal.4th 457, 475, 122 Cal.Rptr.2d 326, 49 P.3d 1067 [“For a person to be a qualified primary caregiver, he or she must be ‘designated’ as such by a qualified patient, *and* must have ‘consistently assumed responsibility’ for the qualified patient's ‘housing, health, or safety’ ” (italics added) ].) Designation is necessary, but not sufficient. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773, 33 Cal.Rptr.3d 859; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1397, 70 Cal.Rptr.2d 20.)

[5] Three aspects of the structure of the responsibility clause are noteworthy. From these aspects, as we shall explain, we conclude a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana.

**\*\*\*488** First, the text requires that the primary caregiver have “consistently” assumed responsibility for the patient's care. “Consistently” suggests an ongoing relationship marked by regular and repeated actions over time. In **\*284** *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th 1383, 70 Cal.Rptr.2d 20, for example, the many customers of a marijuana club, the Cannabis Buyers' Club, executed pro forma designations of the club as their primary caregiver. The Court of Appeal correctly rejected the assertion that the buyers' club could qualify as a primary caregiver in these circumstances: “A person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis, drug dealers on street corners and sales centers such as the Cannabis Buyers' Club as the patient's ‘primary caregiver.’ The primary caregiver the patient designates must be one ‘who has *consistently* assumed responsibility

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for the housing, health, or safety of [the patient].’ ” (*Id.* at p. 1396, 70 Cal.Rptr.2d 20.) One must consistently—“with persistent uniformity” (3 Oxford English Dict. (2d ed.1989) p. 773) or “in a persistent or even manner” (Webster’s 3d New Internat. Dict. (2002) p. 484)—have assumed responsibility for a patient’s housing, health, or safety, or some combination of the three.

[6][7] Second, the definition of a primary caregiver is written using a past participle—“has consistently assumed.” ( § 11362.5, subd. (e).) This reinforces the inference arising from the use of the word “consistently” that primary caregiver status requires an existing, established relationship. In some situations, the formation of a bona fide caregiving relationship and the onset of assistance in taking medical marijuana may be contemporaneous, as with a cancer patient entering chemotherapy who has a recommendation for **\*\*1068** medical marijuana use and has a live-in or home-visit nurse to assist with all aspects of his or her health care, including marijuana consumption. (See § 11362.7, subd. (d)(1) [primary caregiver may include employees of hospice or home health agency].) Even in this scenario, however, the caregiving relationship will arise at or before the onset of assistance in the administration of marijuana. What is not permitted is for an individual to establish an after-the-fact caregiving relationship in an effort to thereby immunize from prosecution previous cultivation or possession for sale. (Cf. *People v. Rigo* (1999) 69 Cal.App.4th 409, 412-415, 81 Cal.Rptr.2d 624 [doctor may not give postarrest recommendation to bless prior use].)

FN5

FN5. In holding that the assumption of primary caregiver responsibilities cannot apply retroactively to immunize prior cultivation or possession of marijuana, we do not suggest it would not apply prospectively. Defendants who show they satisfied all other prerequisites for primary caregiver status for a given patient at some point after the onset of providing

marijuana may avail themselves of the defense going forward, even if they remain subject to prosecution for actions taken prior to assumption of a primary caregiver role.

[8] Third, from these two aspects of the text, as well as logic, we draw a further inference: a primary caregiver must establish he or she satisfies the responsibility clause based on evidence independent of the administration of medical marijuana. Under the Act, a primary caregiver relationship is a necessary antecedent, a predicate for being permitted under state law to possess or cultivate medical marijuana. The possession or cultivation of marijuana for medical purposes cannot serve as the basis for making lawful the possession or cultivation of marijuana for medical purposes; to conclude otherwise would rest the primary caregiver defense on an entirely circular footing.

**\*285** We thus agree with the Court of Appeal in *People v. Frazier* (2005) 128 Cal.App.4th 807, 823, 27 Cal.Rptr.3d 336, which rejected the argument that “a ‘primary caregiver’ is a person who ‘consistently grows and supplies physician approved marijuana for a medical marijuana patient to serve the health needs of that patient.’ ” The *Frazier* court concluded that, while *if* one were already qualified as a primary caregiver one could consistently grow and supply medical marijuana to a patient, the consistent**\*\*\*489** growth and supply of medical marijuana would not by itself place one in the class of primary caregivers. (*Ibid.*; see also *People v. Windus* (2008) 165 Cal.App.4th 634, 644, 81 Cal.Rptr.3d 227 [“Case law is clear that one who merely supplies a patient with marijuana has no defense under the [Act]”].) <sup>FN6</sup>

FN6. Mentch directs us to the Attorney General’s Compassionate Use Act guidelines concerning medical marijuana (see § 11362.81, subd. (d)) as supporting a contrary definition of “primary caregiver,” but in fact the guidelines are wholly consistent with case law and the statutory text

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and afford Mentch no support. The guidelines note: “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.” (Cal. Atty. Gen., Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use (Aug.2008) pt. II.B., p. 4.) They do not suggest provision of medical marijuana is alone sufficient to qualify one as a primary caregiver, but recognize instead that the provision of marijuana may be one part of caregiving for an ailing patient.

The trial court accurately assessed the law when, in denying Mentch's request for a primary caregiver instruction, it explained: “I'm satisfied that simply providing marijuana, in and of itself to these folks does not-you don't bootstrap yourself to becoming the primary caregiver because you're providing [marijuana]” and “you have to be a caregiver *before* you can provide the marijuana.” (Italics added.) Later, in denying Mentch's motion for a judgment of acquittal (Pen.Code, § 1118.1), the trial court reiterated the point: “There has to be something more to be a caregiver than simply providing marijuana. Otherwise, there would be no reason to have the definition of a caregiver, because anybody who would be providing marijuana and related services would qualify as a caregiver[,] therefore giving them a defense to the very activity that's otherwise illegal, and I don't think that makes any sense in terms of statutory construction, nor do I think it was intended by the people or the Legislature.”

Mentch himself highlights the dog-chasing-its-tail absurdity of allowing the administration of medical marijuana to patients to form the basis for authorizing the administration of medical marijuana to pa-

tients in his attempts to distinguish this case from *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th 1383, 70 Cal.Rptr.2d 20, and *People v. Urziceanu, supra*, 132 Cal.App.4th 747, 33 Cal.Rptr.3d 859. *Peron* and *Urziceanu*, he argues, involved only casual or occasional \*\*1069 provision of medical marijuana; here, in contrast, he “consistently” provided medical \*286 marijuana, “consistently” allowed his patients to cultivate medical marijuana at his house, and was his five patients' “exclusive source” for medical marijuana. The essence of this argument is that the occasional provision of marijuana to someone is illegal, but the frequent provision of marijuana to that same person may be lawful. The vice in the approach of the cooperatives at issue in *Peron* and *Urziceanu* therefore evidently was not that they provided marijuana to their customers; it was that they did not do it enough.

Nothing in the text or in the supporting ballot arguments suggests this is what the voters intended. The words the statute uses-housing, health, safety-imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need. The ballot arguments in support suggest a patient is generally personally responsible for noncommercially supplying his or her own marijuana: “Proposition \*\*\*490 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws.” (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) But as the focus is on the “seriously and terminally ill” (*ibid.*), logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows “ ‘primary caregiver[s]’ the same authority to act on behalf of those too ill or bedridden to do so” (*People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th at p. 1394, 70 Cal.Rptr.2d 20). To exercise that authority, however, one must be a “primary”-principal, lead, central-“caregiver”-one responsible for rendering assistance in the provision of daily life necessities-for a qualifying seriously or

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terminally ill patient.<sup>FN7</sup>

FN7. The Act is a narrow measure with narrow ends. As we acknowledged only months ago, “ ‘the proponents’ ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition’s limited immunity to cover that which its language does not.’ ” (*Ross v. Ragingwire* (2008) 42 Cal.4th 920, 930, 70 Cal.Rptr.3d 382, 174 P.3d 200, quoting *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152, 128 Cal.Rptr.2d 844.) The Act’s drafters took pains to note that “neither relaxation much less evisceration of the state’s marijuana laws was envisioned.” (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1546, 66 Cal.Rptr.2d 559; see also *People v. Urziceanu*, *supra*, 132 Cal.App.4th at pp. 772-773, 33 Cal.Rptr.3d 859 [the Act “is a narrowly drafted statute,” not an attempt to “decriminalize marijuana on a wholesale basis”].) We must interpret the text with those constraints in mind.

We note in passing that some other states in adopting their own medical marijuana compassionate use acts have adopted substantially different and manifestly broader language in defining their primary caregiver exceptions. In New Mexico, for example, a primary caregiver is “a resident of New Mexico who is at least eighteen years of age and who has been designated by the patient’s practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis.” (N.M. Stat. § 26-2B-3, par. F; see also Vt. Stat. Ann. tit. 18, § 4472, \*287 subd. (6) [registered caregiver must be 21, must have no drug convictions, and must have “agreed to undertake responsibility for managing the well-being of a registered patient with respect to the use of marijuana for symptom relief”].) Had the drafters of the Act intended the broad understanding of

“primary caregiver” that Mentch urges, they might well have been expected to select similar language. They did not.<sup>FN8</sup>

FN8. More generally, we note that in the 12 states to have adopted compassionate use acts, all such states’ acts include a primary caregiver exception or its equivalent, and virtually all include some mechanism for limiting primary caregiver status so the exception does not swallow the rule. Most rely on either mandatory state registries (Alaska Stat. § 17.37.010, subds. (a), (q) [Alaska]; Mont.Code Ann. § 50-46-201 [Montana]; N.M. Stat. § 26-2B-4, par. D [New Mexico] ) or confine each caregiver to a set number of patients (Wash. Rev.Code § 69.51A.010(1)(d) [Washington] ) or both (Haw.Rev.Stat. § 329-123, subd. (c) [Hawaii]; R.I. Gen. Laws §§ 21-28.6-3, subd. (6), 21-28.6-4, subd. (c) [Rhode Island]; Vt. Stat. Ann. tit. 18, § 4474, subds. (a), (c) [Vermont] ).

A minority (Colorado, Nevada, and Oregon) have instead adopted California’s approach of limiting the caregiver exception by using a higher standard for the nature of the relationship and responsibility assumed. (See Colo. Const., art. XVIII, § 14, subd. (1)(f) [must have “significant responsibility for managing the well-being of a patient who has a debilitating medical condition”]; Nev.Rev.Stat. § 453A.080, subsec. 1(b) [must have “significant responsibility for managing the well-being of a person diagnosed with a chronic or debilitating medical condition”]; Or.Rev.Stat. § 475.302, subsec. (5) [must have “significant responsibility for managing the well-being of a person who has been diagnosed with a debilitating medical condition”].)

\*\*\*491 \*\*1070 We have no doubt our interpreta-

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tion of the statute will pose no obstacle for those bona fide primary caregivers whose ministrations to their patients the Act was actually intended to shield from prosecution. The spouse or domestic partner caring for his or her ailing companion, the child caring for his or her ailing parent, the hospice nurse caring for his or her ailing patient—each can point to the many ways in which they, medical marijuana aside, attend to and assume responsibility for the core survival needs of their dependents. The Act allows them, insofar as state criminal law is concerned, to add the provision of marijuana, where medically recommended or approved, as one more arrow in their caregiving quiver. It simply does not provide similar protection where the provision of marijuana is itself the substance of the relationship.

#### B. Sufficiency of the Evidence to Support an Instruction on the Primary Caregiver Affirmative Defense

We turn to the merits of Mentch's request for a primary caregiver instruction in light of the evidence he adduced and the evidence he sought to adduce.

[9][10] “It is well settled that a defendant has a right to have the trial court ... give a jury instruction on any affirmative defense for which the \*288 record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation]—unless the defense is inconsistent with the defendant's theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether ‘there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt...’ [Citations.]” (*People v. Salas* (2006) 37 Cal.4th 967, 982-983, 38 Cal.Rptr.3d 624, 127 P.3d 40; see also *People v. Michaels*, *supra*, 28 Cal.4th at p. 529, 122 Cal.Rptr.2d 285, 49 P.3d 1032.) On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence—

evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether Mentch was a primary caregiver and thus innocent of unlawful possession or cultivation.

Mentch relies on three strands of evidence: his alleged provision of shelter to one patient, his taking of other patients to medical appointments, and his ongoing provision of both marijuana and marijuana advice and counseling to all his patients. Even crediting this evidence, as we must for purposes of deciding whether he was entitled to an instruction, we discern a series of interrelated shortcomings. Some of Mentch's caregiving was independent of providing marijuana, but was not provided at or before the time he began providing marijuana. Some of it may have been at or before the time he began providing marijuana, but was not consistent. And some of it was consistent, but was not independent of providing marijuana. But none of the evidence demonstrated satisfaction of *each* of the three aspects of the responsibility clause we have identified; none of it was sufficient to raise a reasonable doubt as to whether Mentch had provided his patients consistent caregiving, independent of providing them marijuana, at or before the time he began providing them marijuana.

\*\*\*492 1071 First, Mentch argues Eldridge moved in shortly before the June 6, 2003, search. Unfortunately for Mentch's argument, the record directly contradicts this assertion. Eldridge testified she lived elsewhere at the time, and Mentch did not testify to the contrary. Even if the record supported it, however, the argument would not address the lack of any evidence of a primary caregiving relationship during the preceding year and a half during which Mentch was, by his own admission, selling Eldridge marijuana; it would not retroactively bless Mentch's prior cultivation of marijuana and sale of marijuana to her.

[12] Second, Mentch testified he took “a couple” patients to medical appointments “sporadically.” A sporadic assumption of responsibility is the antithesis \*289 of a consistent assumption of responsib-

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ility; it cannot satisfy the responsibility clause.

[13] Third, Mentch otherwise relied almost exclusively on the provision of medical marijuana to establish a primary caregiving relationship. But the evidence must establish an assumption of responsibility independent of the provision of medical marijuana. This shortcoming is also intertwined with Mentch's problems showing a consistent assumption of responsibility: what "caregiving" was consistent consisted only of providing marijuana, while what caregiving was independent of providing marijuana was not consistent.

[14] There is a final overarching problem with the evidence. Mentch testified to providing marijuana to five patients and also to occasionally growing too much and providing the excess to marijuana clubs. But where, as here, Mentch was charged with single counts of possession and cultivation, primary caregiver status would provide Mentch a defense only if it extended to all the marijuana he possessed or cultivated. Consider, for example, a defendant who testified that he (1) grew marijuana, (2) gave half to his critically ill daughter, a qualified patient for whom he was the designated primary caregiver and by whom he was reimbursed for growing expenses, and (3) sold the other half on the street. However much the primary caregiver defense might protect his actions toward his daughter, it would have no bearing on his case because a portion of his distribution of marijuana for money would be unprotected from state prosecution. Similarly, Mentch's testimony that he "sporadically" took "a couple" of the five patients to medical appointments, and his assertion (unsupported by the record) that he provided Eldridge shelter, would, even if believed, do nothing to insulate from prosecution his cultivation of and sale of marijuana to those for whom he did not provide shelter or nonmarijuana-based health care. (See *People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 773, 33 Cal.Rptr.3d 859 [rejecting primary caregiver defense because the defendant failed to adduce evidence he was "the primary caregiver for *all* of the patients who pat-

ronized his cooperative" (italics added) ].) Nor would it protect him from prosecution for cultivating marijuana and providing it to cannabis clubs. (See *People v. Galambos*, *supra*, 104 Cal.App.4th at pp. 1165-1167, 128 Cal.Rptr.2d 844 [the primary caregiver defense does not extend to supplying marijuana to a cooperative]; *People v. Trippet*, *supra*, 56 Cal.App.4th at p. 1546, 66 Cal.Rptr.2d 559 [noting with approval a ballot pamphlet argument that the Act was not intended to protect "anyone who grows too much, or tries to sell" ]; Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p. 61.)<sup>FN9</sup>

FN9. Mentch's primary caregiver defense depended on the jury crediting his own testimony on the scope of his cultivation and distribution of marijuana. This is not a case where, on the record presented, a rational jury could credit some evidence that supported a primary caregiver defense and disbelieve other evidence that suggested marijuana cultivation or possession above and beyond that immunized from state prosecution by the Act. Nor is it a case where a defendant was charged with multiple counts and a rational jury could conclude the Act provided a complete defense to some counts but not others.

\*\*\*493 [15][16] \*290 The Court of Appeal appropriately recognized that the right to a jury resolution of all disputed factual issues is to be jealously protected. However, trial courts are still responsible for acting as gatekeepers and determining whether the evidence presented, considered in the light most favorable to the defendant, could establish an affirmative defense—here, whether it could give rise to a reasonable doubt as to the existence of an established, legally cognizable primary caregiving relationship. The trial court properly fulfilled its role here in declining to give a primary caregiver instruction on this record.

II. *Defenses Under the Medical Marijuana Pro-*

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*gram*

Before us, Mentch contends in the alternative that the 2003 enactment of the Medical Marijuana Program (Program) ( § 11362.7 et seq.) provides a defense to cultivation and \*\*1072 possession for sale charges for those who give assistance to patients and primary caregivers in (1) administering medical marijuana, and (2) acquiring the skills necessary to cultivate or administer medical marijuana ( § 11362.765, subs. (a), (b)(3)). Accordingly, he argues the trial court breached its duty to give sua sponte instructions on any affirmative defense supported by the evidence. (See *People v. Salas*, *supra*, 37 Cal.4th at p. 982, 38 Cal.Rptr.3d 624, 127 P.3d 40.) As Mentch misinterprets the scope and effect of the Program, we conclude the trial court committed no error in failing to instruct on any defense arising from it.

The Program was passed in part to address issues not included in the Act, so as to promote the fair and orderly implementation of the Act and to “[c]larify the scope of the application of the [A]ct.” (Stats.2003, ch. 875, § 1; see *People v. Wright* (2006) 40 Cal.4th 81, 93, 51 Cal.Rptr.3d 80, 146 P.3d 531.) As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§ 11362.765.)

Having closely analyzed the text of section 11362.765, however, we conclude it does not do what Mentch says it does. While the Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the immunities conveyed by section 11362.765 have three defining characteristics: (1) they \*291 each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws. Subdivision

(a) provides in relevant part: “Subject to the requirements of this article, the individuals specified in subdivision (b) shall not be subject, *on that sole basis*, to criminal liability under [enumerated sections of the Health and Safety Code].” (§ 11362.765, subd. (a), italics added.) Thus, subdivision (b) identifies both the groups of people who are to receive immunity and the “sole basis,” the range of their conduct, to which the immunity applies, while subdivision (a) identifies the statutory provisions against which the specified people and conduct are granted immunity.

\*\*\*494 [17] For example, subdivision (b)(1) grants immunity to a “qualified patient or a person with [a Program] identification card” who “transports or processes marijuana for his or her own personal use.” ( § 11362.765, subd. (b)(1).) As we explained in *People v. Wright*, *supra*, 40 Cal.4th 81, 51 Cal.Rptr.3d 80, 146 P.3d 531, this means a specified group-qualified patients and Program identification card holders-may not be prosecuted under particular state laws for specific conduct-transportation or processing for personal use-that otherwise might have been criminal. (*Id.* at p. 94, 51 Cal.Rptr.3d 80, 146 P.3d 531; see *id.* at p. 92, 51 Cal.Rptr.3d 80, 146 P.3d 531 [recognizing that the Program supersedes statement in *People v. Young* (2001) 92 Cal.App.4th 229, 237, 111 Cal.Rptr.2d 726, that the Act does not immunize marijuana transportation].)

The same is true of subdivision (b)(2) of section 11362.765, which likewise extends to a specific group-primary caregivers-state immunity for particular conduct-transportation, processing, administration, delivery, or donation-that might otherwise fall afoul of state law. (See *People v. Trippet*, *supra*, 56 Cal.App.4th at p. 1550, 66 Cal.Rptr.2d 559 [acknowledging that the plain language of the Act, if literally applied, might fail to protect primary caregivers transporting marijuana down a hallway to their patients].) <sup>FN10</sup>

FN10. Section 11362.765, subdivision (b)(2) incorporates the quantitative limits

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of section 11362.77 in defining the scope of the immunity it provides. The constitutionality of those limits is not before us here, and we express no opinion on them. (See *People v. Kelly*, review granted Aug. 13, 2008, S164830.)

Finally, as relevant here, subdivision (b)(3) of section 11362.765 grants immunity to a specific group of individuals—those who assist in administering medical marijuana or acquiring the skills necessary to cultivate it—for specific conduct, namely, assistance in the administration of, or teaching how to cultivate, \*\*1073 medical marijuana.<sup>FN11</sup> This immunity is significant; in its absence, those who assist patients or primary caregivers in learning how to cultivate marijuana might themselves be open to prosecution for cultivation. (§ 11358.)

FN11. Section 11362.765, subdivision (b)(3) extends the statutory immunities of subdivision (a) of that section to “[a]ny individual who provides assistance to a qualified patient or a person with [a Program] 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.”

[18] \*292 Here, this means Mentch, to the extent he assisted in administering, or advised or counseled in the administration or cultivation of, medical marijuana, could not be charged with cultivation or possession for sale “on that sole basis.” (§ 11362.765, subd. (a).) It does not mean Mentch could not be charged with cultivation or possession for sale on *any* basis; to the extent he went beyond the immunized range of conduct, i.e., administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law. As it is undisputed Mentch did much more than administer, advise, and counsel, the Program provides him no defense, and the trial court did not err in

failing to instruct on it.<sup>FN12</sup>

FN12. In our grant of review, we asked the parties to brief whether a defendant's burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower, supra*, 28 Cal.4th at p. 477, 122 Cal.Rptr.2d 326, 49 P.3d 1067) is a burden of production under Evidence Code section 110 or a burden of persuasion under Evidence Code section 115. We also asked the parties to address whether the trial court should instruct the jury on a defendant's burden and, if so, how. (Compare CALJIC No. 12.24.1 (2004 rev.) (7th ed.2003) with CALCRIM No. 2370 (2008).) Because Mentch has failed to show he was entitled to a primary caregiver instruction, error—if any—in describing Mentch's burden in this case would have been harmless, so we need not and do not resolve these issues.

#### \*\*\*495 DISPOSITION

For the foregoing reasons, we reverse the Court of Appeal's judgment.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, MORENO, and CORRIGAN, JJ. CHIN, J., concurring.

I entirely agree with, and have signed, the majority opinion. I write separately to underscore the importance of an issue that we asked the parties to brief but that, due to our holding on the merits of the compassionate use defense, we do not have to decide in this case.

In *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067, we held that the defendant has the burden to raise a reasonable doubt regarding the compassionate use defense. As the majority opinion notes, the trial court instructed the jury on the compassionate use defense by modifying the standard CALJIC instruction. The instruction included this statement: “To establish the de-

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fense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt....” (CALJIC No. 12.24.1 (2004 rev.), quoted in maj. opn., *ante*, 85 Cal.Rptr.3d at p. 486, fn. 4, 195 P.3d at p. 1066, fn. 4.) The standard CALCRIM instruction, by contrast, does not place any burden whatever on the defendant. Instead, it states, “The People have the burden of \*293 proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.” (Judicial Council of Cal.Crim. Jury Instns. (2008), CALCRIM No. 2363.)

Aware of the difference between the two standard instructions, and concerned about whether the trial court properly instructed the jury in this case, we directed the parties “to brief the additional question whether the defendant’s burden to raise a reasonable doubt regarding the compassionate use defense (see *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067) is a burden of producing evidence under Evidence Code section 110 or a burden of proof under Evidence Code section 115. (See, e.g., Evid.Code, §§ 500, 501, 502, 550, and the \*\*1074 Law Revision Commission Comments thereto; see also Pen.Code, § 189.5 and cases interpreting it, including *People v. Deloney* (1953) 41 Cal.2d 832, 841-842, 264 P.2d 532, *People v. Cornett* (1948) 33 Cal.2d 33, 42, 198 P.2d 877, and *People v. Loggins* (1972) 23 Cal.App.3d 597, 100 Cal.Rptr. 528; and *People v. Frazier* (2005) 128 Cal.App.4th 807, 816-822, 27 Cal.Rptr.3d 336.) In this regard, the parties should also discuss whether the trial court should instruct the jury on the defendant’s burden to raise a reasonable doubt and, if so, how. (Compare CALJIC No. 12.24.1 (2005 Revision) with ... CALCRIM No. 2363.)”

The parties have briefed the question and agree on the answer. They agree that the defendant’s burden is only to produce evidence under Evidence Code section 110, and that once the trial court finds the defendant has presented sufficient evidence to war-

rant an instruction on the defense, the defendant has fully satisfied this burden; accordingly, the court should not instruct the jury on any defense burden. (While generally agreeing that the \*\*\*496 standard CALCRIM instruction is correct in this regard, the Attorney General does suggest one modification of that instruction.)

If the parties’ answer to our question is correct, CALJIC No. 12.24.1 misinstructs the jury. The Attorney General argues that any error in this case was harmless beyond a reasonable doubt for two reasons: (1) error in requiring the defendant to raise a reasonable doubt as to a defense is inherently harmless in light of the instructions as a whole, which make clear to the jury that the prosecution has the overall burden of proof beyond a reasonable doubt; and (2) defendant simply did not establish the compassionate use defense. The majority concludes that any error in this regard was harmless because defendant “has failed to show he was entitled to a primary caregiver instruction....” (Maj. opn., *ante*, 85 Cal.Rptr.3d at p. 495, fn. 11, 195 P.3d at p. 1073, fn. 11.) I agree and thus further agree that we need not now decide the question regarding the nature of defendant’s burden to raise a reasonable doubt. (*Ibid.*)

\*294 Nevertheless, the question remains important. As the Attorney General notes in arguing that a defendant’s burden is only to produce evidence under Evidence Code section 110, and that the court should not instruct the jury on this burden, “An instruction on the defendant’s burden of production may run risks that are best avoided.” Accordingly, the question needs to be resolved, preferably sooner rather than later. In the meantime, trial courts might well be advised to be cautious before instructing on any defense burden.

I CONCUR: CORRIGAN, J.

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- 14 **P** Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 A.L.R.5th 938 (1992)
- 15 Avoiding Reversible Error in Criminal Cases s 6:45, Statutory defenses (2009)
- 16 CA Crim. Prac.: Motions, Jury Instr. & Sentencing s 51:102.1, Compassionate use defense--Primary caregiver defined (2009) **HN: 11,12 (Cal.Rptr.3d)**
- 17 California Jury Instructions - Criminal,6th Ed. 12.24.1, Defense of Compassionate Use (2009) **HN: 5 (Cal.Rptr.3d)**
- 18 L & R, California Criminal Law s 11:19, Marijuana offenses--Medicinal marijuana defense (2009)
- 19 Uelmen and Haddox, Drug Abuse and the Law Sourcebook s 5:6, Medical necessity (2009)
- 20 2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf s 70, Compassionate Use Act.
- 21 **C** Am. Jur. 2d Drugs and Controlled Substances s 181, Authority to possess or distribute substance (2009)
- 22 **C** Am. Jur. 2d Drugs and Controlled Substances s 188, Other defenses (2009)
- 23 **C** Am. Jur. 2d Drugs and Controlled Substances s 196, Evidence; proof and presumptions (2009)
- 24 **C** Am. Jur. 2d Initiative and Referendum s 49, Generally; construction and validity of adopted initiative measure (2009)
- 25 **C** Am. Jur. 2d Jury s 2, Function and province of jury (2009)
- 26 Cal. Jur. 3d Criminal Law: Crimes Against Justice s 122, Medical use of marijuana (2009)
- 27 Cal. Jur. 3d Criminal Law: Crimes Against Justice s 133, Accusatory pleadings--Lawfulness of possession as defense (2009)
- 28 Cal. Jur. 3d Criminal Law: Crimes Against Justice s 142, Weight and sufficiency of evidence of possession of drugs--Evidence of knowledge of nature and presence of drugs (2009)
- 29 CA Jur. 3d Initiative and Referendum s 43, Interpreting initiatives (2009)
- 30 25 NO. 26 West's Criminal Law News 16, Marijuana provider was not a primary caregiver under the Compassionate Use Act (2008)
- 31 DRUG & DEVICE NEWS, 26 Medical Malpractice Law & Strategy 9 (2009)

#### Court Documents

##### Appellate Court Documents (U.S.A.)

##### Appellate Petitions, Motions and Filings

- 32 THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. Stacy Robert

- HOCHANADEL, James Thomas Campbell, and John Reynold Bednar, Defendants and Petitioners., 2009 WL 3315084, \*3315084+ (Appellate Petition, Motion and Filing) (Cal. Sep 21, 2009) **Petition for Review** (NO. S176372) ★ ★ ★
- 33 PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. Stacy Robert HOCHANADEL, et al, Defendant and Respondent., 2009 WL 3315085, \*3315085+ (Appellate Petition, Motion and Filing) (Cal. Sep 18, 2009) **Petition for Review** (NO. S176372) ★ ★
- 34 COUNTY OF BUTTE et al., Petitioners, v. THE SUPERIOR COURT OF BUTTE COUNTY, Respondent, David Williams, Real Party in Interest., 2009 WL 2898589, \*2898589+ (Appellate Petition, Motion and Filing) (Cal. Aug 05, 2009) **Petition for Review** (NO. S175219) ★ ★
- 35 THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. Charles A. NEWCOMB et al., Defendant and Appellant., 2009 WL 2898458, \*2898458+ (Appellate Petition, Motion and Filing) (Cal. Jul 20, 2009) **Appellant's Petition for Review After the Decision of the Court of Appeal, Second Appellate District, Division Seven Affirming the Judgment** (NO. S174206) ★ ★
- 36 PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. Demetri Chris PAPPADOPOULOS, Defendant and Appellant., 2009 WL 1872207, \*1872207 (Appellate Petition, Motion and Filing) (Cal. May 20, 2009) **Petition for Review** (NO. S173146) ★ ★

#### Appellate Briefs

- 37 UNITED NEIGHBORS OF THE WESTSIDE, Plaintiff and Appellant, v. CITY OF CULVER CITY, City Council of Culver City, Culver City Redevelopment Agency and does 1 to 5, Defendants and Respondents, CRP Centinela, LP, and Does 6 to 10, Real Parties in Interest and Respondents., 2009 WL 3405572, \*3405572+ (Appellate Brief) (Cal.App. 2 Dist. Sep 29, 2009) **Respondent's Brief Filed by Respondent CRP Centinela, L.P., a Delaware Limited Partnership** (NO. B216818) ★ ★
- 38 UNITED NEIGHBORS OF THE WESTSIDE, Plaintiff and Appellant, v. CITY OF CULVER CITY, City Council of Culver City, Culver City Redevelopment Agency and Does 1 to 5, Defendants and Respondents, CRP Centinela LP, and Does 6 to 10, Real Parties in Interest and Respondents., 2009 WL 3794713, \*3794713+ (Appellate Brief) (Cal.App. 2 Dist. Sep 29, 2009) **Respondents' Brief of City of Culver City, City Council of Culver City, and Culver City Redevelopment Agency** (NO. B216818) ★ ★
- 39 Darrell KRUSE and Claremont All Natural Nutrition Aids Buyers Information Service (a.k.a. C.A.N.N.A.B.I.S.), Appellants, v. THE CITY OF CLAREMONT, Respondent., 2009 WL 1360180, \*1360180+ (Appellate Brief) (Cal.App. 2 Dist. Apr 24, 2009) **Respondent's Brief** (NO. B210084) ★ ★
- 40 QUALIFIED PATIENTS ASSOCIATION, et. al., Plaintiffs/Appellants, v. CITY OF ANAHEIM, Defendant/Respondent., 2009 WL 872518, \*872518+ (Appellate Brief) (Cal.App. 4 Dist. Feb 17, 2009) **Appellant's Letter Brief** (NO. G040077) ★ ★ ★



OFFICE OF THE CITY ATTORNEY  
Long Beach, California

ATTACHMENT 3

**R-10**

ROBERT E. SHANNON  
City Attorney

HEATHER A. MAHOOD  
Chief Assistant City Attorney

MICHAEL J. MAIS  
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Barry M. Meyers  
Cristyl Meyers  
Howard D. Russell  
Tiffany L. Shin  
Linda Trang  
Theodore B. Zinger

November 10, 2009

HONORABLE MAYOR AND CITY COUNCIL  
City of Long Beach  
California

RECOMMENDATION:

On August 4, 2009, the City Council requested that the City Attorney report back to the City Council on the "feasibility, legality, and enforcement of potential local ordinances the Council may enact regarding medical marijuana, pursuant to state law."

That report, which is attached, was submitted to you on October 23, 2009 and is now presented for your consideration and direction. (A draft ordinance will be submitted under separate cover).

SUGGESTED ACTION:

Receive public input and discuss draft ordinance.

Very truly yours,

ROBERT E. SHANNON  
City Attorney

RES:kdh  
Attachment



## City of Long Beach

*Working Together to Serve*

## Memorandum

### Office of the City Attorney

**DATE:** October 22, 2009  
**To:** Mayor and City Councilmembers  
**FROM:** Cristyl Meyers, Deputy City Attorney  
**SUBJECT:** Legal Analysis - Regulating Medical Marijuana

---

On August 4, 2009, the Long Beach City Council requested that the City Attorney prepare a report for the City Council addressing a number of issues concerning medical marijuana and the potential enactment of ordinances relating to its distribution and use. This memorandum responds to that request.

#### FEDERAL LAW

The Federal *Controlled Substances Act* ("CSA") defines marijuana as a Schedule I drug subject to criminal regulation. Further, the United States Supreme Court has ruled that federal law supersedes any state regulation authorizing cultivation or possession of medical marijuana. U.S. Attorney General Eric H. Holder, Jr. has recently announced that the U.S. Department of Justice ("DOJ") would limit investigation and prosecution of medical marijuana, thereby deferring said actions to the states. (See Attachment "1") However, this action does not legalize marijuana related violations of federal or state law.

#### CALIFORNIA LAW

Under the *California Uniform Controlled Substances Act* ("UCSA"), codified in *California Health and Safety Code Sections 11000 et seq.*, marijuana is also deemed a controlled substance for which possession, possession for sale, sale, cultivation, distribution, transportation, and maintenance of places used for storage or distribution of marijuana are criminal offenses. The *UCSA* also provides for civil sanctions. Pursuant to the *Health and Safety Code*, "[e]very building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance [including marijuana], ... and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

#### CALIFORNIA COMPASSIONATE USE ACT

In 1996, voters enacted *The Compassionate Use Act* ("CUA") by passing Proposition 215. The *CUA* ensured that: 1) "seriously ill Californians have the right to obtain and use

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*marijuana for medical purposes where the 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;" 2) "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;" and 3) California licensed medical or osteopathic physicians making oral or written recommendations to their patients for medical marijuana cannot be "punished or denied any right or privilege" for having recommended cannabis.*

However, the *CUA* did not establish an absolute immunity from arrest or prosecution. What it did provide was a limited defense which may be raised by qualified patients and designated primary care givers to protect against criminal conviction for marijuana possession and cultivation. Further, the *CUA* failed to identify what in fact constitutes permissible quantities of medical marijuana qualified patients and designated primary caregivers are permitted to possess or cultivate. Instead of quantified limits, the *CUA* identified permissible amounts to be that which is consistent with the "personal medical purposes of the patient upon the written or oral recommendation or approval of a [licensed] physician." Although the *CUA* is also unclear whether it applies to concentrated cannabis or hashish, in 2003, the California Attorney General issued an opinion stating the *CUA* applies to concentrated cannabis or hashish. (See Attachment "2") Thereafter, in an attempt to clarify and expand the provisions of the *CUA*, the California Legislature enacted the *California Medical Marijuana Program Act*.

### **CALIFORNIA MEDICAL MARIJUANA PROGRAM ACT**

In 2003, the California State Legislature enacted the *Medical Marijuana Program Act* ("*MMP*"). The *MMP* expanded and clarified the scope of the *CUA* by establishing guidelines 1) for a voluntary medical marijuana identification card issuance and registry program for patients and primary caregivers; 2) articulated quantities of marijuana that patients and primary caregivers can presumptively possess; 3) provided affirmative defenses to the possession, possession for sale, transportation, sale, distribution, cultivation and maintenance of places used for storage or distribution of marijuana by qualified patients and primary caregivers who associate as members of a legally recognized cooperative in order to collectively and cooperatively cultivate medical marijuana for the use of its members; and 4) identified locations and circumstances wherein medical marijuana is prohibited. However, nothing in the law "authorize[s] any individual or group to cultivate or distribute marijuana for profit."

#### **Voluntary Identification Cards**

The *MMP* establishes a voluntary identification card program for patients and primary caregivers to protect them against detainment and arrest. Qualified patients and caregivers submit information to the department of public health in the county of their residence. The county health department then issues a photo identification card bearing a unique identification number to the patient and, if applicable, a separate photo identification card to the patient's designated primary caregiver. The county submits the identification numbers to the California

Department of Health Services, which maintains a 24-hour, toll-free telephone number, as well as an on-line database to enable law enforcement to verify the validity of an identification card. ID cards are valid for one year and can be renewed. The MMP prohibits state and local law enforcement from refusing to accept ID cards with valid identification numbers, unless there is reasonable cause to believe that the card is fraudulent. With or without ID cards, qualified patients with *bona fide* physician recommendations, and their primary care givers, are still entitled to the protections of the CUA, as well as most of the provisions afforded by the MMP.

### Permissible Quantities of Medical Marijuana

The MMP establishes limits on the amount of medical marijuana that can be legally possessed or cultivated. The amounts are as follows: six (6) mature or twelve (12) immature plants, and eight (8) ounces of dried marijuana, unless a physician recommends a larger amount of marijuana to address the patient's medical condition. (See Attachment "3") However, this provision of the MMP is currently under review by the California Supreme Court.

### Affirmative Defenses for Collectives and Cooperatives

This provision of the MMP is arguably the cornerstone of the collective/cooperative versus dispensary/cannabis club model debate:

*"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."*

Therefore, qualified patients and their primary caregivers who collectively or cooperatively cultivate marijuana for medical use by members of the collective or cooperative, are protected from criminal prosecution for possessing, cultivating, possessing for sale, sale, or transportation of marijuana, as well as opening/maintaining/renting/leasing any place for the cultivation or distribution of marijuana.

Although the terms collective and cooperative are not defined in the MMP, it appears that California law requires any medical marijuana collective or cooperative to file articles of incorporation as a non-profit entity comprised solely of qualified patients and their primary caregivers, or in the alternative, organize as an unincorporated non-profit association, such as a collective, which would require a democratic governing body, a director, articles of association, and bylaws or other writings that govern the purpose or operation of the unincorporated association. Addressing this issue, California Attorney General, Edmund G. Brown, Jr. advised that as a practical matter, collectives may be required to "organize as some sort of business to carry out its activities." (See Attachment "4") Supporting this position, in the 2005 case of *People v. Urziceanu*, the California Court of Appeal reasoned that the MMP

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*"contemplate[d] 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."*

That said, the MMP also made clear that collectives, cooperatives or other groups shall not *"cultivate or distribute marijuana for profit (emphasis added)."* Collectives and cooperatives comporting with State law are distinguished from store front dispensaries selling marijuana over the counter, which are not protected under the MMP. Currently, *bona fide* medical marijuana collectives and cooperatives are limited to cooperative cultivation of medical marijuana which may be distributed solely to its members. The MMP does not protect against the sale of marijuana cultivated by the collective or cooperative to members or non members, distribution of marijuana cultivated by the collective or cooperative to non members, or distribution and/or sale of marijuana not cultivated by the collective or cooperative to members or non members. Moreover, on October 8, 2009, Los Angeles County District Attorney, Steve Cooley, announced that all medical marijuana dispensaries selling marijuana in Los Angeles County are illegal and that "they are going to be prosecuted." (See Attachment "5")

### **Medical Marijuana Use - Prohibited Locations**

The MMP also identified circumstances and locations wherein use of medical marijuana is strictly prohibited, including, but not limited to, *"any place where smoking is prohibited by law;" "[i]n or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence;" "[o]n a school bus;" "[w]hile in a motor vehicle that is being operated; or "[w]hile operating a boat."* Further, recent California case law holds that neither the MMP nor the CUA preempt municipalities from enforcing local regulations and business licensing requirements.

### **PRIMARY CARE GIVER – PEOPLE V. MENTCH**

The California Supreme Court, which, simply stated, is the last word on the law in this matter, rendered its unanimous decision in the case of *The People v. Roger William Mentch*. The Court held that under the CUA, merely obtaining and/or providing marijuana to a qualified patient does not qualify for *"primary caregiver"* immunity from criminal prosecution. Rather, *"primary caregiver"* is *"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 person."* To avail oneself of this defense, a primary caregiver must be designated by the medical marijuana patient, and that designated primary caregiver must be a person *"who has consistently assumed responsibility for the housing, health, or safety"* of the patient. These responsibilities *"imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need."* Once the criteria are met, the Court identified three additional factors, all of which must be met, to assert primary caregiver status.

First, the person asserting the defense must have consistently provided care to a qualified patient. Second, the care giving services must be independent from any assistance provided involving medical marijuana. Finally, the non-medical marijuana services must have been provided to the qualified patient prior to providing medical marijuana assistance. Bottom line, simply providing marijuana does not satisfy the definition of "primary caregiver." "One who merely supplies a patient with marijuana has no defense under the Act."

According to the Calif. Supreme Court, the CUA "simply does not provide ... protection where the provision of marijuana is itself the substance of the relationship." The Court reasoned that "a defendant whose care giving consisted principally of supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments, cannot qualify as a primary caregiver under the Act..." Moreover, the Court held that "what is not permitted is for an individual to establish an after the fact care giving relationship in an effort to thereby immunize from prosecution previous cultivation or possession for sale." By extension, the Court concluded that the CUA does not protect against prosecution for persons "cultivating marijuana and providing it to cannabis clubs" because "[t]he primary caregiver defense does not extend to supplying marijuana to a cooperative."

The immunities conveyed by the CUA and MMP have "three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws." So, qualified patients cannot be prosecuted for "transportation or possession for personal use." Likewise, designated primary caregivers cannot be prosecuted for "transportation, processing, administration, delivery, or donation" of medical marijuana to the qualified patient who designated that person as a primary caregiver, as long as that person meets the three primary caregiver requirements set forth above. Of equal importance, while a primary caregiver may provide services to more than one qualified patient, the MMP requires the caregiver to reside in the same city or county as the qualified patients they serve. If a primary caregiver resides outside the city or county of the qualified patient, the primary caregiver may not be designated by any other patient.

### LOCAL REGULATION

Section 11362.83 of the MMP states: "Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." Since passage of the CUA, local governments have enacted ordinances regulating medical marijuana, have established moratoriums prohibiting marijuana dispensaries, and have also banned marijuana dispensaries outright. To date, these regulations include, but are not limited to, commercial/industrial zoning restrictions; square footage cultivation restrictions; cultivation grow area restrictions including health and safety, electrical, building and mechanical requirements; exterior signage restrictions; mandatory security; restricted public view; registration of collective/cooperative members by name, phone number, residential address and status as patient or primary caregiver (See HIPAA Attachment 6); property owner approval of the medical marijuana land use; prohibitions of edible marijuana products; verifications that medical marijuana distributed to members was cultivated onsite or at a location previously

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registered with the municipality; distance prohibitions from schools, playgrounds, parks, libraries, places of religious worship, licensed day care facilities, licensed youth facilities and other medical marijuana collectives/cooperatives; prohibitions against medicating onsite; maintenance of onsite records including financial compensation received from collective/cooperative members for cultivation related services; onsite inspections without prior notification; limitations on the number of collectives/cooperatives allowed to operate within the municipality or county; restricted operating hours; and mandatory criminal background checks.

In August of this year, the California Court of Appeal, in the case, *City of Claremont v. Darrell Kruse*, held that the CUA does not preempt local government police powers from regulating zoning and business licenses. The case involved an individual who, despite being advised his proposed business was not permitted, opened a marijuana dispensary. When he refused to cease operations, the city issued repeated citations, and then filed suit, and was granted an injunction to close the dispensary as a public nuisance. In another recent case, *City of Corona v. Naulls*, the court held that "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a permissible use, it follows that such use is impermissible."

More recently, on October 9, 2009, a Fresno County Superior Court judge, citing the decisions in *Naulls* and *Kruse*, ordered nine marijuana dispensaries, allegedly in violation of local municipal codes, to temporarily cease operations pending further litigation. Meanwhile, on September 23, 2009, the Fourth District Court of Appeal heard oral argument in the case, *Qualified Patients Association v. City of Anaheim*, regarding the city's 2007 ordinance banning dispensaries from operating. A decision is expected no later than December 22, 2009.

It is again important to emphasize that no ordinance may purport to regulate over the counter/for profit sales of marijuana, since the Supreme Court in *Mentch* has determined that they may not legally operate.

### REGULATION AT A GLANCE

While neither the CUA nor the MMP require local enforcement, the statutory language encourages municipalities to enact ordinances regulating the possession, cultivation and distribution of medical marijuana. Following are examples of permissible regulation:

- No. of Entities Authorized
  - Zoning
  - Square Footage
  - Membership Size
  - Distance Prohibitions
  - Signage
  - Public View
  - Operating Hours
  - Property Owner Approval
  - Quantity Limits
  - Edibles
  - Paraphernalia
  - Alcohol
  - Security
  - Onsite Medicating
  - Application Fees
  - Background Checks
  - Team Inspections
  - Member Registration
  - Patient/Caregiver Verification
  - Permit Fees
  - Spot Inspections
  - Onsite Records
  - Daily Distribution Limits
  - Inventory Report/Control System
  - Criminal/Civil Penalties
-

**Attachments**

cc: Robert E. Shannon, City Attorney  
Thomas M. Reeves, City Prosecutor  
Patrick H. West, City Manager  
Suzanne M. Frick, Asst. City Manager  
Billy Quach, Interim Police Chief  
Heather A. Mahood, Asst. City Attorney  
Michael J. Mais, Asst. City Attorney

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# Attachment 1



U.S. Department of Justice

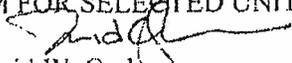
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM:   
David W. Ogdén  
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States  
Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

Lanny A. Breuer  
Assistant Attorney General  
Criminal Division

B. Todd Jones  
United States Attorney  
District of Minnesota  
Chair, Attorney General's Advisory Committee

Michele M. Leonhart  
Acting Administrator  
Drug Enforcement Administration

H. Marshall Jarrett  
Director  
Executive Office for United States Attorneys

Kevin L. Perkins  
Assistant Director  
Criminal Investigative Division  
Federal Bureau of Investigation

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## MEDICAL BOARD OF CALIFORNIA

Attempting to provide further guidance on this matter, in 2004 the Medical Board of California developed a set of standards for physicians to use when recommending medical marijuana for their patients. These standards require physicians to have or obtain patient histories and to conduct a "good faith" patient examination prior to recommending medical marijuana, to develop treatment plans, to periodically review the "treatment's efficacy," and to maintain "proper record keeping that supports the decision to recommend the use of medical marijuana." According to the Medical Board, "if physicians use the same standard of care in recommending medical marijuana to patients as they would recommending or approving any other medication, they have nothing to fear from the Medical Board." Otherwise, if a "physician's conduct has not met the applicable standard of care, the Medical Board may seek to impose disciplinary action against the physician."

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# Attachment 2

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

BILL LOCKYER  
Attorney General

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OPINION

No. 03-411

of

October 21, 2003

BILL LOCKYER  
Attorney General

GREGORY L. GONOT  
Deputy Attorney General

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THE HONORABLE ANTHONY J. CRAVER, SHERIFF-CORONER,  
COUNTY OF MENDOCINO, has requested an opinion on the following question:

Is concentrated cannabis or hashish included within the meaning of  
“marijuana” as that term is used in the Compassionate Use Act of 1996?

CONCLUSION

Concentrated cannabis or hashish is included within the meaning of  
“marijuana” as that term is used in the Compassionate Use Act of 1996.

## ANALYSIS

On November 5, 1996, the voters of California adopted Proposition 215, an initiative statute authorizing the medical use of marijuana. (*People v. Mower* (2002) 28 Cal.4th 457, 463; *People v. Bianco* (2001) 93 Cal.App.4th 748, 751; *People v. Rigo* (1999) 69 Cal.App.4th 409, 412.) The measure added section 11362.5 to the Health and Safety Code<sup>1</sup> and entitled the statute the “Compassionate Use Act of 1996.” (§ 11362.5, subd. (a).) Section 11362.5 “creates an exception to California laws prohibiting the possession and cultivation of marijuana.” (*United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483, 486.) “These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient’s medical purposes upon the recommendation or approval of a physician.” (*Ibid.*; see *People v. Mower, supra*, 28 Cal.4th at pp. 471-474; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1160-1162; *People v. Young* (2001) 92 Cal.App.4th 229, 235.)<sup>2</sup> We are asked to determine whether section 11362.5’s reference to “marijuana” includes concentrated cannabis or hashish. We conclude that it does.

Section 11362.5 provides:

“(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.

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<sup>1</sup> All references hereafter to the Health and Safety Code are by section number only.

<sup>2</sup> The possession and distribution of marijuana remain unlawful under the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*). (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1387, fn. 2.) The federal law contains no medical necessity exception. (*United States v. Oakland Cannabis Buyers’ Cooperative, supra*, 532 U.S. at p. 486; *People v. Mower, supra*, 28 Cal.4th at p. 465, fn. 2; *People v. Bianco, supra*, 93 Cal.App.4th at p. 753.)

“(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 11362.5 uses only the term “marijuana” and contains no direct reference to “concentrated cannabis” or “hashish.”

Although section 11362.5 does not define the term “marijuana,” the statute is part of the California Uniform Controlled Substances Act (§§ 11000-11651; “Act”), which contains the following definition of marijuana in section 11018:

“ ‘Marijuana’ means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture,

or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.”

Federal law has a similar definition of marijuana. (21 U.S.C. § 802(16); see *People v. Hamilton* (1980) 105 Cal.App.3d 113, 116-117; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 916; *United States v. Kelly* (9th Cir. 1976) 527 F.2d 961, 963-964; *U.S. v. Schultz* (S.D. Ohio 1992) 810 F.Supp. 230, 233; cf. *Haynes v. State* (1975) 54 Ala.App. 714, 717-718 [312 So.2d 406].) “Unless the context otherwise requires” (§ 11001), the definition of marijuana found in section 11018 controls our interpretation of section 11362.5.

“Concentrated cannabis” is defined for purposes of the Act, “[u]nless the context otherwise requires” (§ 11001), in section 11006.5: “‘Concentrated cannabis’ means the separated resin, whether crude or purified, obtained from marijuana.” Concentrated cannabis “includes hashish” (*Hooks v. State Personnel Board* (1980) 111 Cal.App.3d 572, 579), which is commonly defined as “[a] form of cannabis that consists largely of resin from the flowering tops and sprouts of cultivated female plants” (Stedman’s Medical Dict. (5th ed. 1982), p. 621).<sup>3</sup>

Tetrahydrocannabinol (“THC”) is marijuana’s most active pharmacological ingredient. (*People v. Rigo, supra*, 69 Cal.App.4th at p. 413; *People v. Hamilton, supra*, 105 Cal.App.3d at p. 116; *People v. Van Alstyne, supra*, 46 Cal.App.3d at pp. 910, 917.) We are informed that the THC level of ordinary marijuana varies widely from 5 to 60 percent; for concentrated cannabis, as defined in section 11006.5, it may range up to 70 percent. The quality, purity, and strength of ordinary marijuana and concentrated cannabis, including hashish, depend upon a number of different factors. (See *People v. Hamilton, supra*, 105 Cal.App.3d at pp. 115-116; *People v. Van Alstyne, supra*, 46 Cal.App.3d at pp. 909-911; *U.S. v. Schultz, supra*, 810 F.Supp. at pp. 231-234; *Haynes v. State, supra*, 312 So.2d at pp. 717-719.)

Returning to the language of section 11362.5, we find that subdivision (d) provides the operative terms of the statute. If a patient or caregiver “possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician,” two statutes do not apply to the patient or caregiver: “Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana.” (See *People v. Fisher* (2002) 96 Cal.App.4th 1147, 1151-1152; *People v. Bianco, supra*, 93 Cal.App.4th at p. 751; *People v. Rigo, supra*, 69

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<sup>3</sup> Accordingly, we will treat concentrated cannabis and hashish as being equivalent for purposes of our analysis.

Cal.App.4th at p. 412; *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th at pp. 1387-1394; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) Section 11357 states:

“(a) Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison.

“(b) Except as authorized by law, every person who possesses not more than 28.5 grams of marijuana other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100). . . .

“(c) Except as authorized by law, every person who possesses more than 28.5 grams of marijuana, other than concentrated cannabis, shall be punished by imprisonment in the county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.

“(d) Except as authorized by law, every person 18 years of age or over who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars (\$500), or by imprisonment in the county jail for a period of not more than 10 days, or both.

“(e) Except as authorized by law, every person under the age of 18 who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be subject to the following dispositions:

“(1) A fine of not more than two hundred fifty dollars (\$250), upon a finding that a first offense has been committed.

“(2) A fine of not more than five hundred dollars (\$500), or commitment to a juvenile hall, ranch, camp, forestry camp, or secure juvenile home for a period of not more than 10 days, or both, upon a finding that a second or subsequent offense has been committed.”

Section 11358 provides:

“Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison.”

We believe that concentrated cannabis comes within the provisions of section 11362.5 for several reasons. First, the statutory definition of marijuana for purposes of the Act as set forth in section 11018 plainly includes concentrated cannabis. Concentrated cannabis is “the separated resin . . . obtained from marijuana” (§ 11006.5) and thus constitutes “the resin extracted from any part of the plant” (§ 11018). In the context of section 11362.5, we find neither intent nor need to construe the term “marijuana” any differently from the definition contained in section 11018. “Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them. [Citations.]” (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.)

Second, section 11357 uses the phrase “other than concentrated cannabis” when concentrated cannabis is intended to be distinguished from ordinary marijuana. The framers of Proposition 215 did not employ similar exclusionary language for concentrated cannabis when they proposed the Compassionate Use Act of 1996. “Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted.” (*Marsh v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal.App.3d 881, 891; see also *Traverso v. People ex rel. Dept. of Transportation* (1993) 6 Cal.4th 1152, 1166; *Holmes v. Jones* (2000) 83 Cal.App.4th 882, 890; *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th at p. 1392; *People v. Trippet, supra*, 56 Cal.App.4th at p. 1550.)<sup>4</sup>

Of course, if concentrated cannabis were not “marijuana” in the first instance, there would be no need in section 11357 to employ the phrase “other than concentrated

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<sup>4</sup> “In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.]” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

cannabis.” “Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary. [Citations.]” (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.) The contrary construction with respect to section 11357 would mean that a person could not *possess* concentrated cannabis for medical purposes under section 11357 but could *process* it for such purposes pursuant to section 11358. “[W]e consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part” (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063) “ ‘in order to achieve harmony among the parts’ ” (*People v. Hull* (1991) 1 Cal.4th 266, 272) “and avoid an interpretation that would lead to absurd consequences” (*People v. Jenkins* (1995) 10 Cal.4th 234, 246; accord, *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 978).

Most significantly, as previously mentioned, the provisions of section 11357 are expressly rendered inapplicable under the conditions specified in section 11362.5, and the first subdivision of section 11357 sets forth the penalty for possession of “concentrated cannabis.” Hence, it is manifest that one may possess concentrated cannabis without violating the terms of section 11357 as long as the requirements of section 11362.5 are met.<sup>5</sup>

Finally, we have carefully reviewed the ballot materials accompanying Proposition 215 and have found nothing therein to indicate that the voters intended for concentrated cannabis to be treated differently from ordinary marijuana when used for medical purposes. (See *People v. Trippet*, *supra*, 56 Cal.App.4th at pp. 1545-1546.) Proposition 215 was approved by the voters without specificity as to the strength, quality, or quantity of marijuana to be used for medical purposes as long as the use is reasonably related to the patient’s current medical needs and was recommended or approved by a physician. (See *People v. Mower*, *supra*, 28 Cal.4th at pp. 471-474; *People v. Galambos*, *supra*, 104 Cal.App.4th at pp. 1161-1162, 1165-1168; *People v. Rigo*, *supra*, 69 Cal.App.4th at pp. 413, 415; *People ex rel. Lungren v. Peron*, 59 Cal.App.4th at p. 1394; *People v. Trippet*, *supra*, 56 Cal.App.4th at pp. 1545-1549.) If anything, the fact that ordinary marijuana and concentrated cannabis, including hashish, may have similar levels of THC supports our interpretation that the terms of section 11362.5 apply to concentrated cannabis.

We conclude that concentrated cannabis or hashish is included within the meaning of “marijuana” as that term is used in the Compassionate Use Act of 1996.

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<sup>5</sup> We view the phrase “relating to the possession of marijuana” contained in subdivision (d) of section 11362.5 as an abbreviated description of section 11357’s provisions rather than as a limitation upon such provisions in a manner intended to exclude the possession of concentrated cannabis. (See, e.g., *People ex rel. Lungren v. Peron*, *supra*, 59 Cal.App.4th at pp. 1386, 1394, 1400.)

# **Attachment 3**



MEDICAL BOARD OF CALIFORNIA

May 13, 2004

## Medical Board Reaffirms its Commitment to Physicians Who Recommend Medical Marijuana

Board adopts statement clarifying implementation of California's Compassionate Use Act to insure California's physicians and consumers receive appropriate guidance under the law

**SACRAMENTO**—The Medical Board of California marked a milestone for California consumers and physicians by adopting a statement clarifying that the recommendation of medical marijuana by physicians in their medical practice will not have any effect against their physician's license if they follow good medical practice.

"The intent of the statement is to clearly and succinctly reassure physicians that if they use the same proper care in recommending medical marijuana to their patients as they would any other medication or treatment, their activity will be viewed by the Medical Board just as any other appropriate medical intervention," said Hazem Chehabi, M.D., immediate past president of the board. "This is consistent with the board's mission to protect and advance the interests of California patients."

In November 1996, the voters of California passed Proposition 215, the "Compassionate Use Act of 1996." The purposes of the act were "to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the 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 medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction."

In January 1997 the Medical Board published standards for physicians when recommending medical marijuana. According to the board's new statement, consultation should include:

- ❖ History and good faith examination of the patient
- ❖ Development of a treatment plan with objectives
- ❖ Provision of informed consent including discussion of side effects
- ❖ Periodic review of the treatment's efficacy
- ❖ Consultation, as necessary
- ❖ Proper record keeping that supports the decision to recommend the use of medical marijuana

"The clarification of the guidelines regarding the recommendation for the use of medical marijuana assists both physicians and patients," said Dr. Chehabi. "Establishing clearly defined guidelines will allow the medical community to concentrate on the important medical needs of the patient and end the confusion about when recommendation of medical marijuana is appropriate."

According to testimony received by the board at its hearing on this issue last week, the author of the Act, Dennis Peron, supported the board's efforts to implement the law and assist California's physicians and their patients who receive a recommendation for the use of medical marijuana. "The Medical Board is in a unique position to guide physicians and patients on the proper standards for medical intervention for those who can benefit from treatment using medical marijuana," stated Mr. Peron. "I applaud the board's efforts and hope their action puts an end to the controversy that has surrounded this issue since California citizens voted to support the Compassionate Use Act."

For a copy of the Medical Board's statement, please contact the board's information officer, Candis Cohen, at (916) 263-2394.

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The mission of the Medical Board is to protect healthcare consumers through the proper licensing and regulation of physicians and surgeons and certain allied healthcare professions and through the vigorous, objective enforcement of the Medical Practice Act.

If you have a question or complaint about the healthcare you are receiving, the Board encourages you to visit its Web site at [www.caldocinfo.ca.gov](http://www.caldocinfo.ca.gov) or for questions call the Consumer Information Line at (916) 263-2382, or with complaints call (800) 633-2322.

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**Document #1315**  
**The Compassionate Use Act of 1996: The**  
**Medical Marijuana Initiative**

**CMA Legal Counsel**  
**January 2009**

“The Compassionate Use Act of 1996” (CUA), was passed by a vote of the people on November 5, 1996, and became effective on November 6, 1996. (Health & Safety Code §11362.5.) In addition, on October 12, 2003, the governor signed S.B. 420 into law, which established the Medical Marijuana Program (MMP). The MMP, codified at Health & Safety Code §§11362.7-11362.83, seeks to implement the CUA by, among other things, clarifying the scope of its application, facilitating the prompt identification of qualified patients/caregivers, and promoting uniform and consistent application of the Act among the counties across the state. This document contains a discussion of the questions most likely to be asked about those laws.

**BASIC PROVISIONS OF THE COMPASSIONATE USE ACT (CUA)**

**1. What did California law formerly prohibit?**

Under former state law, a patient was prohibited from obtaining, possessing, or cultivating, cannabis for any purpose, including medical treatment purposes. *The same continues to be true under federal law.* Under federal law, cannabis is currently classified as a Schedule I drug, which means that it has no generally recognized medical use. On June 6, 2005, the United States Supreme Court ruled that the federal Controlled Substances Act is valid even as applied to the intrastate, noncommercial cultivation, possession and use of cannabis for personal medical use on the advice of a physician. (*Gonzales v. Raich* (2005) 162 L.Ed.2d 1, 125 S.Ct. 2195.) The Court's ruling maintains the existing federal prohibition against possession, cultivation, and distribution of cannabis. The ruling has no direct impact on California's current law (CUA and MMP), nor does it narrow or otherwise negatively effect the Ninth Circuit's ruling in *Conant v. Walters*, which stated that physicians have a First Amendment right to discuss treatment options with their patients, including treatment with medicinal cannabis (*see* discussion below).

**2. What does the CUA allow patients to do?**

The CUA provides that the state criminal law prohibitions against cultivation and possession of cannabis do not apply to a seriously ill patient (and his or her “primary caregiver”) who possesses or cultivates cannabis for (the patient's) personal medical treatment, with the oral or written recommendation or approval of a physician. The California Attorney General has opined that the term “marijuana” in the CUA applies to concentrated cannabis or hashish. (Ops.Cal.Atty.Gen. No. 03-411 (2003).) In addition, the MMP clarifies that a patient or designated primary caregiver may **transport or process** cannabis for the patient's personal medical use. A primary caregiver may also administer medicinal cannabis to a patient. (Health & Safety Code §11362.765.)

The MMP establishes a *voluntary, fee-based* identification card program which enables patients and primary caregivers to offer affirmative proof of their status if they are challenged by state or local law enforcement personnel. The Legislative Counsel of California has opined that **requiring** qualified patients to participate in the ID card program would constitute an unconstitutional amendment of the CUA. (Legislative Counsel of California, “Medical Marijuana: Identification Program (S.B. 420)” #16771 (Aug. 20, 2003).) A patient must submit certain information to the county health department. If the information is complete and accurate, the county will issue a photo identification card to the patient and, if applicable, a

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separate photo ID card to the patient's designated primary caregiver. The county will submit the cardholder's unique user ID number, and the card's expiration date, to the State Department of Health Services. The Department in turn will maintain 24-hour, toll-free telephone number to enable state and local law enforcement officers to verify the validity of the ID card. The card is valid for one year and can be renewed. (Health & Safety Code §§11362.71-76.)

**3. Which medical conditions are covered by the CUA and the MMP?**

The CUA applies to patients with cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine. In addition, it applies to "any other illness for which marijuana provides relief." The MMP clarifies the concept of a "serious medical condition," which can qualify a patient to obtain an ID card and use medicinal cannabis upon a physician's recommendation: AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms (including those associated with MS), seizures (including those associated with epilepsy), and severe nausea. Furthermore, the concept includes *any other chronic or persistent medical symptom that either 1) substantially limits the ability of the person to conduct one or more major life activities as defined in the ADA; or 2) if not alleviated, may cause serious harm to the patient's safety or physical or mental health.* (Health & Safety Code §11362.7(h).) Further information can be obtained from the State of California at the following website: [www.dhs.ca.gov/hisp/ochs/mmp/Frequently\\_Asked\\_Questions/default.htm](http://www.dhs.ca.gov/hisp/ochs/mmp/Frequently_Asked_Questions/default.htm).

**4. Must a patient have tried all other conventional treatments before I can consider recommending medicinal cannabis?**

No. Nothing in the CUA or the MMP requires a physician to determine that a patient has failed (or would fail) on all other conventional medicines before the physician may recommend or approve the use of medicinal cannabis. For the perspective of the Medical Board on this issue, *see* Question No. 11.

**5. Are minors covered by the CUA?**

The CUA does not exclude minors. Moreover, the MMP clarifies that minors are covered by the CUA and can obtain identity cards with the consent of their parents or guardians. (Health & Safety Code §11362.715.) However, a physician should proceed cautiously. The physician should ensure that 1) the parents or guardians are fully informed about the risks and benefits of medicinal cannabis and give their consent to such treatment; 2) the minor has a serious medical condition; and 3) all conventional treatments have been tried unsuccessfully, or considered and rejected (e.g., because of probable unacceptable side effects), before recommending the use of medicinal cannabis. The physician may wish to warn the parents or guardian that child protective agencies in the past have attempted to take action against parents/guardians who have provided medicinal cannabis to their child. Careful documentation in the medical record is particularly essential. For the perspective of the Medical Board on this issue, *see* Question No.11 .

**6. How can a patient establish that he or she qualifies for a card under the MMP?**

A patient must provide "written documentation" by the attending physician in the patient's medical records stating that the person has been diagnosed with a serious medical condition and that the medical use of cannabis is appropriate. In addition, the patient must provide his/her name; proof of county residency; the name, office address, office telephone number, and California medical license number of his/her attending physician; the name and duties of his/her primary caregiver; and a government-issued photo ID card (of the patient and the primary caregiver, if any). (Health & Safety Code §11362.715.) "Written documentation" means accurate reproductions of the relevant portions of the patient's medical record. (Health & Safety Code §11362.7(i).) *See* Question No.34 , below. In Washington, the state supreme court recently ruled that a recommendation from a California physician was not sufficient to qualify a patient residing in

Washington under that state's medicinal cannabis law. (*State of Washington v. Tracy* (Wash. 2006) 158 Wash.2d 683, 147 P.3d 559.

**7. What happens if a patient does not wish to participate in the ID card system but has the bona fide recommendation of a physician to use medicinal cannabis?**

If a qualified patient chooses **not** to obtain a card, he or she will still be entitled to the protections of the CUA. Furthermore, many of the provisions of the MMP apply equally to patients and designated caregivers, whether or not they possess ID cards.

**8. Does the CUA protect a patient from being arrested if he or she has a physician's recommendation?**

No. The CUA does not absolutely immunize a patient from the possibility of arrest. A patient might still be arrested if, for example, law enforcement officers believe that the patient is not cultivating cannabis for his or her personal medical use. Instead it means that a patient or caregiver has a *limited* immunity from prosecution under state law. In *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, the California Supreme Court ruled that pursuant to the CUA the patient may raise his or her status as a patient or caregiver 1) as a basis for moving to set aside an indictment or information before trial on the ground of the absence of reasonable or probable cause to believe that his or she is guilty; or 2) as an affirmative defense at trial. The Court further ruled that the patient/defendant has the burden of proof to establish the facts of his or her status. However, he or she need only raise a reasonable doubt as to his or her guilt, rather than having to prove his or her status by a preponderance of the evidence. (The latter evidentiary standard would require a greater degree of proof.)

The MMP is intended to protect patients with ID cards against improper arrest. The law prohibits state or local law enforcement officers from refusing to accept an ID card unless the officer has **reasonable cause to believe** that the information in the card is false or fraudulent or the card is being used fraudulently. (Health & Safety Code §1362.78.) Hence, the MMP should help to ensure that a patient or primary caregiver is not arrested in the absence of good evidence that he/she is violating the provisions of The CUA and/or the MMP.

The California Court of Appeals for the Fourth Appellate District recently ruled that, if a patient is arrested and is thereafter found to be in lawful possession of marijuana under the CUA and/or the MMP, the police must return the marijuana to him or her. The court opined that law enforcement officers would not be subject to federal sanctions, since they would be acting pursuant to their official duties in complying with the trial court's order to return the marijuana to the patient, and were therefore entitled to immunity under 21 U.S.C. §885(d). *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 68 Cal.Rptr.3d 656. *See also, State v. Kama* (2002) 178 Ore.App. 561; 39 P.3d 866. However, a different outcome may result if a person possesses more marijuana than is permitted under state law, *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104; 20 Cal.Rptr.3d 21.

**9. When should a patient seek a physician's advice about medicinal cannabis?**

As with all medications, it would be best if a patient were to seek the physician's advice and approval before beginning to use cannabis. There may be "exigent circumstances" in which a physician's approval/recommendation may be contemporaneous with, or subsequent to, a patient's possession (although prior to actual usage). (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548 n. 13, 66 Cal.Rptr.2d 559.) However, an appellate court ruled that the Act did not apply to a patient who was self-medicating with cannabis, who had not consulted a physician for several years before his arrest, and who did not seek a physician's approval for his cannabis use until three months after his arrest. (*People v. Rigo* (1999) 69 Cal.App.4th

409, 81 Cal.Rptr.2d 624.) In refusing to apply the Act's protections, the court stressed that "Medical marijuana should be prescribed [by a physician] for specific relief for clearly defined medical problems."

## MEDICAL BOARD ISSUES

### 10. What does the CUA allow physicians to do?

The language of the CUA provides that physicians cannot be "punished or denied any right or privilege" for having recommended cannabis to a patient for medical purposes. Therefore, it should be impermissible for a state governmental entity to punish a physician either criminally or civilly under *state law, or to subject the physician to loss of license or other administrative sanction, solely* on the basis of having made an oral or written recommendation for the medical use of cannabis (at least for a serious medical condition).

Unlike patients, whose possession and/or cultivation of cannabis would be illegal but for the CUA, a physician's discussion and, if appropriate, recommendation, of the use of medicinal cannabis, **in accordance with standard physician office practices**, does not, in the absence of other factors, violate either state law or the professional standard of practice. Therefore, in the unlikely event that a physician were criminally prosecuted under state law, solely on the basis of having recommended the use of medicinal cannabis, it is unclear whether the physician would enjoy the limited immunity established in Mower, or a broader immunity against arrest. However, since immunity from arrest is exceptional, the limited Mower immunity would probably apply. In a subsequent administrative proceeding initiated by the Board, the administrative law judge did, indeed, apply a limited immunity.

### 11. Does this mean that the Medical Board cannot take any action against me because I have recommended cannabis to a patient?

No. The Medical Board should not attempt to punish a physician **solely** on the basis of the fact that the physician approved the use of medicinal cannabis. However, if the Medical Board believes that the physician's conduct has not met the applicable standard of care, the Medical Board may seek to impose disciplinary action against the physician. When the CUA was first enacted, the Medical Board issued a statement stating that a physician who recommends the use of medicinal cannabis should have arrived at that decision in accordance with accepted standards of medical responsibility. On May 7, 2004, the Board adopted an informational statement to give further guidance to physicians who may recommend the use of medicinal cannabis to their patients. The statement stressed that physicians would not be subject to investigation or disciplinary action if they arrive at the decision to recommend medicinal cannabis in accordance with accepted standards of medical responsibility that "any reasonable and prudent physician would follow when recommending or approving any other medication or prescription drug treatment." The statement described these standards as follows:

- History and good faith examination of the patient;
- Development of a treatment plan with objectives;
- Provision of informed consent, including discussion of side effects;
- Periodic review of the treatment's efficacy;
- Consultation, as necessary; and
- Proper record keeping that supports the decision to recommend the use of cannabis.

The statement also provides information on a number of specific issues. The statement:

- Acknowledges that a patient need not have failed on all other medications in order for a physician to recommend or approve the use of medicinal cannabis.
- Cautions physicians to determine that the use of medicinal cannabis will not mask an acute or treatable progressive condition that could lead to a worsening of that condition.
- Clarifies that physicians may recommend or approve medicinal cannabis for conditions other than those specifically set forth in the CUA and, in doing so, the physician may rely upon 1) the results of clinical trials, if available; 2) medical literature and reports; 3) the experience of that physician or other physicians; or 4) credible patient reports. The risk-benefit ratio must be as good, or better, than other medications that could be used for that patient.
- Notes that a physician who is not the patient's primary treating physician may still recommend medicinal cannabis for the patient's symptoms. However, the physician must either consult with the patient's treating physician or obtain the patient's prior medical records that confirm the patient's diagnosis and treatment history.
- Warns that recommendations must be limited to the time necessary to monitor the patient. Periodic reviews must occur at least annually or more frequently as warranted.
- Recognizes that a physician may recommend the use of medicinal cannabis for a minor, but the parents or guardians must be fully informed of the risks and benefits and consent to that use.

The full statement is available at [www.medbd.ca.gov/Medical\\_Marijuana.html](http://www.medbd.ca.gov/Medical_Marijuana.html). The Board amended its original statement to delete the conclusion that the accepted practice standards for recommending or approving medicinal cannabis should be those applicable to "prescription drug treatment." The current statement provides that: "These accepted standards are the same as any reasonable and prudent physician would follow when recommending or approving any other medication." CMA believes that the document provides helpful guidance to physicians and commends the Board for its efforts in developing the statement.

Accordingly, if the Medical Board believes that a physician has failed adequately to follow proper practice standards when recommending the use of medicinal cannabis, the Medical Board may initiate an investigation against the physician.

However, the First Amendment constrains the Board's discretion to investigate a physician. By extension of a decision from the US Court of Appeals for the Ninth Circuit, *Conant v. Walters*, the Board should not be able to initiate such an investigation solely on the basis of a recommendation given within a *bona fide* physician-patient relationship unless the Board in good faith believes that it has substantial evidence of criminal conduct or conduct that fails to meet appropriate standards of care. *See* discussion below. Although this ruling applies specifically to the federal government, the constitutional principles articulated therein would apply equally to actions taken, or sanctions imposed, by state or local governmental entities. In its 2004 statement, the Board stressed that the mere receipt of a complaint that a physician is recommending medicinal cannabis will **not** trigger an investigation "absent additional information that the physician is not adhering to accepted medical standards."

**12. What if I give my patient a written recommendation to use medicinal cannabis, and someone complains to the Medical Board? Does the mere fact that I made such a written**

**recommendation allow the Board to act upon the complaint and seek to obtain my patient's medical records?**

No. In Bearman v. Superior Court (2004) 117 Cal.App.4th 463, 11 Cal.Rptr.3d 644, the California Court of Appeal for the Second Appellate District ruled that the mere fact that a physician has issued a written recommendation for a significant medical condition does not empower the Board to obtain the patient's medical records, as part of the Board's effort to investigate the physician's practices. Under the California constitutional right of privacy, the Board cannot delve into a patient's private medical information merely because it wants assurance that the law has not been violated or a physician is not negligent. The Board must provide sufficient "competent evidence" to enable a court to determine that "good cause" exists to order the records disclosed. The mere fact that a physician has written a recommendation constitutes neither.

The court of appeal further stressed that the patient does not waive his or her constitutional right of privacy merely by disclosing that recommendation to a law enforcement officer for the purpose of establishing the patient's right to possess and/or cultivate cannabis pursuant to the Compassionate Use Act. Such waiver does not occur, even if the physician states, in the written document, the medical condition for which he or she is recommending medicinal cannabis. Under Bearman, then, the Board effectively cannot initiate an investigation based only on a complaint or other information which merely states that the physician has made a recommendation for the use of medicinal cannabis—**since the Board cannot obtain patient medical information to support that investigation**. The Board's 2004 statement appears to confirm this principle.

#### **HEALTH INSURANCE/EMPLOYMENT ISSUES**

**13. Must a health insurer reimburse a patient for the physician's services in examining and evaluating the patient and making a recommendation and/or for the cost of obtaining medicinal cannabis?**

The MMP does not require a government, private or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the use of medicinal cannabis. (Health & Safety Code §11362.785(d).) The CUA is silent on the issue. It is probable that the courts would interpret the CUA in a manner consistent with the MMP. Thus, the issue of reimbursement will depend on the scope of the patient's health plan. In August 2006, the Director of the California Department of Health Services determined that the cost of medicinal cannabis, which a qualified patient regularly purchased from her primary caregiver, constituted a *bona fide* medical expense that should be deducted from her income for the purpose of determining her share of cost under the Medi-Cal Personal Care Services Program. (*In the Matter of Sylvia Price* (Sept. 25, 2006) CDHS 2003106214.)

**14. Must I allow my employees to use medicinal cannabis in my workplace?**

The MMP does not require any accommodation of the use of medicinal cannabis on the property or premises of any place of employment or during the hours of employment. (Health & Safety Code §11362.785(a).) Again, the CUA is silent on the issue. In Ross v. Ragingwire Telecommunications (2008) 442 Cal.4th 920, 70 Cal.Rptr.3d 382, the California Supreme Court concluded that an employer did not violate either the Fair Employment and Housing Act (FEHA) or public policy (as expressed in the CUA) by discharging a recent employee who failed a pre-employment drug test because of his use (outside of the workplace/working hours) of medicinal cannabis. The Court determined that nothing in the text or history of the CUA suggested that the voters intended for the initiative to address the respective right and obligations of employers and employees. On October 1, 2008, Governor Schwarzenegger vetoed AB 2279, a bill that would have prohibited employment discrimination against those who use cannabis outside

the workplace in compliance with state law. For more information on drug testing, *see* CMA ON-CALL document #0525, "Physician Obligations Regarding Drug or Alcohol Testing."

#### **FEDERAL CONTROLLED SUBSTANCE ACT**

- 15. I'm sure that my practices will meet the standard of care, but I don't want to run afoul of federal law. What should I do or avoid in order to keep from violating the federal Controlled Substances Act?**

Physicians who intentionally make certain oral or written statements, or take other action, for the purpose of assisting patients to obtain cannabis in violation of federal law, may be subject to serious liability under federal law. The Ninth Circuit has affirmed that the First Amendment protects physicians' right to recommend or advise that their patients use medicinal cannabis so long as the physicians do not aid and abet, or conspire with, their patients to violate the federal drug laws. (*Conant v. Walters* (9th Cir. 2002) 309 F.3d 629.) It is extremely important for physicians to understand the difference between permissible and impermissible recommendations. This document explains that difference below.

#### **PHYSICIANS' ABILITY TO RECOMMEND THE USE OF CANNABIS**

- 16. I understand that physicians can be punished for recommending cannabis to their patients. How can this be true?**

Federal law establishes a clear prohibition against knowingly or intentionally distributing, dispensing, or possessing cannabis. *See* 21 U.S.C. §§841-44. A person who aids and abets another in violating federal law, 18 U.S.C. §2, or engages in a conspiracy to purchase, cultivate, or possess marijuana, 21 U.S.C. §846, can be punished to the same extent as the individual who actually commits the crime. The penalty for a first-time violation of these provisions in the case of less than 50 kilograms of cannabis is imprisonment for a term of up to five (5) years, a fine of up to \$250,000, or both. The penalty for a violation committed after a prior drug conviction is imprisonment for a term of up to ten (10) years, a fine of \$500,000, or both. (21 U.S.C. §841(b)(1)(D).)

Other federal sanctions are also possible. If a physician were to aid and abet or conspire in a violation of federal law, the federal government might revoke the physician's DEA registration through an administrative procedure. This would seriously hinder the physician's ability to provide proper medical care to his or her patients. Physicians should also be aware that a felony conviction relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance results in mandatory exclusion from the Medicare and Medi-Cal programs. (42 U.S.C. §1320a-7(a)(4).)

- 17. Why has there been so much confusion over whether or to what extent a physician may "recommend" to a patient the medical use of cannabis?**

Before the enactment of the CUA, a physician could discuss with, and recommend to, a patient the medical use of cannabis, but any recommendation did not, as either a legal or practical matter, assist the patient in obtaining cannabis. After the CUA, however, a patient who can demonstrate a physician's recommendation can lawfully (under state law) possess and/or cultivate cannabis for his or her personal medical use. *Furthermore, as a practical matter, a patient with a physician's recommendation can obtain medicinal cannabis at a cannabis dispensary ("buyers' club") or some other source. A few cannabis dispensaries were in existence before the enactment of the CUA, but their numbers and public visibility increased after the law was passed.*

As a result, the federal government argues that, now, a "recommendation" has the same effect as a prescription because it enables a patient to obtain and possess cannabis; therefore, those physicians who

intentionally provide recommendations, only for the purpose of assisting patients in obtaining and possessing cannabis, may be guilty of aiding and abetting a federal crime.

Unfortunately, the terms “recommend” and “recommendation” can refer to a wide variety of discussions and actions. Because of this uncertainty, a number of physicians, who were uncertain whether and to what extent they could converse with their patients about cannabis, brought a lawsuit against the federal government, asking a federal court to determine what types of discussions and recommendations were protected by the First Amendment freedom of speech.

The courts have now definitively ruled in favor of the physicians as discussed below. (*Conant v. Walters* (9th Cir. 2002) 209 F.3d 629, affirming *Conant v. McCaffrey* (N.D.Cal. Sept. 7, 2000) 2000 WL 1281174. See also *Conant v. McCaffrey* (N.D.Cal. 1997) 172 F.R.D. 681.)

**18. What do these rulings allow physicians to do? Can I provide my patients with information and advice about cannabis if I think that might help them make decisions about their medical care?**

In *Conant*, the court made the following rulings:

Physicians licensed in California may discuss and recommend the medical use of cannabis to patients suffering from severe nausea (commonly associated with HIV/AIDS and cancer), wasting syndrome (commonly associated with HIV/AIDS), increased intraocular pressure (commonly associated with glaucoma), seizures or muscle spasms associated with a chronic, debilitating condition (commonly associated with epilepsy, multiple sclerosis, and paraplegia/quadruplegia/hemiplegia), and/or severe, chronic pain (commonly associated with diagnosed paraplegia/quadruplegia/hemiplegia, HIV/AIDS, metastasized cancers, and cervical disk disease). *It is important to note that the court's ruling does not explicitly extend to physicians recommending cannabis to patients with other diseases or conditions.* Physicians who recommend the use of cannabis to other types of patients may still be protected by the First Amendment, but the availability of such constitutional protection is not certain.

A physician's recommendation must be made in the context of a bona fide physician-patient and must be based on the physician's best medical judgment.

Physicians have a legitimate need to discuss with, and to recommend to, their patients all medically acceptable forms of treatment. If a physician could not communicate his or her opinion that cannabis is the best therapy or at least should be tried, the physician-patient relationship would be seriously impaired.

A physician's recommendation may not necessarily lead to a violation of the federal drug laws. Patients may use such a recommendation to urge the government to change those laws, i.e., to petition the government for a redress of grievance or a change in policy. Furthermore, a recommendation may enable a patient to gain admittance to a federally approved research program; to obtain cannabis in a foreign country where such access is not prohibited; or to establish that the patient's use of cannabis is “medically necessary.”<sup>1</sup>

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<sup>1</sup>This last use may no longer be valid after the Supreme Court's decision in *U.S. v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 149 L.Ed.2d 722, establishing that medical necessity does not constitute an exception to the federal Controlled Substances Act, at least with regard to the distribution of medicinal cannabis. On remand, the Ninth Circuit rejected Raich's remaining challenges to the Controlled Substances Act. See *Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850. However, on August 20, 2008, a federal district court refused to dismiss a lawsuit brought by the city of Santa Cruz and the Wo/Men's Alliance for Medical Marijuana, which asserts that the federal government has sought to nullify California's medical marijuana laws, thereby violating the 10th Amendment. (*Santa Cruz v. Mukasey* (N.D.Cal. 2008) No. C 03-01802 JF (not for citation).)

Physicians may issue writings [in addition to normal documentation in the patient's medical record] that memorialize their recommendations, if the patient may need such a writing for the above purposes. However, if these purposes do not apply, a physician "should proceed more cautiously." If the physician concludes that the "sole use and reason" for the writing would be simply to obtain cannabis in violation of federal law, the writing would probably not be entitled to First Amendment protection. **Therefore, a physician should document in his or her records the reason for each recommendation and the reason for each written certification.**

Some patients may use recommendations to obtain cannabis from cannabis clubs in violation of the federal law. However, if a physician issues a sincere recommendation based on his or her best medical judgment, then he or she has not violated federal law, even if the physician foresees that the recommendation could be used to facilitate a federal crime. The Ninth Circuit affirmed that the mere fact that a physician anticipates that a patient will use the recommendation to obtain marijuana "does not translate into aiding and abetting or conspiracy." Nevertheless, the Court cautioned that, "[i]f, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law." The Court explained that a physician would aid and abet "by acting with the specific intent to provide a patient with the means to acquire marijuana." In addition, "a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana."

Bad faith recommendations are not entitled to protection. Thus, physicians who issue insincere recommendations without a medical basis and with the knowledge and intention that the recommendation would be used illegally to obtain cannabis, would be subject to DEA revocation or other federal sanctions. If the patient asks a physician how to obtain cannabis, the physician (if he or she chooses to address the subject) should advise the patient that cannabis is prohibited under the present federal drug laws and inform the patient about the availability of cannabis under federal research programs or foreign laws (if the physician possesses information about such programs or laws). However, federal law would prohibit a patient from bringing cannabis or a cannabis-based medicine across the U.S. border.

Recently, a physician brought First Amendment and equal protection challenges based upon the alleged undercover investigation of his medical practice. The physician contended that the DEA and various state and federal officials had conducted a retaliatory investigation of his practice in response to his statements concerning medical marijuana. The federal trial court denied the defendants' motions to dismiss and for summary judgment with respect to the First Amendment and equal protection claims, applying "strict scrutiny" to the challenged governmental actions. At trial, the physician must provide evidence to support his claim that the government should have employed alternate methods to achieve their stated purpose of obtaining a physician recommendation in order to investigate a medical marijuana dispensary. (*Denney v. DEA* (E.D. Cal. 2007) 508 F.Supp.2d 815.)

**19. Does this mean that I can actually suggest that my patient use medicinal cannabis? Can I use the word "recommend"?**

Under the *Conant* court's ruling, a physician should be able to conduct in good faith a traditional physician-patient conversation in the physician's office as follows:

The physician may describe the relevant scientific literature and provide the patient with information about the possible health risks and therapeutic benefits of cannabis for use in the patient's condition (including informing the patient that those potential risks and benefits have not, for many indications, been fully

tested in, or even fully identified by, properly-controlled clinical trials). The physician can attempt to answer the patient's medical questions.

The physician may describe (without identifying information) anecdotal evidence concerning medicinal cannabis use by other patients with the same or similar condition.

The physician may provide his or her professional opinion concerning the possible balance of risks and benefits in the patient's particular case, including, if appropriate, a specific recommendation that the patient use medicinal cannabis for medical purposes. A physician might say, "For you, cannabis might be worth a try," "I recommend that you use cannabis," "In your case, the benefits of using cannabis appear to outweigh the risks." There are no "magic words" that a physician must use or avoid in order to inform a patient that the physician believes cannabis may be a medically-appropriate treatment for that patient.

In many cases, a patient may already have discovered that cannabis provides relief from his/her symptoms and may be seeking the physician's agreement that the use of medicinal cannabis is appropriate in the patient's case. Without a physician's concurrence, the patient's use of cannabis remains illegal under state law. In such a case, a physician is probably providing an "approval," rather than a "recommendation." In People v. Jones (2003) 112 Cal.App.4th 341, 4 Cal.Rptr.3d 916, the court of appeal stated that the word "approval" "connotes a less formal act than a 'recommendation'." The court indicated that the word "recommendation" suggests that the physician has raised the issue of medicinal cannabis and presented it to the patient as a potentially appropriate treatment, whereas the word "approval" suggests that the patient has raised the issue, and the physician has "expressed a favorable opinion" of the use of medicinal cannabis for that patient. It should be noted that, while a physician's approval would have prospective effect, it may not "retroactively" authorize a patient's prior use of cannabis (which is relevant if a patient is being prosecuted for such use). See Question No. 9 above.

CMA also urges physicians to advise their patients that, notwithstanding the CUA, the cultivation, possession and use of cannabis, even for medical purposes, is illegal under federal law. See Gonzales v. Raich Question No. 1, above. Generally, physicians are not required to be familiar with, nor warn patients about, the legal consequences of a patient's health care treatment decision. However, there has been much controversy and confusion about the legality of the therapeutic use of cannabis, and many patients may think that, if their physician believes cannabis on balance may be beneficial for them, they can cultivate, obtain, and use cannabis *without risk of any punishment*. They may not understand that they could still be subject to prosecution or other sanctions under federal law. (For example, a U.S. Customs Inspector wrote to a physician, urging the physician to advise patients that they may be subject to severe penalties for transporting even a small amount of cannabis.) Therefore, if the physician engages in a conversation with a patient, such as that described above, the physician should ensure that the patient understands what legal risks exist for the patient under federal law. The physician should further make it clear that he or she cannot take any action for the purpose of enabling the patient to obtain or possess cannabis.

**20. What is a "bona fide" physician-patient relationship? May I discuss and advise a patient about medicinal cannabis if I am not the patient's primary treating physician?**

The federal government's threats have frightened and deterred many physicians from being willing to discuss and advise their patients about medicinal cannabis. Furthermore, many physicians do not believe that they are sufficiently well informed about the risks and benefits of medicinal cannabis to be able accurately to counsel their patients. Therefore, patients may seek such information and advice from other physicians who feel both knowledgeable and confident in their ability to address these issues, but who will not be responsible for the ongoing care of the patient's medical condition(s). It is possible that a bona fide physician-patient relationship may be established in such a situation if the physician engages in the same activities ordinarily undertaken by a specialist, for example, by:

- Conducting a good faith examination of, and obtains a medical history from, the patient before discussing and advising the patient about cannabis;
- Ensuring that the patient has a serious medical condition;
- Documenting the results of that exam/history and discussion in the patient's medical record, including the basis for the physician's conclusion that cannabis might be therapeutic;
- Consulting with the patient's primary care physician and/or obtaining a copy of the portion of the patient's medical record relating to the condition for which the physician has recommended the use of cannabis, e.g., which establishes the patient's diagnosis and previous care and treatment;
- Referring a patient to a specialist where appropriate; and
- Providing follow-up assessment at regular intervals including, but not limited to, telephonic communication with the patient, in order to ascertain the safety and effectiveness of cannabis on the patient's condition and overall health. In order to ensure such contact, the physician may limit the duration of the recommendation.<sup>2</sup>

In light of the Medical Board's 2004 statement (*see* Question No. 11), it would appear that such practices constitute a *bona fide* physician-patient relationship. Nevertheless, a physician who seeks to provide information and advice in such a situation should consult his or her legal counsel.

#### **MEDICAL NECESSITY**

##### **21. I have read a lot about a case involving "medical necessity." What does the idea mean, and does it allow cannabis clubs to distribute medicinal cannabis to certain patients?**

A number of years ago, the federal government filed six (6) civil suits against buyers' clubs in Northern California, arguing that the clubs were violating federal law, which prohibits the sale, manufacture or distribution of cannabis. Those suits were consolidated before a single federal judge. A federal district court issued a preliminary injunction to close the clubs. (*U.S. v. Cannabis Cultivators Club* (N.D.Cal. 1998) 5 F.Supp.2d 1086.) The court thereafter refused to modify its injunction to permit the Oakland Cannabis Buyers Cooperative to distribute medicinal cannabis to patients demonstrating "medical necessity." The case was appealed and ultimately reached the U.S. Supreme Court.

In May 2001, the U.S. Supreme Court ruled against the Cooperative. The Court ruled that there is no "medical necessity" exception to the Controlled Substances Act's (CSA) prohibition against manufacturing and distributing cannabis. (*U.S. v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 149 L.Ed.2d 722.) The Court concluded that a necessity exception for cannabis is "at odds" with the terms of the CSA, the provisions of which leave "no doubt" that the defense is unavailable. Cannabis's placement in Schedule I of the CSA "reflects a determination" that cannabis has no medical benefits worthy of an exception and cannot be used outside the confines of a government-approved research project.

On remand, the defendants in the OCBC case, and the parties in a related case involving a Santa Cruz medicinal cannabis cooperative (WAMM), contended that the federal constitution protects *patients' rights* to use and obtain medicinal cannabis, at least when all conventional treatments have failed, and that the

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<sup>2</sup> In *People v. Windus* (2008) 165 Cal.App.4th 634, 81 Cal.Rptr.3d 227, the California Court of Appeal for the Second District ruled that the CUA does not itself require a patient periodically to renew a physician's recommendation. However, the Medical Board has determined that proper medical practice does require a physician to conduct regular follow-up assessments.

Controlled Substances Act cannot validly be applied to noncommercial intrastate activity. As noted above in Question No. 1, the Supreme Court in *Gonzales v. Raich* rejected the Commerce Clause argument, and, on remand, the Ninth Circuit rejected the remaining arguments.

**22. Do the U.S. Supreme Court's rulings in *OCBC* or *Raich* affect the CUA?**

In neither case did the U.S. Supreme Court rule on the validity of the CUA, nor do its holdings implicitly nullify that law. The CUA merely abrogates the state law prohibitions against possession and cultivation of cannabis for seriously ill patients (and their primary caregivers) who have the recommendation or approval of their physicians to use cannabis medicinally. Both before, and after, the Supreme Court's rulings, federal law prohibits such possession and cultivation.

**DISCUSSING RISKS AND BENEFITS**

**23. How can I learn more about the risks and benefits of medicinal cannabis? Where can I get more information?**

There have been few properly controlled clinical trials investigating the safety and efficacy of medicinal cannabis, although information is growing. The Center for Medicinal Cannabis Research (CMCR) at the University of California San Diego has funded a number of Phase 2 clinical trials using smoked cannabis. Several have been completed, and a number are currently underway. For the results of this research, see [www.cmcr.ucsd.edu](http://www.cmcr.ucsd.edu). Several CMCR-funded studies have been published, demonstrating statistically-significant improvements in several pain conditions. Abrams, DI, et al., "Cannabis in Painful HIV-associated Sensory Neuropathy: a Randomized, Placebo-controlled Clinical Trial," *Neurology* 68(7):515-21 (2007) (painful HIV-related peripheral neuropathy); Wilsey, B, et al., "A Randomized, Placebo-Controlled, Crossover Trial of Cannabis Cigarettes in Neuropathic Pain," *The Journal of Pain* 9(6):56-21 (2008) (neuropathic pain); Ellis, RJ, et al., "Smoked Medicinal Cannabis for Neuropathic Pain in HIV: A Randomized, Crossover Clinical Trial," *Neuropsychopharmacology* 1-9 (2008) (painful HIV-related neuropathy). See also, Wallace, M, et al., "Dose-dependent Effects of Smoked Cannabis on Capsaicin-induced Pain and Hyperalgesia in Healthy Volunteers," *Anesthesiology* 107785-96 (2007) (dose-dependent effects in an experimental pain model).

In addition, a UK pharmaceutical company just completed ten Phase 3 double blind, randomized, placebo-controlled clinical trials. These trials, involving patients with multiple sclerosis and/or neuropathic pain, investigated the safety and efficacy of a cannabis-derived pharmaceutical product, comprised of specific cannabinoid ratios and delivered as an oromucosal spray. The results demonstrated statistically significant benefit in a range of symptoms, including neuropathic pain, spasticity, and sleep disturbance. The extracts were shown to have an excellent safety profile, and most patients were able to titrate (adjust) their dose in order to achieve improvements in their symptoms without incurring any notable psychoactive side effects that would interfere with day-to-day living. The company's first product, Sativex®, was approved in 2005 in Canada for the adjunctive treatment of neuropathic pain in multiple sclerosis and in 2007 (also in Canada) for the adjunctive treatment in patients with advanced cancer whose pain is not being adequately controlled by strong opioids. It is available by prescription in Canadian pharmacies under the Bayer label. The FDA has allowed the product to enter directly into large scale clinical trials in advanced cancer patients whose pain is not adequately relieved by opioids. The company began a Phase II/III dose-ranging trial in the US in November 2007.

The extent of information about the various forms of unstandardized herbal cannabis is still limited. Therefore, physicians should be cautious when undertaking to discuss the risks and benefits of medicinal cannabis use. A physician may be at risk of malpractice liability if a patient suffers an adverse effect, of which the physician was unaware, that would likely have been identified if such testing had taken place.

Little is known about potential health risks, particularly of long-term use of smoked cannabis. Furthermore, certain patient populations may be at greater risk of adverse side effects, such as patients with psychiatric illness. It is also uncertain whether cannabis may interact with various prescription medications. Finally, because cannabis is not a regulated pharmaceutical, the crude herbal form may contain impurities or contaminants that could be harmful, particularly to patients with immunodeficiency problems. Physicians should warn patients about these potential risks when appropriate.

The following books and articles also provide extensive sources of information about the risks and benefits of the medical use of cannabis:

- Institute of Medicine, National Academy of Sciences, *Marijuana as Medicine: Assessing the Science Base* (1999).
- McCarberg, BH, "Cannabinoids: Their Role in Pain and Palliation," *Journal of Pain & Palliative Care Pharmacotherapy*. 21(3):19-28 (2007).
- McCarberg, BH, and Barkin, RL, "The Future of Cannabinoids as Analgesic Agents: A Pharmacologic, Pharmacokinetic, and Pharmacodynamic Overview," *American Journal of Therapeutics* 14(5): 475-483 (2007).
- Russo, EB, "The Role of Cannabis and Cannabinoids in Pain Management," in Cole, BE, and Boswell, M., eds., *Weiner's Pain Management: A Practical Guide for Clinicians* 7<sup>th</sup> ed. Boca Raton, FL: CRC Press, p. 823-844 (2006).
- Russo, EB, "The Solution to the Medicinal Cannabis Problem," in: Schatman ME, ed., *Ethical Issues in Chronic Pain Management*. Boca Raton, FL: Taylor & Francis. p 165-194 (2006).
- Russo, EB, and Guy GW, "A Tale of Two Cannabinoids: the Therapeutic Rationale for Combining Tetrahydrocannabinol and Cannabidiol," *Medical Hypotheses* 66(2):234-246 (2006).
- Mechoulam R., ed., *Cannabinoids as Therapeutics*, Basel, Switzerland: Birkhauser Verlag (2005).
- Grinspoon, L and Bakalar, J., *Marijuana: The Forbidden Medicine* (1997).
- Mathre, M.L., ed., *Cannabis in Medical Practice: A Legal, Historical and Pharmacological Overview of the Therapeutic Use of Marijuana* (1997).
- *Cannabis and Cannabinoids: Pharmacology, Toxicology, and Therapeutic Potential*, eds. F. Grotenherman and E.B. Russo, Binghamton, NY: Haworth Press (2002).
- Iversen, L.L., *The Science of Marijuana* (2000)
- Guy, G., Whittle, B.A., and Robson, P.J, eds. *The Medicinal Uses of Cannabis and Cannabinoids* (2004).

## PROFESSIONAL LIABILITY COVERAGE

### 24. What if a patient uses herbal cannabis on my recommendation and suffers some adverse health event as a result? If I am sued, will my professional liability insurance cover me?

Different malpractice carriers have different policies. Some refuse to insure for harms resulting from medications, including cannabis, that are not approved by the FDA. See Mead, A.P., "Cannabis-Based Medicines: What Does the Future Hold?" *Physician Insurer* (Nov. 2006). A physician should discuss the issue with his/her liability carrier.

## OBTAINING CANNABIS/PERMISSIBLE QUANTITIES

### 25. How are patients or caregivers supposed to obtain cannabis?

The CUA was intended to authorize a patient or a patient's "designated primary caregiver" to cultivate and possess cannabis for the patients' medical use. A "primary caregiver" is the individual designated by the patient who has consistently assumed responsibility for the patient's housing, health, or safety. The MMP clarifies the conditions under which an individual may serve as a designated primary caregiver for one or more patients (whether or not the patients have ID cards). See Health & Safety Code §11362.7(d). Furthermore, the law specifically states that the caregiver may receive compensation for actual expenses, including reasonable compensation incurred for services provided to a patient to enable that person to use medicinal cannabis. (Health & Safety Code §11362.765(c).)

Even with a valid recommendation from a physician, many patients (and caregivers) were arrested on the charge that they were cultivating more cannabis than was needed for the patient's personal medical needs and hence were cultivating for purposes of sale. The MMP attempts to address that problem by providing that a patient or primary caregiver may possess eight ounces of dried cannabis, and in addition, six (6) mature or twelve (12) immature plants, per patient. However, if a patient has a physician's statement that this quantity does not meet the patient's medical needs, the patient or primary caregiver may possess a larger amount consistent with those medical needs. (Health & Safety Code §11362.77.) Several counties have also previously established specific limits on the number of plants and the quantity of plant material that an individual patient may possess. The MMP allows cities and counties to retain or enact guidelines permitting patients and caregivers to exceed these amounts. (*Id.*)

Many patients are too ill to cultivate their own marijuana, and many caregivers lack the skill or location for such cultivation. However, the CUA did not authorize any individual or entity (such as cannabis buyers' clubs or dispensaries) to sell, or even give, cannabis to a patient or caregiver, even with a physician's written or oral recommendation. After the CUA was initially passed, the operators of some dispensaries were designated by hundreds of patients as the patients' "primary caregiver."

However, under the CUA, a cannabis dispensary may not qualify as a "primary caregiver" under the law. (*People ex rel Lungren v. Peron* (1997) 59 Cal.App.4th 1383; 70 Cal.Rptr.2d 20.) In *Peron*, the court stressed that the state criminal statutes prohibiting both the selling and the giving away of cannabis were not affected by the CUA. However, the *Peron* case involved a dispensary that was open to the public, i.e., to any individual qualified under the initiative, that charged for the cannabis (albeit on an allegedly nonprofit basis), and that potentially served as only one of several sources of supply for any patient who

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<sup>3</sup> Recently, two California Courts of Appeal have struck down the MMP limits as constituting an invalid modification of the CUA (an initiative cannot be amended by legislation unless the initiative text explicitly permits such legislative amendment, which the CUA does not). See *People v. Kelly* (2008) 163 Cal.App.4th 124; 77 Cal.Rptr.3d 390; *People v. Phomphakdy* (2008) 165 Cal.App.4th 857; 81 Cal.Rptr.3d 443. The California Supreme Court has accepted review of these cases

chose to purchase cannabis there. *See also* People v. Galambos (2002) 104 Cal.App.4th 1147, 128 Cal.Rptr. 844 (neither defense of medical necessity nor limited immunity of the CUA can be claimed by an individual who purported to cultivate cannabis for medicinal cannabis dispensary). The Peron court stressed that the language of the CUA does **not** preclude a primary caregiver from serving more than one patient, and indeed the MMP explicitly allows more than one patient to designate the same caregiver, if the patients and caregiver reside in the same county. However, the California Supreme Court ruled that a person whose "caregiving" consists principally of supplying cannabis and instructing on its use, and who otherwise only sporadically takes some patients to medical appointments, cannot qualify as a "primary caregiver" under the CUA. (People v. Mentch (2008) 45 Cal.4th 274, 85 Cal.Rptr.3d 480.) The Court concluded that a primary caregiver must prove at a minimum that he/she 1) consistently provided caregiving, 2) independent of any assistance in taking medical marijuana, 3) at or before the time he/she assumed responsibility for assisting with medical marijuana. A primary caregiver must be the principal, lead, or central person responsible for rendering assistance in the provision of daily life necessities.

The MMP recognizes that patients and caregivers may associate in order collectively or cooperatively to cultivate medicinal cannabis. (Health & Safety Code §11362.775.) In August 2008, the California Attorney General's office issued "Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use." *See* [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1601\\_medicalmarijuanaguidelines.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf).

The AG's Guidelines stressed that a "cooperative" must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. It must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. A "collective," while not defined under California law, should be an organization that merely facilitates the collaborative efforts of patient and caregiver members. Neither collectives nor cooperatives should purchase cannabis from, or sell to, non-members. The Guidelines also set forth suggested practices to ensure that these entities operate in compliance with state and local law and ensure security and non-diversion of cannabis to illicit markets. Mere storefront dispensaries are illegal.

In addition, many cities and counties in California have issued bans or moratoria on the establishment of dispensaries, believing that such dispensaries are not authorized under state law and/or create unacceptable risks to public health and safety. *See* Riverside County, "Medical Marijuana: History and Current Complications," (white paper) (Sept. 2006).

## **26. How can a patient know how much medicinal cannabis to take?**

Because medicinal cannabis in its unrefined herbal form is not consistent and standardized like conventional pharmaceutical products, both physicians and patients are often uncertain about how the patient should use the substance. Physicians are placed in a difficult position if a patient inquires how much medicinal cannabis the patient should take to obtain therapeutic relief, while avoiding undesirable side effects. Patients may also ask how the cannabis should be administered. Physicians should warn patients of the potential risks of pulmonary harm that could result from smoking, particularly if the patient is using medicinal cannabis for a chronic condition. Furthermore, physicians should be able to inform patients about the existence of alternative, non-smoked delivery forms, such as vaporizers, baked goods, teas, etc. Since the federal government has taken the position that physicians may not lawfully prescribe cannabis for medical use, physicians should be cautious when advising a patient about such issues. If the physician's advice becomes too specific, e.g., how to prepare a tea, how much to drink and at what time of day, where vaporizers can be purchased, it could be construed as a prescription, a form of incitement, or a type of aiding and abetting. Furthermore, many physicians do not have the knowledge to be able to give patients guidance in such matters. Physicians could refer patients to Internet and print resources (*see* partial list above) that can provide a wide spectrum of information about medicinal cannabis. *See* Carter GT,

Weydt P, Kyashna-Tocha M, Abrams DI, "Medicinal Cannabis: Rational Guidelines for Dosing," *IDrugs* 7(5):464-70 (2004).

The city of Oakland has guidelines governing the amounts of cannabis that patients may lawfully possess and cultivate. As of 2006, those guidelines stated that patients may exceed those limits if they have a physician's statement indicating that the amounts allowed by the guidelines do not meet the patient's medical needs. Such a statement allows a patient to cultivate/use an amount of cannabis "consistent with those needs." *A physician should be free to opine that the allowable amount of cannabis does not appear to meet a particular patient's medical needs, if the physician has a reasonable basis for such an opinion. However, CMA does not advise physicians to specify the amount of cannabis that would be consistent with the patient's needs.* CMA believes that a physician may lawfully record the patient's reports of his or her extent of cannabis use and his or her description of symptom relief, or lack thereof. The Oakland guidelines further provide that patients are encouraged to record their actual usage with their physicians and to match their "garden yield" with that documented usage. Again, a physician should be free to record a patient's description of his or her actual usage. However, for the reasons stated in this document, CMA does not encourage physicians to provide specific recommendations of daily usage levels.

**27. What if a patient asks me how he or she can obtain cannabis?**

Physicians should **not** provide a patient with the name and address of a cannabis club or other type of cannabis distributor. While physicians may be sympathetic to a patient who cannot otherwise obtain medicinal cannabis, physicians may risk serious sanctions if they direct a patient to a specific cannabis source. Physicians should inform a patient that the physician cannot affirmatively assist the patient in obtaining cannabis.

**MEDICAL RECORD DOCUMENTATION**

**28. May I record my conversation with the patient in the patient's medical record?**

Most certainly. As with all physician-patient discussions, a conversation about medicinal cannabis should be documented in the medical record, in accordance with the physician's normal charting practices. Such recordation will ensure that this, like all information that relates to the patient's health care, will be available for the future reference of the physician or other health care providers. In addition, if a patient should use cannabis and suffer an untoward side effect (or be prosecuted under federal law), the physician can demonstrate that he or she warned the patient of that possibility.

**29. What should I do if a patient asks for a copy of his or her medical record?**

A patient has a right under state law to obtain a copy of his or her medical record. Since a separate statutory scheme requires physicians to provide patients with their medical records on request, the physician-patient conversation described above should not be construed as deliberately assisting the patient to obtain cannabis, even if the patient, on his or her own, decides to take the medical record to a cannabis dispensary, and even if the physician is aware that the patient may do so. However, a physician might be subject to sanctions if there is clear evidence that the physician is conspiring in the patient's plan. Therefore, physicians should *not* state that the physician is making the recordation in order to enable the patient to obtain cannabis from a buyers' club, nor should the physician actively encourage a patient to request a copy of the medical record for that purpose. When providing the patient with a copy of his or her medical record, the physician again should follow his or her normal practice. Typically, when copying medical records for any purpose, physicians should provide a complete medical record, i.e., one that contains all the patient's medical information, or at least all that is relevant to the condition at issue.

## RESPONDING TO PATIENT REQUESTS FOR TESTIMONY

- 30. What do I do if a patient is prosecuted under state law for possessing or cultivating, and I am subpoenaed to testify about the office conversation in order to establish the patient's right to a limited immunity under the CUA?**

A physician may be required by subpoena to testify in court, or to provide a sworn written statement, to describe the information and advice that he or she provided a patient. The district court's earlier ruling in the *Conant* case indicates that a physician cannot be punished for providing such testimony or statement under compulsion of law. Under the court's later September 7 ruling, it would seem a physician cannot be sanctioned for providing such oral or written testimony *voluntarily*, i.e., without a subpoena, although this is not completely free from doubt. The Ninth Circuit did not explicitly address this issue.

## RESPONDING TO LAW ENFORCEMENT REQUESTS

- 31. I understand that local police in some areas have contacted physicians directly in order to determine whether or not patients have recommendations from those physicians for the medical use of cannabis. How should I deal with their requests?<sup>4</sup>**

Physicians must be extremely cautious in this situation. The California Confidentiality of Medical Information Act severely limits the circumstances under which physicians may disclose patient medical information to a third party, including the police. In short, physicians may discuss or testify about such information only pursuant to 1) a written consent from the patient which meets the formal requirements of the Act, including identification of the specific medical information that can be disclosed; or 2) a court order, or (if patient office records are being sought) search warrant. (If the records are sought by search warrants, they can only be released to a special master. (Penal Code §1524(c).) A "special master" is an attorney who is a member in good standing of the California State Bar who has been selected by the court from a list maintained by the State Bar. The special master must accompany the person serving the warrant and must inform the person upon whom the warrant is being served of the specific items being sought and that the party being served will have an opportunity to produce the items requested. If the physician being served states that certain items should not be disclosed, those items shall be sealed by the special master and taken to court for a hearing. The physician must be informed of the date, time, and place of the hearing, which ordinarily must be held within three days. (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 65 Cal.Rptr.2d 53.)

Even if the physician is required (by court order or search warrant) or permitted (by patient authorization) to testify about or discuss the existence of a recommendation with the police, the physician would be well advised to reveal as little as necessary about the patient's actual medical condition. There are a number of state and federal laws that provide heightened protection to drug and alcohol abuse treatment records, AIDS test results, and certain mental health information. In addition, the California constitutional right of privacy protects patient medical information whenever the patient would have had a "legitimate expectation under the circumstances" that certain information would remain private. Although the application of the constitutional protection is sometimes uncertain, its prohibitions apply to the conduct of private actors (like physicians), and its breach can result in serious damage liability. Therefore, physicians should reveal no more patient information than is essential to serve the legitimate purposes of the inquiring party.

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<sup>4</sup>In one recent case, federal law enforcement personnel seized the patient records of a physician who had provided recommendations to approximately 6,000 patients. The physician, who allegedly has a medical condition that is covered by the CUA, was also cultivating thirty-two (32) cannabis plants.

Thus, again, even if there is a patient consent or a court order, CMA encourages physicians only to reveal whether or not 1) the patient has a serious medical condition (but not the nature of the condition) and 2) the physician has recommended or approved the patient's medicinal use of cannabis. This should be sufficient to enable the police to determine whether the patient is acting in accordance with the intent of the CUA. If a patient registry and ID card program is operating within the city/county, the police should be able to confirm the legitimacy of an ID card without directly contacting the physician.

Physicians who testify or have such discussions with the police should have nothing to fear from the federal government. By confirming to the police that the physician approved the patient's use of medicinal cannabis, the physician is merely providing evidence that is relevant to the criminal proceeding involving the patient.

## RESPONDING TO PATIENT REQUESTS FOR COMPLETION OF FORMS

### **32. Patients have asked me to sign and/or complete different types of forms that relate to the patient's use of cannabis for medical reasons. Can I provide a patient with such a form?**

As indicated above, physicians should avoid providing a patient with any writing whose sole purpose is to enable the patient to obtain cannabis at a cannabis dispensary or some other source. Under no circumstances should a physician sign a form that contains a logo or letterhead of a cannabis dispensary or that mentions a cannabis dispensary in the body of the letter.

Furthermore, even if there is no mention of a cannabis dispensary, a physician must be cautious. As the *Conant* rulings state, a writing is not protected if the physician's purpose in providing the writing is to enable the patient to obtain cannabis in violation of federal law. If the only credible answer to the question "Why did you give this writing to the patient?" is "To enable the patient to obtain cannabis," then the physician may be subject to liability under federal law. It must be remembered that whether or not a physician is merely attempting to help a patient obtain cannabis is a question of fact, and the physician's subjective intent and knowledge must be determined on the facts of each case. The actual wording on a form may not be the only factor that is taken into account in making this determination.

The *Conant* rulings did not specifically address the situation of the physician who gives a patient a letter of recommendation for the purpose of enabling the patient to reduce the likelihood of arrest, or, if arrested, to exercise his or her rights under *Mower* (see Question No. 8). An argument can be made that a recommendation letter which is provided for "defensive" purposes should be protected. However, others have argued that, since such a letter intends to enable a patient to cultivate and/or possess/retain cannabis, it therefore still constitutes aiding and abetting a violation of federal law. It should be noted that the *Conant* district court did state that a physician could be subject to punishment for aiding and abetting the *cultivation or possession* of cannabis.

Physicians should, in any event, avoid making any written statements which "warrant" or "certify" that a particular patient is "in compliance" with the law. It has come to our attention that certain individuals/organizations may be distributing forms which contain such statements. The physician has no way of knowing whether a particular patient, who possesses or cultivates cannabis, is actually "in compliance with" the law. For example, a patient may be cultivating cannabis for purposes of sale, in addition to his or her personal medical use. The California law does not authorize such activity.

## COUNTY CERTIFICATION PROGRAMS

33. I have heard that some cities and counties have their own patient registry programs in which governmental officials will provide a patient with evidence (such as an identity card) that the patient is using cannabis for medical purposes within the protection of the CUA. Should I cooperate with county officials in these programs?

It is impossible to provide an answer that will apply to each and every such certification program, particularly those that were put in place before S.B. 420 was implemented in that county. The Attorney General has determined that the statewide registry and ID card program preempts the operation of a city's (or county's) own registry and ID card program, although a city/county may adopt other ordinances consistent with the statewide program. (Health & Safety Code §11362.83.) However, a city/county may continue to operate its own program until the statewide program is operational in that county, at least to the extent that none of its provisions conflicts with state law. For example, a city's program could not restrict possession of cannabis to levels less than that permitted by state law, nor make having an ID card a mandatory prerequisite for avoiding arrest. (Ops.Cal.Atty.Gen. No. 04-709 (June 2005).)

The state began pilot programs in May 2005 in Amador, Del Norte and Mendocino counties. You should contact your county health department to determine whether your county is currently participating in the statewide program, has its own county (or city) program, or has no program. For further information about the program, see [www.dhs.ca.gov/hisp/ochs/mmp/default.htm](http://www.dhs.ca.gov/hisp/ochs/mmp/default.htm). Record retention policies will differ by county. The county of San Diego has refused to issue ID cards pursuant to the MMP and has filed a lawsuit challenging the validity of the MMP under federal law, contending that by participating in the state program, the county would be in violation of federal law. The Court of Appeal ruled that federal law does not preempt the MMP or the CUA. (*County of San Diego et al., v. San Diego NORML et al.*, (2008) 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461.) The California Supreme Court denied review.

Physicians must carefully examine any local governmental certification program to ensure that the program's stated purpose is not to enable a patient to obtain cannabis from some source, but rather to enable a patient to avoid arrest or conviction under the law. Even in such cases, the treating physician should avoid direct discussion with third parties (including county officials) confirming that the physician has recommended or approved a patient's use of medicinal cannabis. However, a physician can probably safely confirm with county officials that an individual is a patient of the physician's and perhaps also confirm the patient's diagnosis, assuming the patient has provided the physician with the appropriate written authorization for such disclosure. Certainly, the patient has a right to obtain copies of his or her medical records documenting the physician-patient discussion and to submit that documentation to governmental officials in order to obtain an ID card. The physician can confirm the authenticity of such medical records.

It appears that, ostensibly pursuant to the MMP, the California Department of Health Services has developed a physician form entitled "Written Documentation of Patient's Medical Records." The form asks for the physician's name and certain professional information and for the patient's name and diagnosis. The patient must be "under the medical care and supervision" of that diagnosing physician. It also asks the physician to sign a statement confirming that the patient has been diagnosed with the above medical condition(s) and that the "use of medical marijuana is appropriate."

The MMP was carefully crafted to minimize the potential liability risks to physicians under federal law. The MMP clearly states that the requirement of "written documentation" from the attending physician means "accurate reproduction of the relevant portions of the patient's medical records," which the patient has a legal right to request. (Health & Safety Code §11362.7(i).) CMA believes that it would be more prudent for physicians to decline to sign the state form, instead providing a patient (upon the patient's

request) with a copy of the relevant portion of the patient's medical record, which the patient can submit along with his/her application for an ID card. An argument can be made that by filling out the state form, the physician is merely assisting the patient (and the State) in ensuring that a qualified patient is not subject to improper arrest by state or local law enforcement. Such a "defensive" purpose may not put a physician in violation of federal law. However, among the "legitimate" reasons listed by *Conant* as justifying a physician in giving a patient a recommendation, the patient's "avoiding arrest" was not one of them

#### **ACTIONS TO AVOID**

##### **34. Are there any other types of actions that I should avoid?**

A physician should avoid the following:

- a) Providing cannabis to a patient;
- b) Describing to a patient how the patient may obtain cannabis, for example, by giving the name and address of a cannabis distributor;
- c) Communicating with a cannabis distributor, such as a cannabis dispensary, to confirm a recommendation made to a patient in an office dialogue;
- d) Offering a specific patient *individualized* advice concerning appropriate dosage timing, amount, and route of administration.

Whether a particular recommendation or action is permissible will depend on the surrounding circumstances. Again, physicians cannot intentionally take an action for the purpose of enabling a patient to obtain cannabis or otherwise to violate the federal drug laws. There will be a gray area between the clearly permissible and clearly impermissible categories of action. Physicians will need to use their own judgment in assessing the level of risk involved in particular conduct.

#### **POTENTIAL LIABILITY TO THIRD PARTIES**

##### **35. What if one of my patients gets involved in some sort of an accident as a result of using cannabis for medical purposes?**

The Initiative does not a) supersede legislation prohibiting persons from engaging in endangering conduct; nor b) condone the diversion of cannabis for non-medical purposes. Therefore, if a patient using cannabis drives an automobile and injures another individual in an accident, the patient's physician could in theory be sued by the injured party (and/or by an injured patient him or herself) claiming that the physician, who had discussed the potential health risks and therapeutic benefits of cannabis with the patient, had not adequately warned the patient not to engage in such endangering activity while impaired.

If a physician chooses to discuss with a patient the risks and benefits of cannabis, the physician should be sure to warn the patient not to engage in dangerous activities, such as driving, operating large machinery, etc., if impaired by cannabis (or any other medication or substance) and should scrupulously document the conversation in the patient's medical record. In addition, if the physician knows or has reason to believe that the patient will not heed the physician's advice, the physician may be well-advised to warn the patient's family, or other individuals who are likely to occupy an automobile with the patient, about the patient's potentially impaired driving ability. Physicians should be aware that a failure to warn may result in the physician's being liable to the patient if the patient is injured, as well as to third parties who are injured by the patient.

For recent articles on this issue, see Ramaekers, J.G., et al., *Cognition and Motor Control as a Function of Delta-9-THC Concentration in Serum and Oral Fluid: Limits of Impairment*, [www.sciencedirect.com/science?\\_ob=ArticleURL&\\_udi=B6T63-4K1G57Y-1&\\_user=10&\\_rdoc=1&\\_fint=&\\_orig=search&\\_sort=d&\\_view=c&\\_acct=C000050221&\\_version=1&\\_urlVersion=0&\\_userid=10&md5=14f4a3bflfd7d0a8220c0f8624d45177](http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6T63-4K1G57Y-1&_user=10&_rdoc=1&_fint=&_orig=search&_sort=d&_view=c&_acct=C000050221&_version=1&_urlVersion=0&_userid=10&md5=14f4a3bflfd7d0a8220c0f8624d45177) (Elsevier); Smiley, A., *Marijuana: On-Road and Driving Simulator Studies*, pp. 173-88, in *The Health Effects of Cannabis*, eds. H. Kalant, et al., Toronto: Center for Addiction and Mental Health (1998); Sexton, B.F. et al., *The Influence of Cannabis on Driving*, Transport Research Laboratory Limited, Berkshire, UK (2002), [www.trl.co.uk/store/report\\_detail.asp?srid=2694](http://www.trl.co.uk/store/report_detail.asp?srid=2694); Bates, M. and Blakeley, A.T., *Role of Cannabis in Motor Vehicle Crashes*, *Epidemiologic Reviews* 21: 222-232 (1999); EMCDDA, "Cannabis Use and Driving: Implications for Public Health and Transport Policy," [www.emcdda.europa.eu/themes/driving](http://www.emcdda.europa.eu/themes/driving).

## CMA POLICY

### 36. What is CMA's position on the medical use of cannabis?

**Physician-patient dialogue:** CMA opposes any governmental threats against physicians arising from discussion of medicinal cannabis in the context of an established physician-patient relationship. Therefore, CMA strongly supports the principles articulated by the federal court in the *Conant* case described above.

**Opposition to prosecution of patients:** CMA opposes the criminal prosecution of patients who possess or use smoked herbal cannabis for medical reasons upon the recommendation of a physician.

**Therapeutic use:** CMA has consistently maintained its position that cannabis should be available for therapeutic use as a Schedule II drug only if there are properly controlled studies proving that it is efficacious. CMA believes that seriously ill patients should not be offered a therapy whose efficacy may be illusory and which in some cases may actually worsen the patient's medical condition. Therefore, CMA has opposed the "medicalization" of cannabis unless and until there is objective proof that such use is scientifically justifiable.

**Medical necessity:** At the same time, however, CMA believes that, if a physician concludes that there are no standard therapies available that will sufficiently relieve the suffering of a seriously ill patient, and cannabis is the only treatment that can provide such relief, the patient should be able to seek out, and obtain access to, that treatment without interference from the federal government. Therefore, CMA filed an amicus brief with both the Ninth Circuit and the US Supreme Court in *U.S. v. Oakland Cannabis Buyers Cooperative* and *Gonzales v. Raich*, discussed above, supporting the concept of medical necessity.

**Research encouraged:** CMA continues to support scientifically rigorous research, including all FDA-approved Phase II and Phase III clinical trials and to examine the current science concerning the therapeutic role of cannabinoid-based pharmaceuticals. To this point, CMA has supported efforts to remove cannabis from Schedule I in order to allow greater access for research, limited prescriptive access and appropriate oversight of the supply for the protection of patients and society. In addition, CMA has supported efforts to create, and to obtain federal government approval for, a reliable and high-quality source of cannabis within California for the purposes of (1) facilitating research; and (2) providing controlled distribution (of cannabis) to appropriate patients, upon recommendation of their physician, through pharmacies or other closely regulated sources. However, CMA believes that it should re-examine the need for continued research on smoked herbal cannabis in light of recent research on its benefits and harm and the long-term prospect of smoked herbal cannabis as a medicine.

**Medical Board scrutiny:** In March 2003, CMA's House of Delegates concluded that CMA should urge the Medical Board to revise its guidelines concerning medicinal cannabis so that the guidelines include the requirement for a good faith exam with diagnosis, treatment and follow up recommendations, and more

fully clarify and affirm the legitimate role of physicians in recommending cannabis to appropriate patients. CMA also believes that the Medical Board should apply clinically appropriate standards of care to all physicians, and should **not** apply a higher standard of care or to require a higher degree of evidence in cases where medicinal cannabis is involved. As a result of this policy, CMA worked with the Medical Board to develop an appropriate informational document concerning medicinal cannabis, as discussed in Question No. 11.

#### **CURRENT RESEARCH AND THE POSITION OF THE FDA**

CMA supported a piece of legislation, S.B. 847, authored by Senator Vasconcellos, which established the Cannabis Research Act. This legislation authorized the University of California to implement a three-year research program (the California Cannabis Research Program) to ascertain the general medical safety and efficacy of cannabis and, if it is found to be therapeutically valuable, to establish guidelines for its appropriate administration and use. See Health & Safety Code §11362.9. Three million dollars were appropriated for the first three years of the program. As a result, the Center for Medicinal Cannabis Research (CMCR), whose administrative offices are based at the University of California in San Diego, has awarded a number of research grants. For more information, you may wish to call the Center at (619) 543-5024 or view its website at [www.cmcr.ucsd.edu](http://www.cmcr.ucsd.edu). Under recent legislation, CMCR was established as a permanent research center within the University of California.

In addition, GW Pharmaceuticals, a British pharmaceutical company founded for the purpose of developing cannabis-derived pharmaceutical products, has been conducting controlled clinical trials in the UK for the past nine years. GW is focusing on symptoms of cancer pain, neuropathic dysfunction, and neuropathic pain. GW has obtained marketing approval in Canada for its first prescription product, Sativex®. GW has just begun clinical trials in the US with advanced cancer patients whose pain is not adequately controlled by strong opioids. For more information about GW's research program, see [www.gwpharm.com](http://www.gwpharm.com).

In 2004, the Food and Drug Administration (FDA) issued a guidance document entitled "Botanical Drug Products," in which it acknowledged that modern pharmaceutical products can be developed from botanical materials and set forth the elements of that development path. Food and Drug Administration, "Botanical Drug Products," [www.fda.gov/CDER/guidance/4592fnl.pdf](http://www.fda.gov/CDER/guidance/4592fnl.pdf). In April 2006, the FDA released an interagency statement stating that recent voter initiatives or legislative actions making smoked cannabis available for medical use are "inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effect under the standards of the FD&C Act." The Statement concluded that "[e]fforts that seek to bypass the FDA drug approval process would not serve the interest of public health because they might expose patients to unsafe and ineffective drug products." Food and Drug Administration, "Inter-Agency Advisory Regarding Claims That Smoked Marijuana is a Medicine," [www.fda.gov/bbs/topics/NEWS//2006/NEW01362.html](http://www.fda.gov/bbs/topics/NEWS//2006/NEW01362.html).

Currently, the University of Mississippi (pursuant to a contract with the National Institute on Drug Abuse) provides the sole source of research-grade herbal cannabis in the US. The University of Massachusetts Amherst (Prof. Lyle Craker) is seeking to obtain from the DEA a bulk manufacturing license in order to cultivate and supply cannabis for FDA-approved research projects. An Administrative Law Judge has recommended to the DEA that the application be granted. *In the Matter of Lyle E. Craker, Ph.D., Docket No. 05-16, Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of Administrative Law Judge* (Feb. 12, 2007). The ALJ's recommendation is pending before the DEA Administrator.

Two cannabinoid pharmaceutical products are presently on the US market. Cesamet® (nabilone) and Marinol® (dronabinol). Both are approved for nausea and vomiting associated with cancer chemotherapy

in patients who have failed to respond adequately to conventional treatments. Marinol® is also approved for appetite loss associated with weight loss in people who have acquired immunodeficiency syndrome (AIDS). Cesamet®, a synthetic analogue of tetrahydrocannabinol (THC) is in Schedule II of the Controlled Substances Act, and Marinol® is in Schedule III. THC in any other form remains in Schedule I (as does marijuana).

We hope this information is helpful to you. CMA is unable to provide specific legal advice to each of its more than 30,000 members. For a legal opinion concerning a specific situation, consult your personal attorney.

For information on other legal issues, use CMA ON-CALL, or refer to CMA's *California Physician's Legal Handbook*. This book contains legal information on a variety of subjects of everyday importance to practicing physicians. Written by CMA's Legal Department, the book is available on a fully searchable CD-ROM, or in a seven-volume, softbound format. To order your copy, call (800) 882-1262 or visit CMA's Bookstore at [www.cmanet.org](http://www.cmanet.org).

# Attachment 4

## CALIFORNIA ATTORNEY GENERAL GUIDELINES

On August 25, 2008, California Attorney General Edmund G. Brown, Jr. sought to clarify and harmonize the *CUA* and its subsequent enabling legislation, the *MMP*, by releasing a set of Guidelines for patients, caregivers and law enforcement to ensure that medical marijuana is not diverted to illicit markets. (See Attachment "4") The document stated that "California voters approved an initiative legalizing medical marijuana, not street drugs. Marijuana intended for medicinal use should not be sold to non-patients or on illicit markets.... [and that] [t]hese guidelines will help law enforcement agencies perform their duties in accordance with California law and help patients understand their rights under Proposition 215."

Under the Guidelines, entities dispensing medical marijuana must operate as non-profit collectives or cooperatives, and are prohibited from buying marijuana from growers who are not themselves patients or registered caregivers, and the only fees dispensaries can collect are those covering overhead and operating expenses. The Guidelines identified cooperatives as entities which 1) filed articles of incorporation with the State pursuant to *California Corporation Codes*; 2) were properly organized and registered as corporations under the *California Corporations or Food and Agriculture Codes*; 3) 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;" and 4) do not purchase marijuana from, or sell to, non members, but, rather, facilitate transactions solely between cooperative members.

Whereas, a collective is defined as an organization that "merely facilitates the collaborative efforts of patient and caregiver members, including the allocation of costs and revenue," and does not purchase marijuana from, or sell to, non-members, but instead, provides a means for facilitating or coordinating transactions between members. Aside from providing protections to patients and non-profit dispensaries organized as cooperatives or collectives, the Guidelines prohibited qualified patients from ingesting/smoking marijuana near school, recreation centers and places of employment, required cooperatives and collectives to document their activities and record the source of the marijuana they purchase, and authorized criminal sanctions for non compliant dispensaries.

Since the Guidelines were issued, California Courts have generated binding case law regarding distribution of medical marijuana. As a result, the California Attorney General has taken the position that the term "primary caregiver" precludes marijuana clubs from asserting the defense they are primary caregivers. Based in part on the plain statutory language utilizing the noun "individual" the Attorney General's opinion requires that a caregiver must be a "person" who has demonstrated a relationship with the qualified patient over a meaningful period of time. However, the Attorney General's analysis of the term "primary caregiver" does allow for the possibility of a small cooperative/collective, of qualified patients and/or primary caregivers associating together, to use a common plot of land to grow, harvest and divide for patient use the marijuana grown.

**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).<sup>1</sup>) 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

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<sup>1</sup> 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](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](http://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](http://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:<sup>2</sup>** 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

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<sup>2</sup> 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 “coop”) 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.

# **Attachment 5**



**LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE  
MEDIA RELATIONS DIVISION**

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STEVE COOLEY • District Attorney  
JOHN K. SPILLANE • Chief Deputy District Attorney

JOSEPH SCOTT • Director  
SANDI GIBBONS • P.I.O.  
JANE ROBISON • News Secretary  
SHIARA M. DÁVILA • Asst. P.I.O.

**Medical marijuana statement Oct. 8, 2009**  
**Quiet Cannon Restaurant, Montebello**

Law enforcement and prosecutors are sworn to uphold the law as it is written.

What the voters approved in Proposition 215 was to allow the use of marijuana for those seriously ill and with a legitimate doctor's recommendation. Law enforcement recognizes and responds to the compassionate cases and the law that makes medical marijuana available to those qualified to receive it.

Prop. 215 did not and does not provide for over-the-counter sales of marijuana for profit. As law enforcement officers and prosecutors, it is our job to ensure that the law is followed as written and approved by California voters. Current and future enforcement and prosecutions actions are directed at illegal over-the-counter sales for profit operations.

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18-1112 Clara Shortridge Foltz Criminal Justice Center  
210 West Temple Street  
Los Angeles, CA 90012  
(213) 974-3525

# Attachment 6

## HEALTH INSURANCE PORTABILITY ACCOUNTABILITY ACT (HIPAA)

The *Health Insurance Portability and Accountability Act (HIPAA)* is a federal law enacted in 1996 to, in part, address security and privacy issues related to patient health data. The *HIPAA Privacy Rule*, which took effect on April 14, 2003, regulates use and disclosure of patient medical records and payment histories maintained by "covered entities" including health plans, insurance companies, and health care providers including doctors, clinics, hospitals, psychologists, chiropractors, nursing homes, pharmacies and dentists. Yet, does *HIPAA* apply to medical marijuana collectives and cooperatives?

The Federal Department of Health and Human Services developed Administrative Simplification Standards to determine whether an organization or individual meets *HIPAA* criteria for "covered entities." A *HIPAA* covered entity must be a natural person, business or government agency that furnishes, bills or receives payment for, health care in the normal course of business. Because medical marijuana collectives and cooperatives fail to meet these standards, they are not deemed a *HIPAA* covered health care provider. Moreover, because marijuana remains an illegal drug that is indisputably illegal to possess or sell under Federal law, it is unlikely that Federal *HIPAA* Privacy Rules would apply to medical marijuana collectives/cooperatives. Further, under California law, collectives and cooperatives are not licensed by the State as Health Care Providers, and therefore do not qualify as "covered entities" under *HIPAA*, and therefore the privacy provisions of *HIPAA* are not applicable to medical marijuana.

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**R-10**

Draft Ordinance

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AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LONG BEACH AMENDING THE LONG BEACH MUNICIPAL CODE BY ADDING CHAPTER 5.87 TO IMPLEMENT THE STATE COMPASSIONATE USE ACT AND STATE MEDICAL MARIJUANA PROGRAM ACT.

WHEREAS, California voters approved the Compassionate Use Act ("CUA") in 1996 to exempt seriously ill patients and their primary caregivers from criminal liability for possession and cultivation of marijuana for medical purposes; and

WHEREAS, the Medical Marijuana Program Act of 2003 ("MMPA") provides for the association of primary caregivers and qualified patients to cultivate marijuana for specified medical purposes and also authorizes local governing bodies to adopt and enforce laws consistent with its provisions; and

WHEREAS, there have been recent reports from the Long Beach Police Department and the media of increasing numbers of medical marijuana dispensaries operating in the City of Long Beach; and

WHEREAS, medical marijuana that has not been collectively or personally grown may constitute a unique health hazard to the public because, unlike all other ingestibles, marijuana is not regulated, inspected, or analyzed for contamination by state or federal government and may contain harmful chemicals that could further endanger the health of persons already seriously ill; and

WHEREAS, the City of Long Beach has a compelling interest in protecting the public health, safety and welfare of its residents and businesses, in preserving the peace and quiet of the neighborhoods in which medical marijuana collectives operate, and in providing compassionate access to medical marijuana to its seriously ill residents;

OFFICE OF THE CITY ATTORNEY  
ROBERT E. SHANNON, City Attorney  
333 West Ocean Boulevard, 11th Floor  
Long Beach, CA 90802-4664

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DRAFT

1 NOW, THEREFORE, the City Council of the City of Long Beach ordains  
2 as follows:

3  
4 Section 1. Chapter 5.87 is added to the Long Beach Municipal Code to  
5 read as follows:

6 Chapter 5.87

7 MEDICAL MARIJUANA COLLECTIVE

8  
9 5.87.010 Purpose and intent.

10 A. It is the purpose and intent of this Chapter to regulate the  
11 collective cultivation of medical marijuana in order to ensure the health,  
12 safety and welfare of the residents of the City of Long Beach. The  
13 regulations in this Chapter, in compliance with the State Compassionate  
14 Use Act and the State Medical Marijuana Program Act ("State Law"), do  
15 not interfere with a patient's right to use medical marijuana as authorized  
16 under State Law, nor do they criminalize the possession or cultivation of  
17 Medical Marijuana by specifically defined classifications of persons, as  
18 authorized under State Law. Under State Law, only qualified patients,  
19 persons with identification cards, and primary caregivers may legally  
20 cultivate medical marijuana collectively. Medical marijuana collectives  
21 shall comply with all provisions of the Long Beach City Municipal Code  
22 ("LBMC"), State Law, and all other applicable local and state laws.  
23 Nothing in this Chapter purports to permit activities that are otherwise  
24 illegal under federal, state, or local law.

25  
26 5.87.015 Definitions.

27 Unless the particular provision or the context otherwise requires,  
28 the definitions and provisions contained in this Section shall govern the

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1 construction, meaning, and application of words and phrases as used in  
2 this Chapter:

3 A. "Attending Physician" shall have the same definition as  
4 given such term in California Health and Safety Code Section 11362.7, as  
5 may be amended, and which defines "Attending Physician" as an  
6 individual who possesses a license in good standing to practice medicine  
7 or osteopathy issued by the Medical Board of California or the  
8 Osteopathic Medical Board of California and who has taken responsibility  
9 for an aspect of the medical care, treatment, diagnosis, counseling, or  
10 referral of a patient and who has conducted a medical examination of that  
11 patient before recording in the patient's medical record the physician's  
12 assessment of whether the patient has a serious medical condition and  
13 whether the medical use of marijuana is appropriate.

14 B. "Chief of Police" as used in this Chapter means the Chief of  
15 the Long Beach Police Department or her/his designee.

16 C. "Concentrated Cannabis" shall have the same definition as  
17 given such term in California Health and Safety Code Section 11006.5, as  
18 may be amended, and which defines "Concentrated Cannabis" as the  
19 separated resin, whether crude or purified, obtained from marijuana.

20 D. "Director of Financial Management" as used in this Chapter  
21 means the Director of Financial Management for the City of Long Beach  
22 or her/his designee.

23 E. "Identification Card" shall have the same definition as given  
24 such term in California Health and Safety Code Section 11362.7, as may  
25 be amended, and which defines "Identification Card" as a document  
26 issued by the State Department of Health Services which identifies a  
27 person authorized to engage in the medical use of marijuana, and  
28 identifies the person's designated primary caregiver, if any.

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1 F. "Management Member" means a Medical Marijuana  
2 Collective member with responsibility for the establishment, organization,  
3 registration, supervision, or oversight of the operation of a Collective,  
4 including but not limited to members who perform the functions of  
5 president, vice president, director, operating officer, financial officer,  
6 secretary, treasurer, or manager of the Collective.

7 G. "Marijuana" shall have the same definition as given such  
8 term in California Health and Safety Code Section 11018, as may be  
9 amended, and which defines "Marijuana" as all parts of the plant  
10 Cannabis sativa L., whether growing or not; the seeds thereof; the resin  
11 extracted from any part of the plant; and every compound, manufacture,  
12 salt, derivative, mixture, or preparation of the plant, its seeds or resin. It  
13 does not include the mature stalks of the plant, fiber produced from the  
14 stalks, oil or cake made from the seeds of the plant, any other compound,  
15 manufacture, salt, derivative, mixture, or preparation of the mature stalks  
16 (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized  
17 seed of the plant which is incapable of germination.

18 H. "Medical Marijuana" means Marijuana used for medical  
19 purposes in accordance with California Health and Safety Code Sections  
20 11362.5, *et seq.*

21 I. "Medical Marijuana Collective" ("Collective") means an  
22 incorporated or unincorporated association, composed of four (4) or more  
23 Qualified Patients and their designated Primary Caregivers who associate  
24 at a particular location or Property to collectively or cooperatively cultivate  
25 Marijuana for medical purposes, in accordance with California Health and  
26 Safety Code Sections 11362.5, *et seq.* For purposes of this Chapter, the  
27 term Medical Marijuana "cooperative" shall have the same meaning as  
28 Medical Marijuana Collective.

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J. "Primary Caregiver" shall have the same definition as given such term in California Health and Safety Code Sections 11362.5 and 11362.7 (as set forth in Appendix A of this Chapter), as may be amended, and which define "Primary Caregiver" as an individual, designated by a Qualified Patient, who has consistently assumed responsibility for the housing, health, or safety of that Qualified Patient.

K. "Property" as used in this Chapter means the location at which the Medical Marijuana Collective members associate to collectively or cooperatively cultivate Medical Marijuana.

L. "Qualified Patient" means a person who is entitled to the protections of Health and Safety Code Section 11362.5 for patients who obtain and use marijuana for medical purposes upon the recommendation of an Attending Physician, whether or not that person applied for and received a valid Identification Card issued pursuant to State Law.

M. "State Law" means the state regulations set forth in the Compassionate Use Act and the Medical Marijuana Program Act, codified in California Health and Safety Code Sections 11362.5, *et seq.*

5.87.020 Medical Marijuana Collective – Permit required.

No Medical Marijuana Collective or member shall carry on, maintain or conduct any Medical Marijuana related operations in the City without first obtaining a Medical Marijuana Collective permit from the Department of Financial Management.

5.87.030 Medical Marijuana Collective – Permit application process.

Any Medical Marijuana Collective desiring a permit required by this Chapter shall, prior to initiating operations, complete and file an application on a form supplied by the Department of Financial

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Management, and shall submit with the completed application payment of a nonrefundable investigation and notification fee, as established by the City Council by resolution.

A. Filing. The Medical Marijuana Collective shall provide the following information:

1. The address of the Property where the proposed Medical Marijuana Collective will operate;

2. A site plan describing the Property with fully dimensioned interior and exterior floor plans including electrical, mechanical, plumbing, and disabled access compliance pursuant to Title 24 of the State of California Code of Regulations and the federally mandated Americans with Disabilities Act;

3. If the Property is being rented or leased or is being purchased under contract, a copy of such lease or contract;

4. If the Property is being rented or leased, written proof that the Property owner and landlord if applicable, were given notice that the Property will be used as a Medical Marijuana Collective, and that the Property owner and landlord if applicable agree(s) to said land use;

5. The name, address and telephone number of each Medical Marijuana Collective member, whether the member is a Qualified Patient or designated Primary Caregiver, and the name of the member(s) making the designation(s);

6. The name, title and function(s) of each Management Member;

7. For each Management Member, a fully legible copy of one (1) valid government issued form of photo identification, such as a State Driver's License or Identification Card;

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8. Written confirmation as to whether the Medical Marijuana Collective previously operated in this or any other county, city or state under a similar license/permit, and whether the Collective applicant ever had such a license/permit revoked or suspended and the reason(s) therefore;

9. If the Medical Marijuana Collective is a corporation,  
a. A certified copy of the Collective's Secretary of State Articles of Incorporation, Certificate(s) of Amendment, Statement(s) of Information;

b. A copy of the Collective's By laws;

c. Written verification of the Collective's California tax exempt status;

d. Written verification of the Collective's federal tax exempt status; and

e. Written verification that the Collective is registered with the California Office of the Attorney General as a non profit entity;

10. If the Medical Marijuana Collective is an unincorporated association, a copy of the Articles of Association;

11. A copy of the Medical Marijuana Collective operating conditions, listed in Section 5.87.040, containing a statement dated and signed by each member, under penalty of perjury, that they read, understand and shall comply with the aforementioned operating conditions;

12. A copy of the Prohibited Activity, listed in Section 5.87.090, containing a statement dated and signed by each member, under penalty of perjury, that they read, understand and shall not engage in the aforementioned prohibited activity; and

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1                   13.    A statement dated and signed by each Medical  
2                   Marijuana Collective member, under penalty of perjury, that the member  
3                   has personal knowledge of the information contained in the application,  
4                   that the information contained therein is true and correct, and that the  
5                   application has been completed under the supervision of the Management  
6                   Member(s).

7                   B.     Within seven (7) business days of receipt of a Medical  
8                   Marijuana Collective permit application, the Director of Financial  
9                   Management shall determine whether the application is complete. If it is  
10                  determined the application is incomplete, the applicant shall be notified in  
11                  writing within ten (10) business days of receipt of the application that the  
12                  application is not complete and the reasons therefore, including any  
13                  additional information necessary to render the application complete. The  
14                  Collective shall have thirty (30) calendar days to complete the application.  
15                  Failure to do so within the thirty (30) day period shall render the  
16                  application null and void. Within five (5) business days following the  
17                  receipt of an amended application or supplemental information, the  
18                  Director of Financial Management shall again determine whether the  
19                  application is complete in accordance with the procedures set forth above.  
20                  Evaluation and notification shall occur as provided above until such time  
21                  as the application is found to be complete or in the alternative null and  
22                  void. Once the application is found to be complete, the applicant shall be  
23                  notified within five (5) business days of that fact. All notices required by  
24                  this Chapter shall be deemed issued upon the date they are either  
25                  deposited in the United States mail or the date upon which personal  
26                  service of such notice is provided.

27                  C.     On receipt of the completed Medical Marijuana Collective  
28                  permit application, the Director of Financial Management shall refer the

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1 application to all concerned City departments for investigation. Such  
2 departments shall file a report providing recommendations regarding the  
3 approval or denial of the permit with the Director of Financial Management  
4 within sixty (60) calendar days after the completed application is filed,  
5 except where circumstances beyond the control of the City justifiably  
6 delay such response.

7  
8 5.87.040 Permit approval and operating conditions.

9 The Director of Financial Management shall approve and issue a  
10 Medical Marijuana Collective permit if the application and evidence  
11 submitted demonstrate that:

12 A. The Property is located in an area zoned in the City for  
13 either exclusive commercial or exclusive industrial use. Medical Marijuana  
14 Collectives are not permitted to operate in residential zones or mixed use  
15 zones having a residential component as established pursuant to Title 21  
16 of this Code;

17 B. The Medical Marijuana Collective does not abut and is not  
18 located across the street or alley from or have a common corner with a  
19 property zoned for residential use as set forth in Title 21 of this Code;

20 C. The Medical Marijuana Collective is not located within a one  
21 thousand foot (1,000') radius of a school, public park, public library, state  
22 licensed child care facility, playground, youth center or other Medical  
23 Marijuana Collective. The distance specified in this subdivision shall be  
24 determined by the horizontal distance measured in a straight line from the  
25 property line of the school, public park, public library, state licensed child  
26 care facility, playground, youth center or other Medical Marijuana  
27 Collective, to the closest property line of the lot on which the Medical  
28 Marijuana Collective is located, without regard to intervening structures;

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1           D.     Exterior building lighting and parking area lighting for the  
2           Property on which the Medical Marijuana Collective is located is in  
3           compliance with all applicable provisions of this Code;

4           E.     Any exterior signs or interior signs visible from the exterior of  
5           the Property where the Medical Marijuana Collective is located are  
6           unlighted;

7           F.     Windows and roof hatches at the Property where the  
8           Medical Marijuana Collective is located are secured so as to prevent  
9           unauthorized entry, and are equipped with latches that may be released  
10          quickly from the inside to allow exit in the event of emergency in  
11          compliance with all applicable building code provisions;

12          G.     The Property within which the Medical Marijuana Collective  
13          is located provides sufficient sound absorbing insulation so that noise  
14          generated inside the premises is not audible anywhere on the adjacent  
15          property or public rights-of-way or within any other building or other  
16          separate unit within the same building;

17          H.     The Property within which the Medical Marijuana Collective  
18          is located provides a sufficient odor absorbing ventilation and exhaust  
19          system so that odor generated inside the Property is not detected outside  
20          the Property;

21          I.     The location and property is monitored at all times by web-  
22          based closed-circuit television for security purposes. The camera and  
23          recording system must be of adequate quality, color rendition and  
24          resolution to allow the ready identification of any individual committing a  
25          crime anywhere on or adjacent to the property. The recordings shall be  
26          maintained for a period of not less than thirty (30) days and shall be made  
27          available by the Collective to the Long Beach Police Department upon  
28          request. Consent is given by the collective under this Chapter to the

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1 provision of said recordings to the Police Department without requirement  
2 for a search warrant, subpoena or court order;

3 J. The Property has a centrally-monitored fire and burglar  
4 alarm system;

5 K. A sign is posted in a conspicuous location inside the Medical  
6 Marijuana Collective Property advising:

7 1. "The diversion of marijuana for non-medical  
8 purposes is a violation of State law.

9 2. The use of marijuana may impair a person's ability to  
10 drive a motor vehicle or operate heavy machinery.

11 3. Loitering at the location of a Medical Marijuana  
12 Collective for an illegal purpose is prohibited by California Penal Code  
13 Section 647(h);" and

14 L. The Medical Marijuana Collective meets specific, additional  
15 operating procedures and/or measures imposed as conditions of approval  
16 by City departments to ensure that the operations of the Collective are  
17 consistent with the protection of the health, safety and welfare of the  
18 community, Qualified Patients and their Primary Caregivers, and will not  
19 adversely affect surrounding uses.

20  
21 5.87.050 Medical Marijuana Collective permit – Non transferable.

22 A Medical Marijuana Collective permit issued pursuant to this  
23 Chapter shall become null and void upon the cessation of the Collective,  
24 upon the relocation of the Collective to a different Property, or upon a  
25 violation by the Collective or any of its members of a provision of this  
26 Chapter.

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- 5.87.060 Maintenance of records.
- A. A Medical Marijuana Collective shall maintain records on the Property accurately and truthfully documenting:
1. The full name, address, and telephone number(s) of the owner, landlord and/or lessee of the Property;
  2. The full name, address, and telephone number(s) of each Collective member engaged in the management of the Collective and the exact nature of the participation in the management of the Collective;
  3. The full name, address, and telephone number(s) of each member who participates in the collective cultivation, the date each member joined the Collective and the exact nature of each member's participation;
  4. The full name, address, and telephone number(s) of each member to whom the Collective provides medical marijuana;
  5. Each member's status as a Qualified Patient or Primary Caregiver;
  6. All contributions, whether in cash or in kind, by the members to the Collective and all expenditures incurred by the Collective for the cultivation of Medical Marijuana;
  7. An inventory record documenting the dates and amounts of Marijuana cultivated on the Property, including the amounts of Marijuana stored on the Property at any given time; and
  8. Proof of a valid Medical Marijuana Collective permit issued by the Department of Financial Management in conformance with this Chapter.
- B. These records shall be maintained by the Medical Marijuana Collective for a period of five (5) years and shall be made available by the

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Collective to the City upon request. Consent is given by the Medical Marijuana Collective and its members pursuant to this Chapter to provide said records to the City without requirement for a search warrant, subpoena or court order.

5.87.070 Inspection authority.

City representatives may enter and inspect the Property and records of every Medical Marijuana Collective between the hours of ten o'clock (10:00) A.M. and eight o'clock (8:00) P.M., or at any reasonable time to ensure compliance and enforcement of the provisions of this Chapter. It is unlawful for any Property owner, landlord, lessee, Medical Marijuana Collective member or any other person having any responsibility over the operation of the Medical Marijuana Collective to refuse to allow, impede, obstruct or interfere with an inspection, review or copying of records and closed-circuit monitoring authorized and required under this Chapter, including but not limited to, the concealment, destruction, and falsification of any records or monitoring.

5.87.080 Existing Medical Marijuana operations.

Any existing Medical Marijuana Collective, dispensary, operator, establishment, or provider that does not comply with the requirements of this Chapter must immediately cease operation until such time, if any, when it complies fully with the requirements of this Chapter. No Medical Marijuana Collective, dispensary, operator, establishment, or provider that existed prior to the enactment of this Chapter shall be deemed to be a legally established use or a legal non conforming use under the provisions of this Chapter or the Code.

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- 1 5.87.090 Prohibited activity.
- 2 A. It is unlawful for any person to cause, permit or engage in
- 3 the cultivation, possession, distribution, exchange or giving away of
- 4 Marijuana for medical or non medical purposes except as provided in this
- 5 Chapter, and pursuant to any and all other applicable local and state law;
- 6 B. It is unlawful for any person to cause, permit or engage in
- 7 any activity related to Medical Marijuana except as provided in this
- 8 Chapter and in Health and Safety Code Sections 11362.5 *et seq.*, and
- 9 pursuant to any and all other applicable local and state law;
- 10 C. It is unlawful for any person to knowingly make any false,
- 11 misleading or inaccurate statement or representation in any form, record,
- 12 filing or documentation required to be maintained, filed or provided to the
- 13 City under this Chapter;
- 14 D. No Medical Marijuana Collective or member shall cause or
- 15 permit the sale, distribution or exchange of Medical Marijuana cultivated
- 16 at the Property to any non Collective member;
- 17 E. No Medical Marijuana Collective or member shall allow or
- 18 permit the commercial sale of any product, good or service, including but
- 19 not limited to drug paraphernalia identified in Health and Safety Code
- 20 Section 11364, on or at the Medical Marijuana Collective, or in the parking
- 21 area of the Property;
- 22 F. No cultivation of Medical Marijuana at the Property shall be
- 23 visible with the naked eye from any public or other private property, nor
- 24 shall cultivated Marijuana or dried Marijuana be visible from the building
- 25 exterior. No cultivation shall occur at the Property unless the area
- 26 devoted to the cultivation is secured from public access by means of a
- 27 locked gate and any other security measures necessary to prevent
- 28 unauthorized entry;

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1 G. No manufacture of Concentrated Cannabis in violation of  
2 California Health and Safety Code Section 11379.6 is allowed;

3 H. No Medical Marijuana Collective shall be open to or provide  
4 Medical Marijuana to its members between the hours of eight o'clock  
5 (8:00) P.M. and ten o'clock (10:00) A.M.;

6 I. No sale of Marijuana or of edible products containing  
7 Marijuana shall be allowed, nor shall the manufacturing of these products  
8 for sale be permitted;

9 J. No person under the age of eighteen (18) shall be allowed  
10 at the Property, unless that minor is a Qualified Patient and is  
11 accompanied by his or her licensed Attending Physician, parent(s) or  
12 documented legal guardian;

13 K. No Medical Marijuana Collective shall possess more than  
14 five (5) pounds of dried marijuana or more than one hundred (100) plants  
15 of any size at the Property.

16 L. No Medical Marijuana Collective shall possess Marijuana  
17 that was not cultivated by its members either at the Property or at its  
18 predecessor location fully permitted in accordance with this Chapter;

19 M. No Medical Marijuana Collective or member shall cause or  
20 permit the sale, dispensing, or consumption of alcoholic beverages on the  
21 property or in the parking area of the property;

22 N. No dried Medical Marijuana shall be stored at the Property  
23 in structures that are not completely enclosed, or in an unlocked vault or  
24 safe, in any other unsecured storage structure, or in a safe or vault that is  
25 not bolted to the floor of the Property;

26 O. Medical Marijuana may not be inhaled, smoked, eaten,  
27 ingested, or otherwise consumed on the Property, in the parking areas of  
28 the Property, or in those areas restricted under the provisions of California

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Health and Safety Code Section 11362.79, which include:

1. Any place where smoking is prohibited by law;
2. Within one thousand feet (1,000') of the grounds of a school, recreation center, or youth center;
3. While on a school bus;
4. While in a motor vehicle that is being operated; or
5. While operating a boat; and

P. No person who has been convicted within the previous ten (10) years of a felony or a crime of moral turpitude, or who is currently on parole or probation for the sale or distribution of a controlled substance, shall be engaged directly or indirectly in the management of the Medical Marijuana Collective nor, further, shall manage or handle the receipts and expenses of the Collective.

## 5.87.100 Violation and enforcement.

A. Any person violating any provision of this Chapter or knowingly or intentionally misrepresenting any material fact in procuring the permit herein provided for, shall be deemed guilty of a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000.00) or by imprisonment for not more than twelve (12) months, or by both such fine and imprisonment.

B. Any person who engages in any Medical Marijuana Collective operations after a Medical Marijuana Collective permit application has been denied, or a Medical Marijuana Collective permit has been suspended or revoked, and before a new permit is issued, shall be guilty of a misdemeanor.

C. As a nuisance *per se*, any violation of this Chapter shall be subject to injunctive relief, revocation of the certificate of occupancy for

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the property, disgorgement and payment to the City of any and all monies unlawfully obtained, costs of abatement, costs of investigation, attorney fees, and any other relief or remedy available at law or equity. The City may also pursue any and all remedies and actions available and applicable under local and state law for any violations committed by the Medical Marijuana Collective, its members or any person related or associated with the Collective.

D. Any violation of the terms and conditions of the Medical Marijuana Collective permit, of this Chapter, or of applicable local, state or federal regulations and laws shall be grounds for permit suspension or revocation.

5.87.110 Appeal process.

A. If a City department determines that the applicant does not fulfill applicable requirements of this Chapter, the Director of Financial Management shall deny said permit application in accordance with the provisions set forth in Section 5.06.020, Subsection A, of this Code.

B. If a City department determines that the permittee failed to comply with any provision of this Chapter, or with any other provision or requirement of law, the Director of Financial Management shall revoke or suspend the Medical Marijuana Collective permit in accordance with the provisions set forth in Section 5.06.020, Subsection A, of this Code.

C. The Director of Financial Management shall notify the applicant of a rejected application, or the permittee of the permit revocation or suspension by dated written notice. Said notice shall advise the applicant or permittee of the right to appeal the decision to the City Council. The request for appeal shall be in writing, shall set forth the specific ground(s) on which it is based and shall be submitted to the

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1 Director of Financial Management within ten (10) calendar days from the  
2 date the notice of application denial was mailed along with an appeal  
3 deposit in an amount determined by the City Council by resolution.

4 D. The City Council shall conduct a hearing on the appeal or  
5 refer the matter to a hearing officer, pursuant to Chapter 2.93 of this  
6 Code, within thirty (30) business days from the date the completed  
7 request for appeal was received by the Director of Financial Management,  
8 except where good cause exists to extend this period. The appellant shall  
9 be given at least ten (10) business days written notice of such hearing.  
10 The hearing and rules of evidence shall be conducted pursuant to  
11 Chapter 2.93 of this Code. The determination of the City Council on the  
12 appeal shall be final.

13 E. Whenever a Medical Marijuana Collective permit application  
14 has been denied, or a Medical Marijuana Collective permit has been  
15 revoked or suspended, no other such permit application shall be  
16 considered for a period of one (1) year from either the date notice of the  
17 denial, revocation or suspension was mailed, or the date of the final  
18 decision of the City Council, whichever is later.

19  
20 5.87.120 Operative date.

21 No Medical Marijuana Collective permit application shall be  
22 accepted by the Department of Financial Management prior to the  
23 effective date of this ordinance.

24  
25 5.87.130 Severability.

26 If any provision of this Chapter, or the application thereof to any  
27 person or circumstance, is held invalid, that invalidity shall not affect any  
28 other provision or application of this Chapter that can be given effect

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without the invalid provision or application; and to this end, the provisions or applications of this Chapter are severable.

Section 2. The City Clerk shall certify to the passage of this Ordinance by the City Council and cause it to be posted in three conspicuous places in the City of Long Beach, and it shall take effect on the thirty-first (31<sup>st</sup>) day after it is approved by the Mayor.

I hereby certify that the foregoing Ordinance was adopted by the City Council of the City of Long Beach at its meeting of \_\_\_\_\_, 2009, by the following vote:

Ayes: Councilmembers: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Noes: Councilmembers: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Absent: Councilmembers: \_\_\_\_\_

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City Clerk

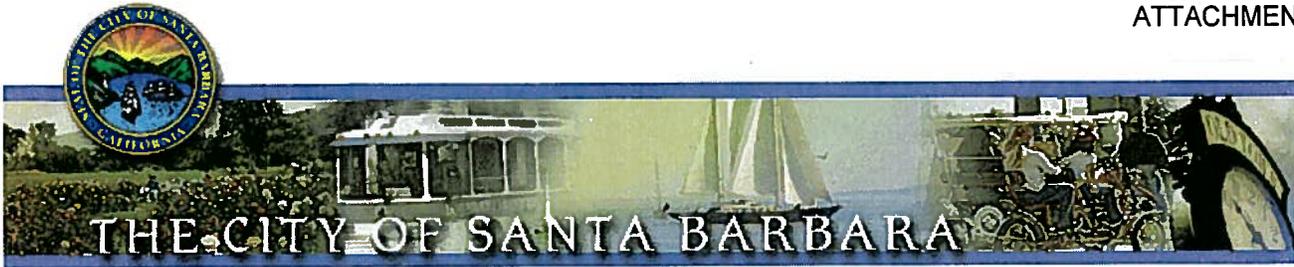
Approved: \_\_\_\_\_

\_\_\_\_\_

Mayor

OFFICE OF THE CITY ATTORNEY  
ROBERT E. SHANNON, City Attorney  
333 West Ocean Boulevard, 11th Floor  
Long Beach, CA 90802-4664

CM:ma (A09-03403)  
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## Medical Marijuana Dispensary Ordinance

September 22, 2009

On July 28, 2009, the City Council directed the Ordinance Committee to review the Medical Cannabis Dispensary Ordinance, and to make recommendations to revise it. The Ordinance Committee met on September 15, 2009, and heard a staff presentation and public comment. The Ordinance Committee members did not have time to discuss the issue or give direction. The Ordinance Committee continued the item until Tuesday, September 29, 2009. The hearing will begin at 11:00 a.m. in Council Chambers, 735 Anacapa Street, Second Floor. If you would like to be on a notification email list, please send an email to Danny Kato at [dkato@santabarbaraca.gov](mailto:dkato@santabarbaraca.gov).

The Ordinance Committee Staff Report is available by following this link ([OC Staff Report](#)). The video of the 9/15/09 meeting is available by following this link ([9/15 OC Video](#), then find the meeting of 9/15, and click on the word, "Video," to the right). The PowerPoint from the staff presentation is available by following this link ([9/15 OC PowerPoint](#)).

There were items of interest submitted to the Ordinance Committee on 9/15. Links to some of those items are presented here:

- 1) [2009 White Paper on Medical Cannabis by the CA Police Chief's Association Fact Sheet](#),
- 2) [Medical Marijuana Facilities within the City of Los Angeles](#) by LAPD (we think, the first 2 pages are missing)
- 3) [Citizen Proposed MCDP Ordinance Amendments and Supporting Documentation](#), by a Coalition of Neighborhood Groups
- 4) [Fortune Magazine article on Medical Cannabis](#)
- 5) [White Paper on Medicinal Cannabis Dispensaries in the City of Santa Barbara](#), by Patrick Fourmy

Staff has created new maps, for discussion purposes. The Ordinance Committee Chairperson asked that the public review these maps, and give input as to where dispensaries SHOULD be allowed, rather than where dispensaries SHOULD NOT be allowed.

Maps showing 500' radius from schools and parks:

- 1) [Citywide](#)
- 2) [Downtown](#)
- 3) [Downtown showing prohibition in El Pueblo Viejo and Brinkerhoff Districts](#)
- 4) [Downtown showing prohibition within 500 feet of residential zones](#)
- 5) [Milpas](#)
- 6) [Mesa](#)

7) Upper State

Maps showing 750' radius from schools and parks:

- 1) Citywide
- 2) Downtown
- 3) Milpas
- 4) Mesa
- 5) Upper State

Maps showing 1000' radius from schools and parks:

- 1) Citywide
- 2) Downtown
- 3) Milpas
- 4) Mesa
- 5) Upper State

Maps showing 1320' radius (1/4 mile) from schools and parks:

- 1) Citywide
- 2) Downtown
- 3) Milpas
- 4) Mesa
- 5) Upper State

Maps showing 1700' radius from schools and parks. The Citizen Proposed Ordinance Amendment included a prohibition of 1/2 mile walking distance from a number of land uses, like schools, parks, day care, pre-school, church, etc. We are not able to show an exact 1/2 mile walking distance, but that is at minimum, a 1700' radius.

- 1) Citywide
- 2) Downtown
- 3) Milpas
- 4) Mesa
- 5) Upper State

-----  
July 3, 2008

The City of Santa Barbara adopted a Medical Marijuana Dispensary Ordinance on March 25, 2008, and it became effective on April 24, 2008.

The application packet is available by following this link ([Application Packet](#)), and you may start the application process.

As part of the application, you must prepare a document that shows how your dispensary complies with the operational requirements AND the criteria for approval in the Ordinance. For

your convenience, the requirements and the criteria for approval are in this [Medical Cannabis Dispensary Permit Application Document](#).

The application fee has not been established; however, in the interim, we will be charge the Planning Division's hourly rate for processing time. Currently, the rate is \$200.00/hr. We will collect a deposit of 10 hours times the hourly rate at the time of application intake, and charge hours against that amount. When the deposit runs out (and we anticipate that will), you will be asked to submit additional funds to continue with the application processing. Fees increase every July 1.

Staff recommends the following steps before beginning the application process:

- 1) Read the adopted [Medical Marijuana Dispensary Ordinance](#)
- 2) Find a location that meets the requirements of the Ordinance.
  - a) The following maps will help you find a spot:
    - i) [Citywide map](#)
    - ii) [Downtown map](#)
    - iii) [Outer State Street map](#)
    - iv) [Milpas Street map](#)
    - v) [Mesa map](#)
  - b) The schools on these maps are based on lists from the Santa Barbara County Education Office as of May 2008, and are most likely accurate; however, we recommend that you walk or bike an area that's at least a one block radius of the proposed site to see if there are any private schools (K-12) in the area.
  - c) The maps only show the locations of the known Medical Cannabis Dispensaries as of the dates on the maps. We recommend that you walk or bike an area that's at least one block radius of the proposed site to see if there are any other Medical Cannabis Dispensaries in the area.

The remaining steps are outlined in the application packet.

Please check back to this website for additional information.

**Page Information**

*Last modified: Tuesday, September 29, 2009*

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Agenda Item No. \_\_\_\_\_

File Code No. 120.03

## CITY OF SANTA BARBARA

### ORDINANCE COMMITTEE REPORT

**AGENDA DATE:** September 15, 2009

**TO:** Ordinance Committee

**FROM:** Planning Division, Community Development Department

**SUBJECT:** Medical Cannabis Dispensary Ordinance Revision

#### RECOMMENDATION:

That the Ordinance Committee review the existing Medical Cannabis Dispensary Ordinance, discuss options, and provide direction to staff on potential revisions.

#### EXECUTIVE SUMMARY:

On July 28, 2009, the City Council referred the Medical Cannabis Dispensary Ordinance, SBMC Chapter 28.80, to the Ordinance Committee, with direction to review the ordinance, discuss options, and make recommendations to Council. Several subject areas were specifically mentioned by the Council, and others have been added by staff, based on experience processing recent applications. Each subject area is discussed briefly in this Ordinance Committee report.

#### BACKGROUND:

On July 28, 2009, the City Council referred the Medical Cannabis Dispensary Ordinance to the Ordinance Committee, with direction to review the following nine subject areas, discuss options, and make recommendations to Council on revisions to the ordinance.

1. Police Department statistics surrounding the existing dispensaries in order to tighten up the ordinance;
2. Cap on the number of dispensaries per area or citywide;
3. Security requirements;
4. Milpas Street recovery zone and how it interacts with the dispensaries;
5. Locational requirements of dispensaries in proximity of schools and educational enterprises;
6. Reducing the amortization period for nonconforming dispensaries;
7. Impacts on neighborhoods;
8. Re-establishing a moratorium or interim ordinance, and the applicability of new regulations to existing and pending dispensaries; and
9. Information about neighboring jurisdictions' medical cannabis regulations.

Additionally, based on recent experience processing Medical Cannabis Dispensary Permits (MCDPs) and recent public input, staff suggests that the Ordinance Committee also discuss the following subject areas:

10. Criteria for Issuance;
11. Permit discretion given to the Staff Hearing Officer;
12. Whether permit decisions should be appealable to the City Council;
13. Allowing Dispensaries in the C-O and/or C-1 Zones.
14. Full cost recovery for application review.

### **Known Medical Cannabis Dispensaries**

The following is a summary of known medical cannabis dispensaries by category:

#### **PERMITTED BY CITY AND OPERATING**

331 N. Milpas St. (compliance with approved permit is under investigation)

#### **PERMIT APPROVED APPLICATIONS**

500 N. Milpas St.

#### **PENDING APPLICATIONS**

631 Olive St. Commission	Approved by Staff Hearing Officer, on appeal to Planning
741 Chapala St	Pending
2 W. Mission	Pending
234 E. Haley	Pending
302 E. Haley	Pending
826 De la Vina	Pending

#### **NONCONFORMING**

These dispensaries were found to be legal under the City's Interim Ordinance, and are allowed to remain in their current locations for three years from the effective date of the current ordinance (until April 25, 2011). If they meet the locational requirements of the current ordinance, they can apply for a Medical Cannabis Dispensary Permit, otherwise they must close or obtain a City Zoning Variance. See Subject #6 below. A nonconforming status under investigation means that at the time of application, they were found to be nonconforming, but it is uncertain whether those conditions still exist.

3128 State Does not meet locational requirements, too close to MacKenzie Park

3516 State	Meets locational requirements (continuing legal Nonconforming status under investigation).
27 Parker Way	Does not meet locational requirements, but may qualify for a variance. Too close to Moreton Bay Fig Tree Park, which is across US101. (Nonconforming status under investigation)
100 E. Haley	Does not meet locational requirements, too close to Vera Cruz Park. (continuing legal Nonconforming status under investigation).

ILLEGALLY OPERATING – The following are under investigation and enforcement:

2915 De la Vina	(Currently the subject of a City Zoning Enforcement Action)
336 Anacapa	(Currently the subject of a City Zoning Enforcement Action)

There are other dispensaries that are currently under investigation by the Police Department.

#### **DISCUSSION:**

The current Medical Marijuana Dispensary ordinance includes locational requirements for permitted dispensaries. They are allowed in the C-2 and C-M zones, as well as on Upper State Street, Milpas Street, and the Mesa, but not within 500 feet of schools, parks or another dispensary. The ordinance's operational requirements include: a security plan, cameras, floor plan, consumption prohibition within 200 feet, etc. The existing ordinance does not place a cap on the number of dispensaries within the City or a limit on the hours of operation.

#### **1. Police Department Statistics**

The Police Department staff will be present at the Ordinance Committee meeting to present crime statistics concerning existing dispensaries.

#### **2. Cap on the Number of Dispensaries per Area**

The Council discussed both a citywide cap and a cap per geographic area. Currently, the areas (Downtown, Upper State, Milpas, Mesa) are not delineated by boundaries within the ordinance. If the Ordinance Committee would like geographic area caps, staff will return with boundaries, to facilitate the discussion. An alternative to a cap would be to increase the minimum distance between dispensaries from 500 feet (1 block).

#### **3. Security Requirements**

The existing ordinance, SBMC Chapter 28.80, has quite a number of security requirements, which seem adequate to staff; however, it may be appropriate to consider adding two additional requirements: 1) a limitation on the hours of operation, such as from 10 am to 7pm; and 2) a requirement that the security personnel be licensed by the State (Department of Consumer Affairs, Bureau of Security and Investigative Services). Both of

these requirements have been added as conditions of approval of recently approved dispensaries.

The current ordinance requires a separate, secure area designated for dispensing cannabis. A pending dispensary at 741 Chapala Street originally proposed a very open floor plan, with cannabis dispensing taking place at a counter in the general retail area, rather than a separate dispensing area. The operator of this proposed dispensary operates several dispensaries of a similar configuration in the Los Angeles area, and according to them, has had no problems with security. Staff would like the Ordinance Committee's confirmation that a separate, secure dispensing area is appropriate.

#### **4. Milpas Recovery Zone**

The Milpas Recovery Zone is a proposal by the Milpas Action Task Force to create a space where those seeking recovery from substance abuse, mental illness and physical ailments can be free from negative illegal influences. The area suggested by the Milpas Action Task Force is bounded by Milpas Street, the beach, Garden Street, and Gutierrez Street. Although the City has agreed on the implementation of a Recovery Zone concept, definitive boundaries have not yet been determined. Medical Cannabis Dispensaries could be excluded from the Recovery Zone.

#### **5. Siting Requirements of Dispensary in Proximity to Schools and Parks**

The current ordinance prohibits dispensaries within 500 feet of parks and schools (pre-schools, day care centers, colleges, universities, trade schools, and vocational schools are not considered "schools" under the existing ordinance). This 500-foot radius could be increased, which would reduce the number of viable locations, perhaps severely, if the radius is much larger. Pre-schools and day care centers were specifically excluded from this radius requirement since most attendees are in parental control during pick-up and drop-off. At a Downtown Organization meeting, a representative of the SB School Board requested a limitation on dispensaries on or near safe routes to schools or around bus stops where school age children congregate. One concern with more siting restrictions around private schools and day care centers is that such operations come and go, so a dispensary may start up, and later, a child care center is proposed. Does the dispensary become nonconforming?

Additionally, the current ordinance does not contain a prohibition of dispensaries within a certain distance of residential zones. Such a prohibition was discussed, but not recommended. In recent hearings, concern was raised by the public about the proximity of dispensaries to residential zones. Depending on the distance, this requirement could eliminate large portions of Milpas Street and Outer State Street from the areas where dispensaries are allowed.

## **6. Reducing the Amortization Period for Nonconforming Dispensaries**

SBMC Chapter 28.80 allows dispensaries that were in compliance with the Interim Ordinance to continue operation for three years from the effective date of the current ordinance (April 25, 2008), under certain conditions. Three years was considered reasonable by the Council in 2008, as it gave operators time to amortize their tenant improvement expenses. Additionally, for those dispensaries that could be legalized, the three years gave adequate time to do so. The nonconforming dispensaries must either get a Medical Cannabis Dispensary Permit or relocate before April 25, 2011 (about 19 months). The Ordinance Committee could recommend a shorter amortization period.

## **7. Impacts on Neighborhoods**

Staff has heard about the following types of neighborhood impacts from the public in meetings and correspondence: loitering, such that passers-by or nearby business owners or residents are uncomfortable or fearful; smoking near dispensaries, either in public or in cars; marijuana odors (both from smoking and from the raw material); dispensary patients selling marijuana to non-patients (including children) outside the dispensary; robberies and violence. The Police Department staff will discuss this issue at the Ordinance Committee hearing.

## **8. Re-establishing an Interim Ordinance, and the applicability of new regulations to existing and pending dispensaries**

After the issue of Medical Cannabis Dispensaries first arose in August 2007, the City passed an Interim Ordinance which prohibited the opening of new dispensaries for one year, while the permanent ordinance was being drafted. We have a request to do this again, and depending on the extent of changes that the Council may be considering, it may be appropriate to impose a new moratorium/interim ordinance.

The subject of applicability of new regulations to existing and pending dispensaries must be addressed in the ordinance revision. Normally, new regulations do not apply to existing, legal land uses, at least not without an appropriate amortization period. For example, if a land use zone changes from industrial to residential, the industrial use is allowed to remain as long as certain criteria are met for not expanding the non-conforming use. Another methodology is to allow an amortization period, similar to the current Medical Cannabis Dispensary Ordinance, which allows pre-existing, nonconforming dispensaries three years to seek approval of a MCDP under the current code, relocate, or close operations. For pending dispensaries, any number of points in the process (building occupancy, building permit issuance, project approval, application completeness, etc.), could be the point at which the revised regulations would apply.

## **9. Information about Neighboring Jurisdictions' Medical Cannabis Regulations**

Staff has researched neighboring jurisdictions on the South Coast, and found that virtually all jurisdictions (Lompoc, Santa Maria, Buellton, Solvang, Goleta, Carpinteria, Ventura, Oxnard, Camarillo and Guadalupe) have either an outright ban on dispensaries or a temporary moratorium on new dispensaries. Both Goleta's and Ventura's moratoriums are to consider allowing dispensaries pursuant to an ordinance in the future. It appears that the city and County of Santa Barbara are the only local jurisdictions that currently allow medical cannabis dispensaries.

## **10. Criteria for Issuance**

SBMC Chapter 28.80 establishes 13 criteria for issuance that must be considered by the decision making body in determining whether to grant or deny a dispensary permit. After processing several dispensary permit applications, Staff believes that it is appropriate to revise or eliminate some of these criteria.

- A. Criterion #2 requires that the location of the dispensary is not identified by the City Chief of Police as an area of high crime activity. The Police Department has not currently identified any areas of high crime activity in the City, so the value of this criterion is questionable. Staff recommends changing the language so that it can better reflect when the Police Department has concerns over criminal activity at the potential location of a dispensary.
- B. Criterion #4 refers to "reporting requirements." This is a remnant from when the Ordinance contained language requiring periodic reporting or permit renewal. Staff proposes to delete this phrase.

## **11. Amount of discretion given to the Staff Hearing Officer**

The Medical Cannabis Dispensary Permit is set up as a Performance Standard Permit (PSP), which is a discretionary action partway between a ministerial action (no discretion) and a Conditional Use Permit (total discretion). A PSP allows the decision making body only a limited amount of discretion, and if the Criteria for Issuance are met, then the permit is approved. This was done because it seemed that the location and operational requirements would prevent the type of neighborhood concerns that caused the drafting of the current ordinance. It was to be the Staff Hearing Officer's responsibility to review the project to ensure that the requirements were met, and to give the public a forum to speak to the project.

Of the current 13 criteria for issuance, there are two criteria for issuance that give the decision making bodies some discretion: #7 and #10. Criterion #7 states, "...no significant nuisance issues or problems are anticipated..." Criterion #10 states, "That the

dispensary would not adversely affect the health, peace, or safety of persons living or working in the surrounding area...”

A question that has arisen from the Staff Hearing Officer is: how much discretion does the Staff Hearing Officer have to deny a dispensary permit, if all locational and operational requirements are met. Staff would like to discuss this issue with the Ordinance Committee for possible amendments to these criteria.

## **12. Lack of Appeal to City Council**

The current ordinance allows the Staff Hearing Officer’s decision to be appealed to the Planning Commission, but the Planning Commission is the final review body. The Planning Commission’s decision cannot be appealed to City Council. Planning Commissioners, appellants and some interested parties have questioned this lack of appeal rights, and Staff would appreciate a discussion of this subject by the Ordinance Committee.

## **13. Allowing Dispensaries in the C-O and/or C-1 Zones**

During the City Council meeting on July 28, 2009, several public speakers commented that Medical Cannabis Dispensaries should be located near hospitals or in doctors’ offices, and that the current ordinance targets certain areas of the City for dispensaries. Hospitals and doctors’ offices are located, for the most part, in the C-O Zone, which is centered around Cottage Hospital and the old St. Francis Hospital on East Micheltorena Street. Staff does not believe that dispensaries should be located in the East Micheltorena C-O Zone, as it’s very small, is surrounded by residential uses, and the hospital is no longer in operation. However, dispensaries could be found to be appropriate in the C-O Zone surrounding Cottage Hospital. Additionally, perhaps dispensaries should be allowed in the C-1 zone (Coast Village Road), in order to have a more even distribution of dispensaries in the city.

## **14. Full Cost Recovery for Application Processing**

The City Council directed the Finance Committee to review a cost recovery fee, and staff would like the Ordinance Committee’s input on this issue as well. Although several Councilmembers have expressed interest in fees that would recover the cost of all aspects of City involvement with dispensaries, including policing, staff does not believe that all such fees are lawful. However, it would be appropriate to charge full cost for application processing. Currently, Planning Staff charges its hourly rate for application processing. The current rate is \$200/hr. Planning Staff collects \$2000 as a deposit (10 hrs) and charges additionally if the processing takes more than 10 hours of the case planner’s time. There are several issues we would like the Ordinance Committee to discuss:

A. The other major participants in the review of Medical Cannabis Dispensaries are the Police Department and the Building & Safety Division. We have not been charging the

applicants for the time spent by these participants, but will do so from this point forward. Another issue here is that we will be re-examining whether \$200/hr represents the full hourly rate (including overhead), of the Community Development Department and Police Departments.

- B. The appeal fees in the City are very low and only cover a small percentage of the costs involved with appeals. Currently, appellants (usually neighbors) pay the appeal fee of \$300.00, but we do not charge applicants the hourly fee. Should the applicants be charged hourly for the time spent on an appeal?

**ATTACHMENTS:**

1. Current Medical Marijuana Dispensary Ordinance
2. Maps of Allowed Locations for Medical Marijuana Dispensaries

**PREPARED BY:** Danny Kato, Senior Planner

**SUBMITTED BY:** Paul Casey, Community Development Director

**APPROVED BY:** City Administrator's Office

ORDINANCE NO. 5449

AN ORDINANCE OF THE COUNCIL OF THE CITY OF  
SANTA BARBARA AMENDING THE MUNICIPAL CODE  
BY ADDING CHAPTER 28.80 ESTABLISHING  
REGULATIONS AND PROCEDURES FOR MEDICAL  
CANNABIS DISPENSARIES

THE COUNCIL OF THE CITY OF SANTA BARBARA DOES ORDAIN AS FOLLOWS:

**SECTION ONE.** The City Council adopts the ordinance codified in this chapter based upon the following findings and determinations:

- A. The voters of the State of California approved Proposition 215 (codified as Health and Safety Code Section 11362.5 et seq.) entitled "The Compassionate Use Act of 1996" (Act).
- B. The intent of Proposition 215 was to enable persons residing in the State of California who are in need of cannabis for medical purposes to be able to obtain and use it without fear of criminal prosecution under limited, specified circumstances.
- C. The State enacted SB 420 in 2004, being Sections 11362.7 et seq., of the Health and Safety Code, being identified as the Medical Cannabis Program (Program), to clarify the scope of the Compassionate Use Act of 1996 and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the Program.
- D. To protect the public health, safety, and welfare, it is the desire of the City Council to modify the City Code consistent with the Program, regarding the location and operation of medical cannabis dispensaries.
- E. It is the City Council's intention that nothing in this chapter shall be construed to do any of the following: 1. to allow persons to engage in conduct that endangers others or causes a public nuisance; 2. to allow the use of cannabis for non-medical purposes; or 3. to allow any activity relating to the cultivation, distribution, or consumption of cannabis that is otherwise illegal and not permitted by state law.
- F. Pursuant to California Health and Safety Code Section 11362.71 et seq., the State Department of Health, acting by and through the state's counties, is to be responsible for establishing and maintaining a voluntary medical cannabis identification card program for qualified patients and primary caregivers.

G. California Health and Safety Code Section 11362.71(b) requires every county health department, or its designee, to implement a procedure to accept and process applications from those seeking to join the identification program in the matters set forth in Section 11362.71 et seq.

H. This chapter is found to be categorically exempt from environmental review pursuant to CEQA Guidelines Section 15061(b) (3) in that the Council finds and determines that there is nothing in this chapter or its implementation that could foreseeably have any significant effect on the environment.

I. This chapter is compatible with the general objectives of the general plan and any applicable specific plan, in that this use would be conditionally permitted in commercial and industrial districts, being similar to other permitted and conditionally permitted uses, such as pharmacies and medical clinics, and in that the use will be subject to strict review and conditions.

J. This chapter is compatible with the public convenience, general welfare and good land use practice, in that medical marijuana dispensaries address a medical need in the community, and in that the use will be subject to rigorous review and conditions.

K. This chapter will not adversely affect the orderly development of property, in that dispensaries would be subject to a careful review process, and strict operating requirements would be imposed.

**SECTION TWO.** Title 28 of the Santa Barbara Municipal Code is amended by adding a new chapter, Chapter 28.80 entitled "Medical Cannabis Dispensaries," which reads as follows:

**28.80.010 Purpose and Intent.**

It is the purpose and intent of this chapter to regulate the locations of medical cannabis dispensaries in order to promote the health, safety, and general welfare of residents and businesses within the City. It is neither the intent nor the effect of this chapter to condone or legitimize the use or possession of cannabis except as allowed by California law.

**28.80.020 Definitions.**

For the purpose of this chapter, the following words and phrases shall have the following meanings:

**A. Applicant.** A person who is required to file an application for a permit under this chapter, including an individual owner, managing partner, officer of a corporation, or any other operator, manager, employee, or agent of a dispensary.

**B. Drug Paraphernalia.** As defined in California Health and Safety Code Section 11362.5, and as may be amended from time to time.

**C. Identification Card.** As defined in California Health and Safety Code Section 11362.5 et seq., and as may be amended from time to time.

**D. Medical Cannabis Dispensing Collective or Dispensary.** Any association, cooperative, affiliation, or collective of persons where multiple qualified patients or primary care givers are organized to provide education, referral, or network services, and facilitation or assistance in the lawful retail distribution of medical cannabis. "Dispensary" shall include any facility or location where the primary purpose is to dispense medical cannabis (i.e., marijuana) as a medication that has been recommended by a physician, and where medical cannabis is made available to or distributed by or to a primary caregiver or a qualified patient in strict accordance with California Health and Safety Code Section 11362.5 et seq. A dispensary shall not include dispensing by primary caregivers to qualified patients in the following locations, so long as the location of the clinic, health care facility, hospice, or residential care facility is otherwise permitted by the Municipal Code or by applicable state laws:

1. a clinic licensed pursuant to Chapter 1 of Division 2 of the state Health and Safety Code;

2. a health care facility licensed pursuant to Chapter Two of Division 2 of the state 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 state Health and Safety Code;

4. a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the state Health and Safety Code;

5. a residential hospice or a home health agency licensed pursuant to Chapter 8 of Division 2 of the state Health and Safety Code;

provided that any such clinic, health care facility, hospice or residential care facility complies with applicable laws, including, but not limited to, Health and Safety Code Section 11362.5.

**E. Permittee.** The person to whom either a dispensary permit is issued by the City and who is identified in California Health and Safety Code Section 11362.7, subdivision (c) or (d), or (e) or (f).

**F. Person.** An individual, partnership, co-partnership, firm, association, joint stock company, corporation, limited liability company, or combination of the above in whatever form or character.

**G. Person with an Identification Card.** As set forth in California Health and Safety Code Section 11362.5 et seq., and as amended from time to time.

**H. Physician.** A licensed medical doctor, including a doctor of osteopathic medicine as defined in the California Business and Professions Code.

**I. Primary Caregiver.** As defined in California Health and Safety Code Section 11362.5 et seq., and as it may be amended.

**J. Qualified Patient.** As defined in California Health and Safety Code Section 11362.5 et seq., and as it may be amended from time to time.

**K. School.** An institution of learning for minors, whether public or private, offering a regular course of instruction required by the California Education Code. This definition includes an elementary school, middle or junior high school, senior high school, or any special institution of education for persons under the age of eighteen years, whether public or private.

#### **28.80.030 Dispensary Permit Required to Operate.**

It is unlawful for any person to engage in, conduct or carry on, or to permit to be engaged in, conducted or carried on, in or upon any premises in the City, the operation of a dispensary, unless the person first obtains and continues to maintain in full force and effect a Dispensary Use Permit issued by the City Staff Hearing Officer pursuant to this Chapter, or by the Planning Commission on an appeal from a decision by the Staff Hearing Officer.

#### **28.80.040 Business License Tax Liability.**

An operator of a dispensary shall be required to apply for and obtain a Business Tax Certificate pursuant to Chapter 5.04 as a prerequisite to obtaining a permit pursuant to the terms of this Chapter, as required by the State Board of Equalization. Dispensary sales shall be subject to sales tax in a manner required by state law.

#### **28.80.050 Imposition of Dispensary Permit Fees.**

Every application for a dispensary permit or renewal shall be accompanied by an application fee, in an amount established by resolution of the City Council from time to time. This application or renewal fee shall not include the standard City fees for

fingerprinting, photographing, and background check costs and shall be in addition to any other business license fee or permit fee imposed by this Code or other governmental agencies.

**28.80.060 Limitations on the Permitted Location of a Dispensary.**

**A. Permissible Zoning for Dispensaries.** A dispensary may only be located within the C-2 or C-M zoned areas of the City as so designated in the General Plan, Title 28 of the Municipal Code, and City Zoning map, provided, however, that dispensaries may also be located on parcels situated as follows:

1. any parcel fronting on State Street between Calle Laureles and the westerly boundary of the City at the intersection of State Street and Calle Real;
2. any parcel fronting on Milpas between Canon Perdido Street and Carpinteria Street;
3. any C-P zoned parcel fronting on Cliff Drive within 1000 feet of the intersection of Cliff Drive and Meigs Road;

**B. Storefront Locations.** A dispensary shall only be located in a visible store-front type location which provides good public views of the dispensary entrance, its windows, and the entrance to the dispensary premises from a public street.

**C. Areas and Zones Where Dispensaries Not Permitted.** Notwithstanding subparagraph (A) above, a dispensary shall not be allowed or permitted in the following locations or zones:

1. On a parcel located within 500 feet of a school or a park; or
2. On a parcel located within 500 feet of a permitted dispensary; or
3. On a parcel fronting on State Street between Cabrillo Boulevard and Arrellaga Street; or
4. On a parcel zoned R-O or zoned for residential use.

**D. Locational Measurements.** The distance between a dispensary and the above-listed uses shall be made in a straight line from any parcel line of the real property on which the dispensary is located to the parcel line of the real property on which the facility, building, or structure, or portion of the building or structure, in which the above-listed use occurs or is located.

## **28.80.070 Operating Requirements for Dispensaries.**

Dispensary operations shall be permitted and maintained only in compliance with the following day-to-day operational standards:

**A. Criminal History.** A dispensary permit applicant, his or her agent or employees, volunteer workers, or any person exercising managerial authority over a dispensary on behalf of the applicant shall not have been convicted of a felony or be on probation or parole for the sale or distribution of a controlled substance.

**B. Minors.** It is unlawful for any dispensary permittee, operator, or other person in charge of any dispensary to employ any person who is not at least 18 years of age. Persons under the age of 18 shall not be allowed on the premises of a dispensary unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian. The entrance to a dispensary shall be clearly and legibly posted with a notice indicating that persons under the age of 18 are precluded from entering the premises unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian.

**C. Dispensary Size and Access.** The following dispensary and access restrictions shall apply to all dispensaries permitted by the Chapter:

1. A dispensary shall not be enlarged in size (i.e., increased floor area) without a prior approval from the Staff Hearing Officer amending the existing dispensary permit pursuant to the requirements of this Chapter.

2. The entrance area of the dispensary building shall be strictly controlled. A viewer or video camera shall be installed in the door that allows maximum angle of view of the exterior entrance.

3. Dispensary personnel shall be responsible for monitoring the real property of the dispensary site activity (including the adjacent public sidewalk and rights-of-way) for the purposes of controlling loitering.

4. Only dispensary staff, primary caregivers, qualified patients and persons with bona fide purposes for visiting the site shall be permitted within a dispensary.

5. Potential patients or caregivers shall not visit a dispensary without first having obtained a valid written recommendation from their physician recommending use of medical cannabis.

6. Only a primary caregiver and qualified patient shall be permitted in the designated dispensing area along with dispensary personnel.

7. Restrooms shall remain locked and under the control of Dispensary management at all times.

**D. Dispensing Operations.** The following restrictions shall apply to all dispensing operations by a dispensary:

1. A dispensary shall only dispense to qualified patients or primary caregivers with a currently valid physician's approval or recommendation in compliance with the criteria in California Health and Safety Code Section 11362.5 et seq. Dispensaries shall require such persons to provide valid official identification, such as a Department of Motor Vehicles driver's license or State Identification Card.

2. Prior to dispensing medical cannabis, the dispensary shall obtain a verification from the recommending physician's office personnel that the individual requesting medical cannabis is or remains a qualified patient pursuant to state Health & Safety Code Section 11362.5.

3. A dispensary shall not have a physician on-site to evaluate patients and provide a recommendation or prescription for the use of medical cannabis.

**E. Consumption Restrictions.** The following medical marijuana consumption restrictions shall apply to all permitted dispensaries:

1. Cannabis shall not be consumed by patients on the premises of the dispensary.

The term "premises" includes the actual building, as well as any accessory structures, parking lot or parking areas, or other surroundings within 200 feet of the dispensary's entrance. Dispensary employees who are qualified patients may consume cannabis within the enclosed building area of the premises, provided such consumption occurs only via oral consumption (i.e., eating only) but not by means of smoking or vaporization.

2. Dispensary operations shall not result in illegal re-distribution of medical cannabis obtained from the dispensary, or use or distribution in any manner which violates state law.

**F. Retail Sales of Other Items by a Dispensary.** The retail sales of dispensary-related or marijuana use items may be allowed under the following circumstances:

1. With the approval of the Staff Hearing Officer, a dispensary may conduct or engage in the commercial sale of specific products, goods, or services in addition to the provision of medical cannabis on terms and conditions consistent with this chapter and applicable law.

2. No dispensary shall sell or display any drug paraphernalia or any implement that may be used to administer medical cannabis.

3. A dispensary shall meet all the operating criteria for the dispensing of medical cannabis as is required pursuant to California Health and Safety Code Section 11362.5 et seq.

**G. Operating Plans.** In connection with a permit application under this Chapter, the applicant shall provide, as part of the permit application, a detailed Operations Plan and, upon issuance of the dispensary permit, shall operate the dispensary in accordance with the Operations Plan, as such plan is approved by the Staff Hearing Officer.

1. **Floor Plan.** A dispensary shall have a lobby waiting area at the entrance to the dispensary to receive clients, and a separate and secure designated area for dispensing medical cannabis to qualified patients or designated caregivers. The primary entrance shall be located and maintained clear of barriers, landscaping and similar obstructions so that it is clearly visible from public streets, sidewalks or site driveways.

2. **Storage.** A dispensary shall have suitable locked storage on premises, identified and approved as a part of the security plan, for after-hours storage of medical cannabis.

3. **Security Plans.** A dispensary shall provide adequate security on the premises, in accordance with a security plan approved by the Chief of Police and as reviewed by the Staff Hearing Officer, including provisions for adequate lighting and alarms, in order to ensure the safety of persons and to protect the premises from theft.

4. **Security Cameras.** Security surveillance cameras shall be installed to monitor the main entrance and exterior of the premises to discourage and to report loitering, crime, illegal or nuisance activities. Security video shall be maintained for a period of not less than 72 hours.

5. **Alarm System.** Professionally monitored robbery alarm and burglary alarm systems shall be installed and maintained in good working condition within the dispensary at all times.

6. **Emergency Contact.** A dispensary shall provide the Chief of Police with the name, cell phone number, and facsimile number of an on-site community relations staff person to whom the City may provide notice of any operating problems associated with the dispensary.

**H. Dispensary Signage and Notices.**

1. A notice shall be clearly and legibly posted in the dispensary indicating that smoking, ingesting or consuming cannabis on the premises or in the vicinity of the dispensary is prohibited.

2. Signs on the premises shall not obstruct the entrance or windows.

3. Address identification shall comply with Fire Department illuminated address sign requirements.

4. Business identification signage shall comply with the City's Sign Ordinance (SBMC Chapter 22.70) and be limited to that needed for identification only, consisting of a single window sign or wall sign that shall not exceed six square feet in area or 10 percent of the window area, whichever is less.

**I. Employee Records.** Each owner or operator of a dispensary shall maintain a current register of the names of all volunteers and employees currently working at or employed by the dispensary, and shall disclose such registration for inspection by any City officer or official, but only for the purposes of determining compliance with the requirements of this chapter.

**J. Patient Records.** A dispensary shall maintain confidential health care records of all patients and primary caregivers using only the identification card number issued by the county, or its agent, pursuant to California Health and Safety Code Section 11362.71 et seq., as a protection of the confidentiality of the cardholders, or a copy of the written recommendation from a physician or doctor of osteopathy stating the need for medical cannabis under state Health & Safety Code Section 11362.5.

**K. Staff Training.** Dispensary staff shall receive appropriate training for their intended duties to ensure understanding of rules and procedures regarding dispensing in compliance with state and local law, and properly trained or professionally-hired security personnel.

**L. Site Management.**

1. The operator of the establishment shall take all reasonable steps to discourage and correct objectionable conditions that constitute a nuisance in parking areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours, if directly related to the patrons of the subject dispensary.

2. The operator shall take all reasonable steps to reduce loitering in public areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours.

3. The operator shall provide patients with a list of the rules and regulations governing medical cannabis use and consumption within the City and recommendations on sensible cannabis etiquette.

**M. Trash, Litter, Graffiti.**

1. The operator shall clear the sidewalks adjoining the premises plus 10 feet beyond property lines along the street, as well as any parking lots under the control of the operator, as needed to control litter, debris and trash.

2. The operator shall remove all graffiti from the premises and parking lots under the control of the operator within 72 hours of its application.

**N. Compliance with Other Requirements.** The dispensary operator shall comply with all provisions of all local, state or federal laws, regulations or orders, as well as any condition imposed on any permits issued pursuant to applicable laws, regulations or orders.

**O. Display of Permit.** Every dispensary shall display at all times during business hours the permit issued pursuant to the provisions of this chapter for such dispensary in a conspicuous place so that the same may be readily seen by all persons entering the dispensary.

**P. Alcoholic Beverages.** No dispensary shall hold or maintain a license from the State Division of Alcoholic Beverage Control for the sale of alcoholic beverages, or operate a business on the premises that sells alcoholic beverages. No alcoholic beverages shall be allowed or consumed on the premises.

**Q. Parking Requirements.** Dispensaries shall be considered office uses relative to the parking requirements imposed by Section 28.90.100(I).

#### **28.80.080 Dispensary Permit Application – Preparation and Filing.**

**A. Application Filing.** A complete Performance Standard Permit use permit application submittal packet shall be submitted, including all necessary fees and all other information and materials required by the City and this chapter. All applications for permits shall be filed with the Community Development Department, using forms provided by the City, and accompanied by the applicable filing fee. It is the responsibility of the applicant to provide information required for approval of the permit. The application shall be made under penalty of perjury.

**B. Eligibility for Filing.** Applications may only be filed by the owner of the subject property, or by a person with a lease signed by the owner or duly authorized agent of the owner allowing them the right to occupy the property for the intended use.

**C. Filing Date.** The filing date of any application shall be the date when the City receives the last submission of information or materials required in compliance with the submittal requirements specified herein.

**D. Effect of Incomplete Filing.** Upon notification that an application submittal is incomplete, the applicant shall be granted an extension of time to submit all materials required to complete the application within 30 days. If the application remains incomplete in excess of 30 days, the application shall be deemed withdrawn and new application submittal shall be required in order to proceed with the subject request. The

time period for granting or denying a permit shall be stayed during the period in which the applicant is granted an extension of time.

**E. Effect of Other Permits or Licenses.** The fact that an applicant possesses other types of state or City permits or licenses does not exempt the applicant from the requirement of obtaining a dispensary permit.

**28.80.090 Criteria for Review of Dispensary Applications by Staff Hearing Officer.**

**A. Decision on Application.** Upon an application for a Dispensary permit being deemed complete, the Staff Hearing Officer, or the Planning Commission on appeal of a decision of the Staff Hearing Officer, shall either issue a Dispensary permit, issue a Dispensary permit with conditions in accordance with this chapter, or deny a Dispensary permit.

**B. Criteria for Issuance.** The Staff Hearing Officer, or the Planning Commission on appeal, shall consider the following criteria in determining whether to grant or deny a dispensary permit:

1. That the dispensary permit is consistent with the intent of the state Health & Safety Code for providing medical marijuana to qualified patients and primary caregivers, and the provisions of this Chapter and the Municipal Code, including the application submittal and operating requirements herein.

2. That the proposed location of the Dispensary is not identified by the City Chief of Police as an area of high crime activity (e.g., based upon crime reporting district/statistics as maintained by the Police Department).

3. For those applicants operating other Dispensaries within the City, that there have not been significant numbers of calls for police service, crimes or arrests in the area, or to the applicant's existing dispensary location.

4. That all required application fees have been paid and reporting requirements have been satisfied in a timely manner.

5. That issuance of a dispensary permit for the dispensary size requested is justified to meet needs of community.

6. That issuance of the dispensary permit would serve needs of City residents within a proximity to this location.

7. That the location is not prohibited by the provisions of this chapter or any local or state law, statute, rule or regulation, and no significant nuisance issues or

problems are anticipated or resulted, and that compliance with other applicable requirements of the City's Zoning Ordinance will be accomplished.

8. That the site plan, floor plan, and security plan have incorporated features necessary to assist in reducing potential crime-related problems and as specified in the operating requirements section. These features may include, but are not limited to, security on-site; procedure for allowing entry; openness to surveillance and control of the premises, the perimeter, and surrounding properties; reduction of opportunities for congregating and obstructing public ways and neighboring property; illumination of exterior areas; and limiting furnishings and features that encourage loitering and nuisance behavior.

9. That all reasonable measures have been incorporated into the security plan or consistently taken to successfully control the establishment's patrons' conduct resulting in disturbances, vandalism, crowd control inside or outside the premises, traffic control problems, cannabis use in public, or creation of a public or private nuisance, or interference with the operation of another business.

10. That the dispensary would not adversely affect the health, peace, or safety of persons living or working in the surrounding area, overly burden a specific neighborhood, or contribute to a public nuisance; or that the dispensary will generally not result in repeated nuisance activities, including disturbances of the peace, illegal drug activity, cannabis use in public, harassment of passerby, excessive littering, excessive loitering, illegal parking, excessive loud noises, especially late at night or early in the morning hours, lewd conduct, or police detentions or arrests.

11. That any provision of the Municipal Code or condition imposed by a City-issued permit, or any provision of any other local or state law, regulation, or order, or any condition imposed by permits issued in compliance with those laws, will not be violated.

12. That the applicant has not knowingly made a false statement of material fact or has knowingly omitted to state a material fact in the application for a permit.

13. That the applicant has not engaged in unlawful, fraudulent, unfair, or deceptive business acts or practices with respect to the operation of another business within the City.

#### **28.80.100 Appeal from Staff Hearing Officer Determination.**

**A. Appeal to the Planning Commission.** An applicant or any interested party who disagrees with the Staff Hearing Officer's decision to issue, issue with conditions, or to deny a dispensary permit may appeal such decision to the City Planning Commission by filing an appeal pursuant to the requirements of subparagraph (B) of Section 28.05.020 of the Municipal Code.

**B. Notice of Planning Commission Appeal Hearing.** Upon the filing of an appeal pursuant to subparagraph (A) above, the Community Development Director shall provide public notice in accordance with the notice provisions of SBMC Section 28.87.380.

**C. Planning Commission Appeal.** Notwithstanding subparagraph (C) of Section 28.05.020, Section 28.87.360, and Section 1.30.050, a decision by the Planning Commission on appeal of the Staff Hearing Officer pursuant to this Chapter shall be final and may not be appealed to the City Council.

#### **28.80.110 Suspension and Revocation by Planning Commission.**

**A. Authority to Suspend or Revoke a Dispensary Permit.** Consistent with Section 28.87.360, any dispensary permit issued under the terms of this chapter may be suspended or revoked by the Planning Commission when it shall appear to the Commission that the permittee has violated any of the requirements of this chapter, or the dispensary is operated in a manner that violates the provisions of this chapter, including the operational requirements of this Chapter, or in a manner which conflicts with state law.

**B. Suspension or Revocation – Written Notice.** Except as otherwise provided in this chapter, no permit shall be revoked or suspended by virtue of this chapter until written notice of the intent to consider revocation or suspension of the permit has been served upon the person to whom the permit was granted at least ten (10) days prior to the date set for such review hearing, and the reasons for the proposed suspension or revocation have been provided to the permittee in writing. Such notice shall contain a brief statement of the grounds to be relied upon for revoking or suspending such permit. Notice may be given either by personal delivery to the permittee, or by depositing such notice in the U.S. mail in a sealed envelope, postage prepaid (via regular mail and return receipt requested), addressed to the person to be notified at his or her address as it appears in his or her application for a dispensary permit.

**C. Appeal of Planning Commission Decision.** Notwithstanding subparagraph (C) of Section 28.05.020, Section 28.87.360, and Section 1.30.050, a decision by the Planning Commission to suspend or revoke a permit issued pursuant to this Chapter shall be final and may not be appealed to the City Council.

#### **28.80.120 Transfer of Dispensary Permits.**

**A. Permit – Site Specific.** A permittee shall not operate a dispensary under the authority of a dispensary permit at any place other than the address of the dispensary stated in the application for the permit. All dispensary permits issued by the City pursuant to this chapter shall be non-transferable.

**B. Transfer of a Permitted Dispensary.** A permittee shall not transfer ownership or control of a dispensary or attempt to transfer a dispensary permit to another person, unless and until the transferee obtains an amendment to the permit from the Staff Hearing Officer pursuant to the permitting requirements of this chapter, stating that the transferee is now the permittee. Such an amendment may be obtained only if the transferee files an application with the Community Development Department in accordance with all provisions of this chapter accompanied by the required application fee.

**C. Request for Transfer with a Revocation or Suspension Pending.** No dispensary permit may be transferred (and no permission for a transfer may be issued) when the Community Development Department has notified the permittee in writing that the permit has been or may be suspended or revoked, and a notice of such suspension or revocation has been provided.

**D. Transfer Without Permission.** Any attempt to transfer a permit either directly or indirectly in violation of this section is declared void, and the permit shall be deemed revoked.

#### **28.80.130 Medical Marijuana Vending Machines.**

No person shall maintain, use, or operate a vending machine which dispenses marijuana to a qualified patient or primary caregiver unless such machine is located within the interior of a duly permitted dispensary.

**SECTION THREE.** Those Dispensaries which were authorized pursuant to the Santa Barbara Municipal Code Chapter 28.80 prior to the date of the adoption of the ordinance enacting this Chapter shall be deemed pre-existing legal uses of real property upon which they are situated for a period of three (3) years from the date of the adoption of this Ordinance, provided the following operational conditions are complied with:

1. the dispensary shall not be relocated nor shall it be discontinued for a period of time in excess of thirty (30) days without obtaining a dispensary permit pursuant to this Chapter;
2. the dispensary shall comply with all portions of Chapter 28.80 (as enacted by this Ordinance) except for the locational provisions of Section 28.80.060; and
3. the dispensary shall be subject to the requirements for nonconforming uses of SBMC Section 28.87.030 until such time that they have been permitted under this Ordinance.

Prior to the expiration of the three (3) year nonconforming period, all medical marijuana dispensaries operating as allowed dispensaries which pre-date the adoption

of this Ordinance shall either obtain a dispensary permit (as required by and in full accord with this Ordinance) or shall discontinue such use not later than the end of the three (3) year amortization period. No such pre-existing legal dispensary shall be assigned or otherwise transferred to a new owner or owners, whether voluntarily or by operation of law, without having obtained a permit pursuant to this ordinance.

**SECTION FOUR.** The requirements of this Chapter shall apply to all dispensaries which are not permitted or authorized by the Municipal Code prior to the date of the adoption of the ordinance enacting this chapter.

ORDINANCE NO. 5449

STATE OF CALIFORNIA            )  
  )  
COUNTY OF SANTA BARBARA    ) ss.  
  )  
CITY OF SANTA BARBARA        )

I HEREBY CERTIFY that the foregoing ordinance was introduced on March 18, 2008, and was adopted by the Council of the City of Santa Barbara at a meeting held on March 25, 2008, by the following roll call vote:

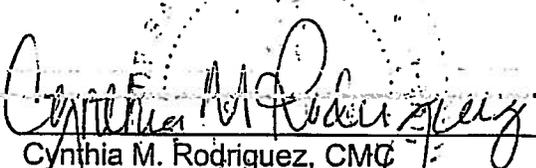
AYES:                    Councilmembers Iya G. Falcone, Dale Francisco, Roger L. Horton,  
                                  Grant House, Helene Schneider

NOES:                    Mayor Marty Blum

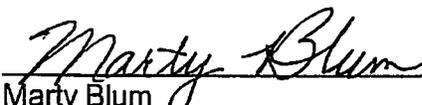
ABSENT:                 Councilmember Das Williams

ABSTENTIONS:        None

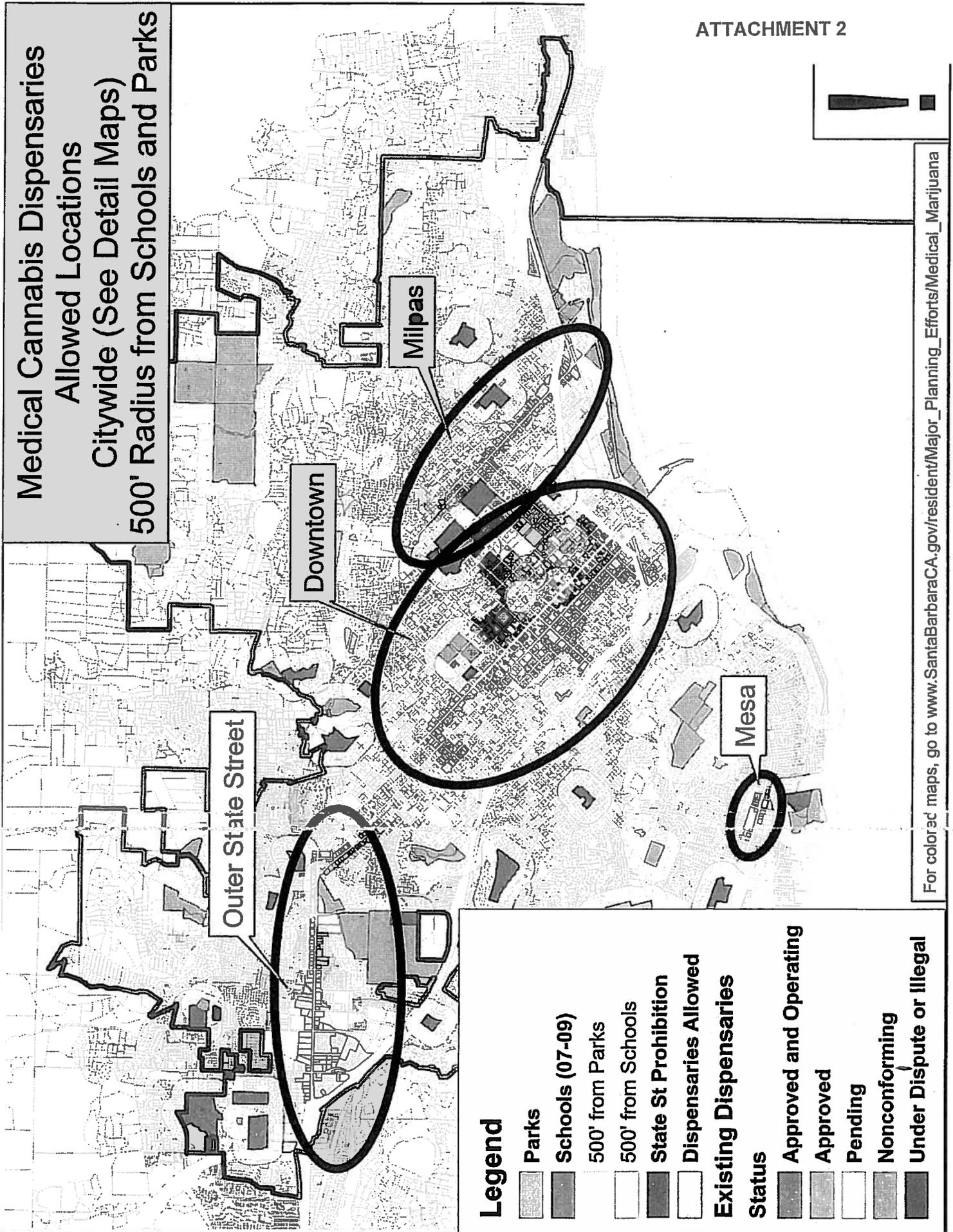
IN WITNESS WHEREOF, I have hereto set my hand and affixed the official seal of the City of Santa Barbara on March 26, 2008.

  
Cynthia M. Rodriguez, CMG  
City Clerk Services Manager

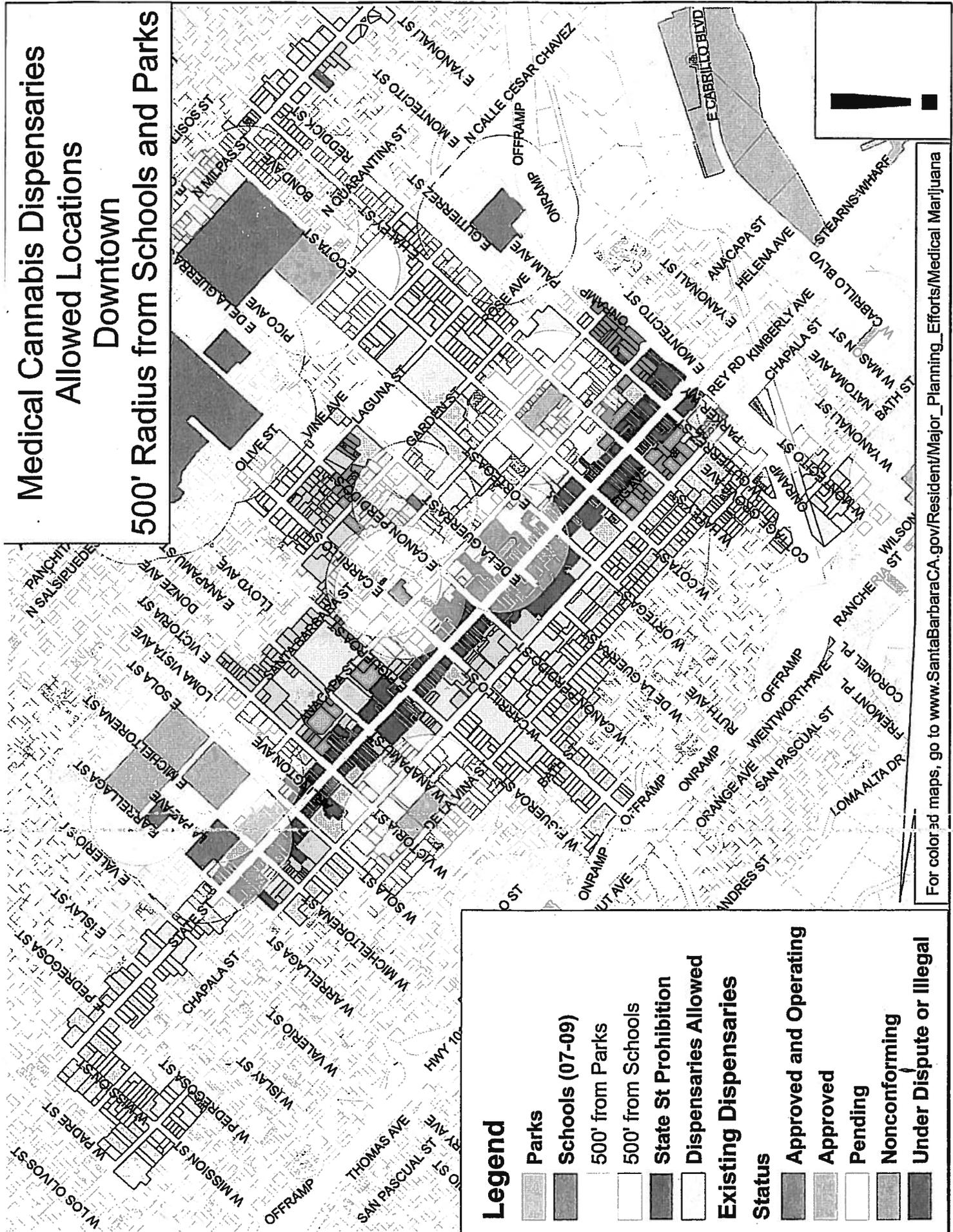
I HEREBY APPROVE the foregoing ordinance on March 26, 2008.

  
Marty Blum  
Mayor

**Medical Cannabis Dispensaries  
Allowed Locations  
Citywide (See Detail Maps)  
500' Radius from Schools and Parks**



# Medical Cannabis Dispensaries Allowed Locations Downtown 500' Radius from Schools and Parks



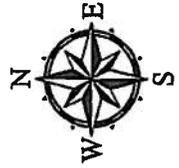
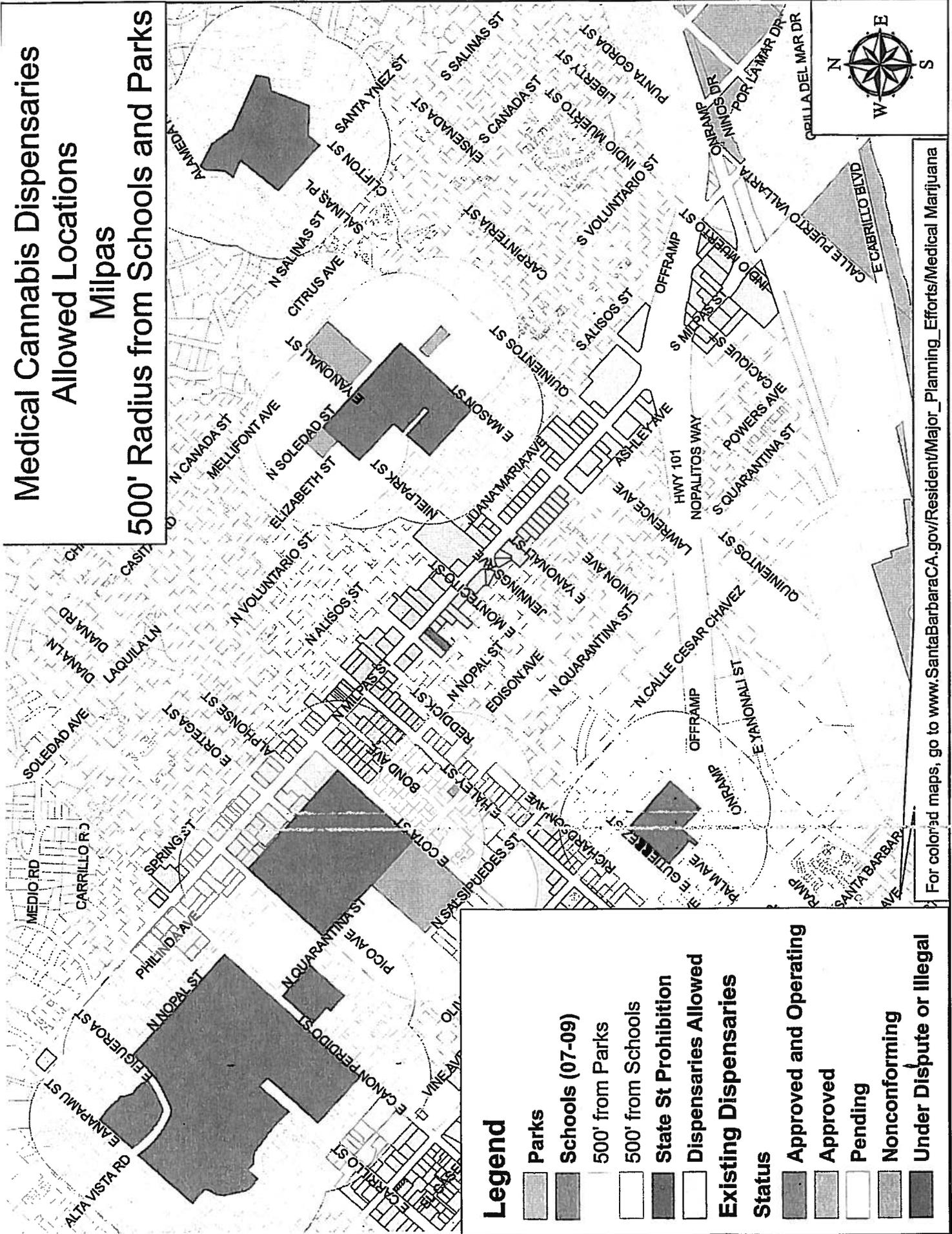
## Legend

- Parks
  - Schools (07-09)
  - 500' from Parks
  - 500' from Schools
  - State St Prohibition
  - Dispensaries Allowed
- ## Existing Dispensaries
- ### Status
- Approved and Operating
  - Approved
  - Pending
  - Nonconforming
  - Under Dispute or Illegal

For color ed maps, go to [www.SantaBarbaraCA.gov/Resident/Major\\_Planning\\_Efforts/Medical Marijuana](http://www.SantaBarbaraCA.gov/Resident/Major_Planning_Efforts/Medical_Marijuana)

# Medical Cannabis Dispensaries Allowed Locations Milpas

## 500' Radius from Schools and Parks



### Legend

- Parks
  - Schools (07-09)
  - 500' from Parks
  - 500' from Schools
  - State St Prohibition
  - Dispensaries Allowed
- ### Existing Dispensaries
- Status
  - Approved and Operating
  - Approved
  - Pending
  - Nonconforming
  - Under Dispute or Illegal

For colored maps, go to [www.SantaBarbaraCA.gov/Resident/Major\\_Planning\\_Efforts/Medical\\_Marijuana](http://www.SantaBarbaraCA.gov/Resident/Major_Planning_Efforts/Medical_Marijuana)



# Medical Cannabis Dispensaries Allowed Locations Mesa 500' Radius from Schools and Parks

RED ROSE LN  
RED ROSE WAY

CAMINO CALMA

SOLORES DR

CLIFF DR

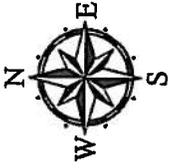
MEIGS RD

EL FARO

LIGHTHOUSE RD

ELISE WAY

REEF CT



## Legend

- Parks
  - Schools (07-09)
  - 500' from Parks
  - 500' from Schools
  - State St Prohibition
  - Dispensaries Allowed
- ### Existing Dispensaries
- Status**
- Approved and Operating
  - Approved
  - Pending
  - Nonconforming
  - Under Dispute or Illegal

RECEIVED

To: Santa Barbara City Council  
From: David Bearman, M.D.  
Re: Marijuana Dispensary Ordinance

SEP 03 2009

CITY CLERK'S OFFICE  
SANTA BARBARA, CA

CITY ADMINISTRATOR'S OFFICE  
SANTA BARBARA

**• Recommendations**

Cannabis should be dispensed from pharmacies under local and state regulations. My study of history reveals little evidence of problems with distribution of cannabis via pharmacies. From 1854 to 1941 cannabis was in the USP (United States Pharmacopeia), produced by well-known pharmaceutical companies and dispensed through pharmacies in both cannabis containing OTC medication and prescription medication. This is why in 1937 the AMA vigorously testified against the Marijuana Tax Act and why in 1944 the New York Academy of Medicine (as part of the LaGuardia Crime Commission Report) endorsed use of recreational marijuana should be legal.

At any rate, until the federal government takes its head out of the sand, recognizes science, and places cannabis in the appropriate schedule or even better, recognizes that the Controlled Substances Act of 1970 violates the Constitution, we are not going to have pharmacies dispensing cannabis. The next best thing is to apply similar regulations and zoning ordinances to cannabis dispensaries as those which presently govern pharmacies. In addition a couple of my suggestions are that you consider requiring nurses or pharmacists to dispense cannabis, not allowing anyone under the age of 23 in a cannabis dispensary, and requiring that you must be 25 or over to be allowed to work there. It also strikes me that some small but meaningful special tax would be useful to the City of Santa Barbara.

**Background**

What follows is some background information on this topic which may prove helpful. There is almost unanimous agreement that California's medical marijuana dispensary system should be regulated. Furthermore if the regulations are reasonable and responsible people in the dispensary field will support closing down any major offenders.

The focus needs to be on the patient. We need to recognize that it is a matter of access. The 1996 Proposition 215 that began California's approval of Medical Marijuana laid out that this was done for the benefit of people who are ill. Prop 215 said in Section (A) that the initiative was *"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."* This wide use (e.g., "for any other illness for which marijuana provides relief") is consistent with FDA rules for prescription pharmaceuticals. Under FDA guidelines, any pharmaceutical which has been approved for use for one disease can be prescribed ("off-label") by doctors for "any other illness for which" the doctor thinks it "provides relief." In that key regard, California does treat medical marijuana "like every other drug."

That said, most of the problems in regulating dispensaries have been caused by the federal government and the Supreme Court by ignoring the 9<sup>th</sup> and 10<sup>th</sup> Amendments to the Constitution, as well as the 1925 Supreme Court decision in the Lindner case which affirmed that it is the State's sole responsibility to regulate the practice of medicine.

There are two basic reasons why marijuana is not available "through a legitimate pharmacy" and is not "regulated like every other drug." It is not the supporters of medical marijuana who are responsible for keeping cannabis out of the FDA "system". One is the reluctance of the FDA to follow the law, be it the 1938 Food Cosmetic and Drug Act or the Controlled Substances Act of 1970. For decades supporters of medicinal cannabis have attempted to work through the government bureaucracy and been thwarted. For instance in 1972 NORML sued unsuccessfully to get it rescheduled, so it might be prescribed. The government stalled until 1986. In 1988 the FDA's Chief Administrative Law Judge, Francis Young, issued his recommendation based on 15 days of hearings, that marijuana should be rescheduled. This opinion was rejected by George H.W. Bush's head of the FDA, John Lawn.

Secondly, it can cost huge sums to try to get any "drug" through the FDA process which was not set up to analyze a complex plant. In 1993, NORML was told by the Clinton Administration that it would cost \$1.5 million to get the FDA to review marijuana and move it from Schedule I to Schedule II. NORML did not have the \$1.5 million, and the Clinton Administration did not have the courage to do even what it had promised patients that it would do so. They had also pledged to reopen the so-called "Compassionate IND" program, but in the end these promises came to nothing.

In fact cannabis should be lower than Schedule II. In 1998, after a number of states passed medical marijuana laws, Marinol, synthetic THC, was quickly moved from Schedule II to Schedule III with the full support of the DEA, while marijuana remains absurdly in Schedule I.) Of historical note is a 1971 letter from Dr. Rodger Egeberg, then Under Secretary for Health for HEW and former dean of USC Medical School who pointed out that cannabis was only temporarily in Schedule I until the Report of the Nixon Marijuana Commission came out. The Commission recommended legalization of marijuana for recreational use, yet marijuana still languishes as a Schedule I drug.

- **Discussion**

*Feds Have Created the Problem*

One justification for the dispensary system is that the federal government has made it difficult for pharmacies to dispense cannabis. Another is that dispensaries keep medical cannabis users from having to go to "street dealers" in order to get their medicine. So while we would be better served by the system which existed from 1854-1941, dispensaries are an improvement over the previous distribution system.

*Dispensary System Decreases Substance Abuse*

In the broader context of drug policy, the California medical marijuana dispensary system has the same beneficial effect as the Dutch cannabis "coffee shop" system. The Dutch call it the "separation of the markets for soft and hard drugs." The Dutch have a much lower use of hard drugs, especially heroin, among young people than does the U.S. This is very likely a consequence of this "separation of the markets."

*Dispensaries Have Some Controls*

Dispensaries are not selling to just anyone. Dispensaries do provide some limited controls as well as safe access. They require a special form of identification that establishes the fact that a doctor has approved of the patient's use of cannabis. (That is all that is required by state law, and – critically – all that is allowed by Federal law.)

This zoning issue would disappear if the federal government respected the 9<sup>th</sup> and 10<sup>th</sup> Amendments to the Constitution. Then cannabis would be available in a pharmacy by prescription. Since the federal government only grudgingly changing on this matter, the ordinance should look to zoning and licensing requirements of commercial pharmacies.

No control system is perfect. Any "control" system devised by humans will be either "too tight" or "too loose." If it is too tight, then some sick and probably a few dying people will not be able to get their medical marijuana. Second, healthy young people can always find "weed" on the "streets." I am trying to use the AACM to marginalize those physicians who are practicing minimalist medicine.

We need to figure out if there is a way to prevent filling the approval several times. We need to recognize that while this will be very useful it won't be perfect. Even with the laws we have regulating pharmacies the "prescription" drug control system does not keep prescription drugs from all teens or prescription drugs out of the illicit market. The dispensary system also has that deficiency. One of the loopholes in the current system is that people can go to several dispensaries. This needs to be addressed, but we must also recognize that no regulatory system in a free society is perfect.

#### *Diversion of Prescription Drugs*

On June 14, 2008 the New York Times reported that the "Florida Medical Examiners Commission found that the rate of deaths caused by prescription drugs was three times the rate of deaths caused by all illicit drugs combined."

Whereas cannabis does not cause death and has relatively benign consequences, there is a big problem with diversion of prescription drugs. Nevertheless we continue to allow the pharmaceutical industry to stay in business.

"The Florida report analyzed 168,000 deaths statewide. Cocaine, heroin and all methamphetamines caused 989 deaths, it found, while legal opioids – strong painkillers in brand-name drugs like Vicodin and OxyContin – caused 2,328.

Drugs with benzodiazepine, mainly depressants (sic) like Valium and Xanax, led to 743 deaths. Alcohol was the most commonly occurring drug, appearing in the bodies of 4,179 of the dead and judged the cause of death of 466 – fewer than cocaine (843) but more than methamphetamine (25) and marijuana (0)." (emphasis added) See Guess Who Said, "The decrease in the abuse of cannabis among youth in the United States may be offset by an increase in the abuse of prescription drugs." Iron Law of Prohibition" & Czar's Strategy 3."

#### **Conclusion:**

I am confident that you will craft a good functional ordinance. Your staff should be able to incorporate the best features of the many ordinances that have already been instituted. I think that if you keep in mind that these dispensaries serve some very ill people and that the ordinance won't be perfect, you won't drive yourself to distraction trying to escape the legal straightjacket created by the federal government. You might read Sandra Day O'Connor's dissent in *Gonzales v. Raich* for a good assessment of state's rights in this matter.

**CITIZEN REVISED ORDINANCE NO. 5449**

**AN ORDINANCE OF THE COUNCIL OF THE CITY OF  
SANTA BARBARA AMENDING THE MUNICIPAL CODE  
BY ADDING CHAPTER 28.80 ESTABLISHING  
REGULATIONS AND PROCEDURES FOR MEDICAL  
CANNABIS DISPENSARIES**

**Final Draft Copy**

**Produced by a coalition formed between members of:**

**West Downtown Neighborhood Group  
The Downtown Business Association  
Franklin Neighborhood Group  
Franklin Neighborhood Advisory Council  
Westside Advisory Council**

**Drafted by:**

**Sharon Byrne and Tony Vassallo**

**September 7, 2009**

Please note: changes to the ordinance introduced by the citizen revisions are in **red**. Strikethroughs indicate language to be deleted from the existing ordinance and replaced by the citizen-revised version.

**CITIZEN REVISED ORDINANCE NO. 5449**

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THE COUNCIL OF THE CITY OF SANTA BARBARA DOES ORDAIN AS FOLLOWS:

**SECTION ONE.** The City Council adopts the ordinance codified in this chapter based upon the following findings and determinations:

A. The voters of the State of California approved Proposition 215 (codified as Health and Safety Code Section 11362.5 et seq.) entitled "The Compassionate Use Act of 1996" (Act).

B. The intent of Proposition 215 was to enable persons residing in the State of California who are in need of cannabis for medical purposes to be able to obtain and use it without fear of criminal prosecution under limited, specified circumstances.

C. The State enacted SB 420 in 2004, being Sections 11362.7 et seq., of the Health and Safety Code, being identified as the Medical Cannabis Program (Program), to clarify the scope of the Compassionate Use Act of 1996 and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the Program.

D. To protect the public health, safety, and welfare, it is the desire of the City Council to modify the City Code consistent with the Program, regarding the location and operation of medical cannabis dispensaries.

E. It is the City Council's intention that nothing in this chapter shall be construed to do any of the following: 1. to allow persons to engage in conduct that endangers others or causes a public nuisance; 2. to allow the use of cannabis for non-medical purposes; or 3. to allow any activity relating to the cultivation, distribution, or consumption of cannabis that is otherwise illegal and not permitted by state law.

F. Pursuant to California Health and Safety Code Section 11362.71 et seq., the State Department of Health, acting by and through the state's counties, is to be responsible for establishing and maintaining a voluntary medical cannabis identification card program for qualified patients and primary caregivers.

G. California Health and Safety Code Section 11362.71 (b) requires every county health department, or its designee, to implement a procedure to accept and process applications from those seeking to join the identification program in the matters set forth in Section 11362.71 et seq.

H. This chapter is found to be categorically exempt from environmental review pursuant to CEQA Guidelines Section 15061 (b) (3) in that the Council finds and determines that there is nothing in this chapter or its implementation that could foreseeably have any significant effect on the environment.

I. This chapter is compatible with the general objectives of the general plan and any applicable specific plan, in that this use would be conditionally permitted in commercial and industrial districts, **except that this use may be prohibited where a specific plan has been adopted and may contain commercial and industrial districts. In any case, such use will be subject to strict and rigorous review and conditions.**

J. This chapter is compatible **with meeting the intent of "The Compassionate Use Act of 1996. (act).**

K. This chapter will not adversely affect the orderly development of property, in that dispensaries would be subject to a careful review process, strict operating requirements **and regular physical monitoring of the use** would be imposed. **Documentation by sworn Compliance Officials of adverse affects from this use on the orderly development or operation of property will result in the cancellation of the permit to operate this use at its approved location.**

**SECTION TWO.** Title 28 of the Santa Barbara Municipal Code is amended by adding a new chapter, Chapter 28.80 entitled "Medical Cannabis Dispensaries," which reads as follows:

**28.80.010 Purpose and Intent.**

It is the purpose and intent of this chapter to regulate the locations of medical cannabis dispensaries in order to promote the health, safety, and general welfare of residents and businesses within the City. It is neither the intent nor the effect of this chapter to condone or legitimize the use or possession of cannabis except as allowed by California law.

**28.80.020 Definitions.**

For the purpose of this chapter, the following words and phrases shall have the following meanings:

A. **Applicant.** A person who is required to file an application for a permit under this

chapter, including an individual owner, **investor**, managing partner, officer of a corporation, or any other operator, manager, employee, or agent of a dispensary.

**B. Drug Paraphernalia.** As defined in California Health and Safety Code Section 11362.5, and as may be amended from time to time.

**C. Identification Card.** As defined in California Health and Safety Code Section 11362.5 et seq., and as may be amended from time to time.

**D. Medical Cannabis Dispensing Collective or Dispensary.** Any association, cooperative, affiliation, or collective of persons where multiple qualified patients or primary care givers are organized to provide education, referral, or network services, and facilitation or assistance in the lawful retail distribution of medical cannabis. "Dispensary" shall include any facility or location where the primary purpose is to dispense medical cannabis (Le., marijuana) as a medication that has been recommended **with a written prescription** by a physician **in good standing with State Medical Licensing Board**, and where medical cannabis is made available to or distributed by or to a primary caregiver or a qualified patient in strict accordance with California Health and Safety Code Section 11362.5 et seq. A dispensary shall not include dispensing by primary caregivers to qualified patients in the following locations, so long as the location of the clinic, health care facility, hospice, or residential care facility is otherwise permitted by the Municipal Code or by applicable state laws:

1. a clinic licensed pursuant to Chapter 1 of Division 2 of the state Health and Safety Code;
2. a health care facility licensed pursuant to Chapter Two of Division 2 of the state 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 state Health and Safety Code;
4. a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the state Health and Safety Code;
5. a residential hospice or a home health agency licensed pursuant to Chapter 8 of Division 2 of the state Health and Safety Code;

provided that any such clinic, health care facility, hospice or residential care facility complies with applicable laws, including, but not limited to, Health and Safety Code Section 11362.5.

**E. Permittee.** The person to whom either a dispensary permit is issued by the City and who is identified in California Health and Safety Code Section 11362.7, subdivision (c) or (d), or (e) or (f).

**F. Person.** An individual, partnership, co-partnership, firm, association, joint stock company, corporation, limited liability company, or combination of the above in whatever form or character.

**G. Person with an Identification Card.** As set forth in California Health and Safety Code Section 11362.5 et seq., and as amended from time to time.

**H. Physician.** A licensed medical doctor, including a doctor of osteopathic medicine as defined in the California Business and Professions Code.

**I. Primary Caregiver.** As defined in California Health and Safety Code Section 11362.5 et seq., and as it may be amended.

**J. Qualified Patient.** As defined in California Health and Safety Code Section 11362.5 et seq., and as it may be amended from time to time.

**K. School.** An institution of learning for minors, whether public or private, offering a regular course of instruction required by the California Education Code. This definition includes a **pre-school or daycare provider**, an elementary school, middle or junior high school, senior high school, or any special institution of education for persons under the age of eighteen years, whether public or private.

#### **28.80.030 Dispensary Permit Required to Operate.**

It is unlawful for any person to engage in, conduct or carry on, or to permit to be engaged in, conducted or carried on, in or upon any premises in the City, the operation of a dispensary, unless the person first obtains and continues to maintain in full force and effect a Dispensary Use Permit issued ~~by the City Staff Hearing Officer pursuant to this Chapter, or by the Planning Commission on an appeal from a decision by the Staff Hearing Officer,~~ **or by the City Council on an appeal from a decision by the Planning Commission.** Any dispensaries that conduct business without a permit are subject to immediate shutdown; and all ~~penalties under current municipal code that apply to businesses operating without a valid license.~~ **Dispensaries that operate without permits may be subject to criminal prosecution under California or Federal Law.**

#### **28.80.040 Business License Tax Liability.**

An operator of a dispensary shall be required to apply for and obtain a Business Tax Certificate pursuant to Chapter 5.04 as a prerequisite to obtaining a permit pursuant to the terms of this Chapter, as required by the State Board of Equalization. Dispensary sales shall be subject to sales tax in a manner required by state law **and will pay an annual business tax based on gross revenues. This annual business tax is to provide for cost-recovery for administration and enforcement costs for dispensary operations.**

#### **28.80.050 Imposition of Dispensary Permit Fees.**

Every application for a dispensary permit or renewal shall be accompanied by an application fee, in an amount established by resolution of the City Council from time to time. This application or renewal fee shall not include the standard City fees for fingerprinting, photographing, and background check costs and shall be in addition to any other business license fee or permit fee imposed by this Code or other *governmental* agencies. This permit must be renewed annually based on dispensary compliance with the ordinance and standards of operation, and may be subject to written recommendations contained in reports submitted by Sworn Compliance Officials.

#### **28.80.055 Cost Recovery Mechanism for Enforcement.**

Each medical marijuana dispensary shall be liable for all costs associated with the investigation, prosecution, incarceration, booking, medical treatment, and storage and destruction of evidence, and any other unspecified costs for the failure to comply with the provisions of this ordinance resulting in the arrest and prosecution of investors employees, owners, operators, and patrons.

#### **28.80.060 Limitations on the Permitted Location of a Dispensary.**

**A. Permissible Zoning for Dispensaries.** There is a limit of 4 dispensaries permitted throughout the city. A dispensary may only be located within the C-2 or C-M zoned areas of the City as so designated in the General Plan, Title 28 of the Municipal Code, and City Zoning map, provided, *however*, that dispensaries are also located on parcels situated as follows:

1. any parcel fronting on ~~State Street between Calle Laureles and the westerly boundary of the City at the intersection of State Street and Calle Real;~~
2. any parcel fronting on ~~Milpas between Canon Perdido Street and Carpinteria Street;~~
3. any ~~C-P zoned parcel fronting on Cliff Drive within 1000 feet of the intersection of Cliff Drive and Meigs Road;~~

One dispensary is permitted in each of the following areas:

Downtown below Arrellaga St:

1. East of State
2. West of State

3. **North of Downtown:** any parcel fronting on State Street between Calle Laureles and the westerly boundary of the City at the intersection of State Street and Calle Real;

4. **The Mesa** - any C-P zoned parcel fronting on *Cliff Drive* within 1000 feet of the intersection of *Cliff Drive* and Meigs Road;

**B. Storefront Locations.** A dispensary shall only be located in a *visible* store-front type location which provides good public views of the dispensary entrance, its windows,

and the entrance to the dispensary premises from a public street. Windows should not be impeded, so that citizens and law enforcement can see into the dispensary and visit the non-cannabis area of the store.

**C. Areas and Zones Where Dispensaries Not Permitted.** Notwithstanding subparagraph (A) *above*, a dispensary shall not be allowed or permitted in the following locations or zones:

1. On a parcel located within ½ of a mile of a school, a pedestrian walking route of a school, house of worship, a park, or a "special needs facility", including Housing Authority projects, occupied by any resident with a past history of drug abuse and determined by written statement by the facility to be in recovery.

2. On a parcel located within 1 mile of a permitted dispensary; or

3. On a parcel in El Pueblo Viejo, fronting on any of the following streets: State Street, Chapala Street, and Anacapa Street between Cabrillo Boulevard and Arrellaga Street; or

4. On a parcel zoned R-O or zoned for residential use; or

5. On a parcel within the Brinkerhoff Historic Landmark District

**D. Locational Measurements.** The distance between a dispensary and the *above-listed* uses shall be made in a straight line measuring pedestrian walking routes from any parcel line of the real property on which the dispensary is located to the parcel line of the real property on which the facility, building, or structure, or portion of the building or structure, in which the *above-listed* use occurs or is located.

#### **28.80.070 Operating Requirements for Dispensaries.**

Dispensary operations shall be permitted and maintained only in compliance with the following day-to-day operational standards:

**A. Criminal History.** The dispensary is required to perform a background check of the owners, investors, operators and all employees. The background check shall consist of a letter of clearance from the US Department of Justice and fingerprint verification of the identity and criminal history of all employees and potential owners. Disqualification from operating or working in a medical marijuana facility shall include any past convictions for any crime specified in California Penal Code Sections 654-678 and / or participation with any group that advocates violence against individuals because of their race, religion, orientation, political affiliation, ethnic origin, nationality, sexual preference, or disability. ~~A dispensary permit applicant, his or her agent or employees, volunteer workers, or any person exercising managerial authority over a dispensary on behalf of the applicant shall not have been convicted of a felony or be on probation or parole for the sale or distribution of a controlled substance.~~

**B. Minors.** It is unlawful for any dispensary permittee, operator, or other person in charge of any dispensary to employ any person who is not at least 18 years of age. Persons under the age of 18 shall not be allowed on the premises of a dispensary unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian. The entrance to a dispensary shall be clearly and legibly posted with a notice indicating that persons under the age of 18 are precluded from entering the premises unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian.

**C. Dispensary Size and Access.** The following dispensary and access restrictions shall apply to all dispensaries permitted by the Chapter:

1. A dispensary shall not be enlarged in size (Le., increased floor area) without **conducting a Public Hearing by the Planning Commission.**

~~prior approval from the Staff Hearing Officer amending the existing dispensary permit pursuant to the requirements of this Chapter.~~

2. The entrance area of the dispensary building **or portion of the floor plan devoted to medical cannabis patient service and operation** shall be strictly controlled. A viewer or video camera shall be installed in the door that allows maximum angle of view of the exterior entrance **irrespective of entrance leading only into a non-medical cannabis portion of the building.**

3. Dispensary personnel shall be responsible for monitoring the real property of the dispensary site activity (including the adjacent public sidewalk and rights-of-way) for the purposes of controlling loitering, **as well as perform the duties of a good neighborhood policy by monitoring all public areas within the neighborhood, as determined during the application process or amended by agreement at permit compliance meetings specified elsewhere in this Ordinance.** The dispensary operator shall post **"No Loitering" signs on the property.**

4. Only dispensary staff, primary caregivers, qualified patients and persons with bona fide purposes for visiting the site shall be permitted **within the medical cannabis portion** of the a dispensary.

5. Potential patients or caregivers shall not visit a dispensary without first having obtained a valid written **prescription recommendation** from their physician with a license in good standing with the State recommending use of medical cannabis.

6. Only a primary caregiver and qualified patient shall be permitted in the designated dispensing area along with dispensary personnel.

7. Restrooms shall remain locked and under the control of Dispensary management at all times.

**D. Dispensing Operations.** The following restrictions shall apply to all dispensing operations by a dispensary:

1. A dispensary shall only dispense to qualified patients or primary caregivers with a currently valid physician's **prescription approval or recommendation** in compliance with the criteria in California Health and Safety Code Section 11362.5 et seq. Dispensaries shall require such persons to provide valid official identification, such as a Department of Motor Vehicles driver's license or State Identification Card **in addition to a copy of the doctor's prescription noting the doctors name, address, phone number and license number.**

2. Prior to dispensing medical cannabis, the dispensary shall obtain a verification from the prescribing physician's office personnel that the individual requesting medical cannabis is or remains a qualified patient pursuant to state Health & Safety Code Section 11362.5.

3. A dispensary shall neither have a physician on-site to evaluate patients ~~and nor~~ provide a recommendation or prescription for the use of medical cannabis.

4. The dispensary shall obtain medical cannabis only from

a) an off-site location cultivated by the collective in accordance with applicable zoning regulations in the jurisdiction in which it is cultivated, or, any stricter requirements which may be imposed in the future by the State or,

b) qualified patient(s) and member(s) of the Collective.

5. Dispensaries shall not provide cannabis to any individual in an amount not consistent with personal medical use. Specifically, no more than one ounce of dried marijuana per qualified patient or primary caregiver per visit to the medical marijuana dispensary.

6. ~~Only one visit per customer is allowed to the dispensary per day with any consecutive day sale for the same patient requiring immediate notification to and review by a City Sworn Compliance Official.~~

7. Dispensaries must keep accurate ledgers with the following information:

a. The name, address, and Medical Marijuana Identification Card (MMIC) of the patient

b. The name, address, phone and business name of the prescribing doctor

c. Quantity dispensed, and date and time dispensed

All of the above information must be readily available to the Santa Barbara Police Department and other sworn Compliance officials during normal business hours.

**E. Consumption Restrictions.** The following medical marijuana consumption restrictions shall apply to all permitted dispensaries:

1. Cannabis shall not be consumed by patients on the premises of the dispensary. ~~Nor shall it be consumed via smoking or vaporization form in any public area within the City.~~

The term "premises" includes the actual building, as well as any accessory structures, parking lot or parking areas ~~which are part of the approved location, and all private property within the city, except the patient's place of residence, or other private property where authorization to consume has been given.~~

~~Or other her surroundings within 200 feet of the dispensary's entrance. Dispensary employees who are qualified patients may consume cannabis within the enclosed building area of the premises, provided such consumption occurs only via oral consumption (Le., eating only) but not by means of smoking or vaporization.~~

2. Dispensary operations shall not result in illegal re-distribution of medical cannabis obtained from the dispensary, or use or distribution in any manner which violates state law. ~~Dispensaries are liable for the costs of arrest and prosecution for any Illegal re-distribution that can be traced back to the dispensary by the Santa Barbara Police Department.~~

**F. Retail Sales of Other Items by a Dispensary.** The retail sales of dispensary related or marijuana use items may be allowed under the following circumstances:

1. ~~With the approval of the Staff Hearing Officer~~ ~~the Planning Commission at a Public Hearing~~, a dispensary may conduct or engage in the commercial sale of specific products, goods, or services in addition to the provision of medical cannabis on terms and conditions consistent with this chapter and applicable law.

2. No dispensary shall sell or display any drug paraphernalia or any implement that may be used to administer medical cannabis.

3. A dispensary shall meet all the operating criteria for the dispensing of medical cannabis as is required pursuant to California Health and Safety Code Section 11362.5 et seq.

**G. Operating Plans.** In connection with a permit application under this Chapter, the applicant shall provide, as part of the permit application, a detailed Operations Plan and, upon issuance of the dispensary permit, shall operate the dispensary in accordance

with the Operations Plan, as such plan is approved by the ~~Staff Hearing Officer~~ **Planning Commission**.

**1. Floor Plan.** A dispensary shall ideally have an open door policy with an integrative approach to natural health. The floor plan should be similar to existing retail pharmacies. ~~have a lobby waiting area at the entrance to the dispensary to receive clients, and~~ The dispensary must have a separate and secure designated area for dispensing medical cannabis to qualified patients or designated caregivers. The primary entrance shall be located and maintained clear of barriers, landscaping and similar obstructions so that it is clearly visible from public streets, sidewalks or site driveways.

**2. Storage.** A dispensary shall have suitable locked storage on premises, identified and approved as a part of the security plan, for after-hours storage of medical cannabis. Suitable structures are locked vaults, safes, or other means that are bolted onto the floor or structure of the facility. The secure storage facility, structure, or safe should allow for a response time of at least 15 minutes prior to being breached, for the police to arrive once notified by the alarm company that the dispensary has been potentially burglarized.

**3. Security Plans.** A dispensary shall provide adequate security on the premises, in accordance with a security plan approved by the Chief of Police and as reviewed by the **Planning Commission** ~~Staff Hearing Officer~~, including provisions for adequate lighting and alarms, in order to ensure the safety of persons and to protect the premises from theft.

All security guards employed by dispensaries shall be licensed and possess a valid Department of Consumer Affairs "Security Guard Card" at all times. No guards may be employed with temporary Security Guard Cards. Dispensaries shall not employ security guards who possess firearms or tazers. Additionally, dispensaries shall provide a neighborhood security guard patrol for the good neighbor area defined above surrounding the dispensary during all hours of operation.

**4. Security Cameras.** Security surveillance cameras shall be installed to monitor the main entrance and exterior of the premises to discourage and to report loitering, crime, illegal or nuisance activities. Security video shall be maintained for a period of ~~not less than 72 hours~~ at least 90 days and must be readily available to the Santa Barbara Police Department or other Sworn Compliance Officials during normal business hours. All areas of the dispensary and 100 ft perimeter extended around the dispensary, inclusive of the parking lot, must be recorded. All transactions must be recorded from above and behind the locations where dispensing takes place to ensure sufficient ability to facially identify a subject in the event of a crime.

**5. Alarm System.** Professionally monitored robbery alarm and burglary alarm systems shall be installed and maintained in good working condition within the dispensary at all times.

**6. Emergency Contact.** A dispensary shall provide the Chief of Police, the City Council, and all neighbors within 300 ft with the name, cell phone number, and facsimile number of an on-site community relations staff person to whom the City may provide notice of any operating problems associated with the dispensary.

**7. Hours of Operation.** Dispensaries are permitted to operate between the hours of 8:00 AM and 7:00 PM only. If any police incident is recorded during an after-dark hour that the dispensary is open it must immediately revise its operating hours to daylight only hours but not before 8 A.M. Dispensaries must close for a period of ½ hour before school lets out to ½ hour afterwards, and must also close during school lunch periods.

**8. After-hours and during hours of darkness.** Dispensaries shall illuminate all areas of the premises, including adjacent public sidewalks, so that all areas are readily visible by law enforcement personnel. During all hours, the medical marijuana dispensary shall illuminate the entire interior of the building, with particular emphasis on the locations of the counter, the safe, and any location where people are prone to congregate. The lighting must be sufficiently bright to ensure the interior is readily visible from the exterior of the building from a distance of 100 ft. All exterior lighting should be approved by either the ABR or the HLC, depending on which board reviews the application prior to the Planning Commission Public Hearing.

**9. Community Meetings.** Dispensaries should meet, on site, once per quarter with police, appropriate city personnel, businesses operating in the same 4 block area, and interested neighborhood groups to assess the dispensary's impact on the neighborhood, ensure compliance, and address any issues caused by the operation of the dispensary and to be part of the neighborhood activities and projects. The City Compliance Officer should organize this meeting, issue invitations and notifications, take attendance, and follow up on concerns raised or rectify problems identified. Written evidence of these meetings will be supplied by the police department or other Sworn Compliance Officials as part of the annual audit and renewal process.

#### **H. Dispensary Signage and Notices.**

1. A notice shall be clearly and legibly posted in the dispensary indicating that smoking or vaporizing cannabis within any public area within the city is prohibited, ingesting or consuming cannabis on the premises or in the vicinity of the dispensary is prohibited.

2. Signs on the premises shall not obstruct the entrance or windows.

3. Address identification shall comply with Fire Department illuminated

address sign requirements.

4. Business identification signage shall comply with the City's Sign Ordinance (SBMC Chapter 22.70) and be limited to that needed for identification only, consisting of a single window sign or wall sign that shall not exceed six square feet in area or 10 percent of the window area, whichever is less.

5. Dispensaries must not hand out flyers promoting the dispensary.

6. Dispensaries must not under any circumstances direct advertisements to children under 18 or in areas in which they congregate.

7. All print and electronic advertisements for medical marijuana dispensaries shall include the following language: "Only individuals 18 years of age and older with legally recognized doctor's prescriptions and /or Medical Marijuana Identification Cards may obtain medical marijuana from medical marijuana dispensaries." The text shall be a minimum of two inches in height except in the case of a general advertising sign, where it shall be a minimum of six inches in height. Oral, video, and internet advertisements for medical marijuana shall use the same language.

**I. Employee Records.** Each owner or operator of a dispensary shall maintain a current register of the names of all volunteers and employees currently working at or employed by the dispensary, and shall disclose such registration for inspection by any City officer or Sworn Compliance official, but only for the purposes of determining compliance with the requirements of this chapter.

**J. Patient Records.** A dispensary shall maintain confidential health care records of all patients and primary caregivers using only the identification card number issued by the county, or its agent, pursuant to California Health and Safety Code Section 11362.71 et seq., as a protection of the confidentiality of the cardholders, or a copy of the written ~~prescription recommendation~~ from a physician or doctor of osteopathy stating the need for medical cannabis under state Health & Safety Code Section 11362.5.

**K. Staff Training.** Dispensary staff shall receive appropriate training for their intended duties to ensure understanding of rules and procedures regarding dispensing in compliance with state and local law, and properly trained or professionally-hired security personnel.

**L. Site Management.**

1. The operator of the establishment shall take all reasonable steps to discourage and correct objectionable conditions that constitute a nuisance in parking areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours, if directly related to the patrons of the subject dispensary.

2. The operator shall take all reasonable steps to reduce loitering in public areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours and monitor the public areas of the neighborhood through its good neighbor policy.

3. The operator shall provide patients with a list of the rules and regulations governing medical cannabis use and consumption within the City and recommendations on sensible cannabis etiquette.

#### **M. Trash, Litter, Graffiti.**

1. The operator shall clear the sidewalks adjoining the premises plus 10 feet beyond property lines along the street, as well as any parking lots under the control of the operator, as needed to control litter, debris and trash and participate in the "Adopt a Block Program" sponsored by the City.

2. The operator shall remove all graffiti from the premises and parking lots under the control of the operator within 72 hours of its application.

**N. Compliance with Other Requirements.** The dispensary operator shall comply with all provisions of all local, state or federal laws, regulations or orders, as well as any condition imposed on any permits issued pursuant to applicable laws, regulations or orders.

**O. Display of Permit.** Every dispensary shall display at all times during business hours the permit issued pursuant to the provisions of this chapter for such dispensary in a conspicuous place so that the same may be readily seen by all persons entering the dispensary.

**P. Alcoholic Beverages.** No dispensary shall hold or maintain a license from the State Division of Alcoholic Beverage Control for the sale of alcoholic beverages, or operate a business on the premises that sells alcoholic beverages. No alcoholic beverages shall be allowed or consumed on the premises.

**Q. Parking Requirements.** Dispensaries shall be considered office uses relative to the parking requirements imposed by Section 28.90.100(1).

**R. Annual Audit / Review for Renewal of Permit.** Dispensaries are required to pass an annual audit-review process, conducted by the city, to ensure they are compliant with this ordinance. If the dispensary doesn't pass the audit, the permit shall be temporarily suspended. The dispensary has 30 days to comply. Failure to comply after the 30 day period is over shall mean the permit is revoked.

The audit review shall consist of the following:

1. Ledgers of transactions maintained correctly. No multiple sales within one day to one patient, or amounts greater than 1 ounce dispensed per day, or consecutive days without required notification to Compliance Officials, to a single patient.
2. No violations of any provisions of the dispensing of marijuana as outlined in this chapter.
3. Written evidence documenting that community meetings been held quarterly.
4. Taxes due to city are current.
5. No significant (>10%) increase in calls for service to the police department from the immediate neighborhood either from dispensary operations or ancillary crimes associated with the dispensary.
6. Property is maintained in good working order in accordance with this chapter.

### **28.80.075 Dispensary Request For Proposal Process.**

**A. City Determination of Geographical Area Open for Dispensary and Issuance of RFP.** The city will monitor the 4 dispensary cap. If the number of permitted dispensaries falls below 4, the city can declare the area from 28.80.060 section (A) where there is no dispensary "Open for RFP for Medical Marijuana Dispensary". The city should publicly issue the RFP, using local media and other notification channels as appropriate, and invite operators wishing to open a dispensary to submit proposals. The time period for proposals can be up to 30 days, or extended further if needed.

**C. City Review of Proposal.** Once the RFPs have been received, and the close date has passed, the city should review the proposals and select the best candidate to apply for a permit to open a dispensary. Criteria for evaluation can include but are not limited to: the dispensary model proposed, potential revenues / tax estimates, anticipated design of dispensary, array of wellness product offerings, aesthetic fit for the neighborhood, soundness of business plan, contributions to community via percentage of net profit, letter of recommendation from state jurisdiction/city where dispensary operator already operating, and has a proven track record in operating top-quality, non-problematic dispensaries.

**D. Selected Candidate notification.** The Planning Commission at a Public Hearing shall select one of the top three responders to the Request for Proposals to locate a dispensary. The selected candidate should be notified in writing, and given 60 days to file its site-specific Land Use application within the area of the city that has an opening in the CAP. The Land use application shall be reviewed first by the ABR or HLC which ever has jurisdiction and then proceed to the Planning Commission for Public Hearing with appeal by either applicant or opponent to the City Council.

### **28.80.080 Request For Proposals (RFP) Responses & Dispensary Permit Application - Preparation and Filing.**

**A. Request for Proposal (RFP) Responses and Land Use Application Filings.** Both the RFP and the land use Performance Standard Permit use permit application submittal packet shall be submitted, including all necessary fees and all other

information and materials required by the City and this chapter. All RFP responses and applications for permits shall be filed with the Community Development Department, using forms provided by the City, and accompanied by the applicable filing fee. It is the responsibility of the applicant to provide information required for approval of the permit. The application shall be made under penalty of perjury.

**B. Eligibility for Filing.** Request for Proposal responses need not be site specific but must be filed by the dispensary operator only and upon selection all applications may only be filed by the owner of the subject property, or by a person with a lease signed by the owner or duly authorized agent of the owner allowing them the right to occupy the property for the intended use.

**C. Filing Date.**

The filing date for a response to a Request for Proposal shall be the date it is submitted to the city as long as the filing is within the advertised period for receipt of proposals.

The filing date of any land use application shall be the date when the City receives the last submission of information or materials required in compliance with the submittal requirements specified herein.

**D. Effect of Incomplete Filing.** Upon notification that an a land use application submittal is incomplete, the applicant shall be granted an extension of time to submit all materials required to complete the application within 30 days. If the application remains incomplete in excess of 30 days, the application shall be deemed withdrawn and the number two response selected in the RFP process shall be contacted an given an opportunity to file a land use application. If none of the top three RFP responders completes an application process then a new RFP process shall begin absent the three that failed to submit a valid land use application.

~~and new application submittal shall be required in order to proceed with the subject request. The time period for granting or denying a permit shall be stayed during the period in which the applicant is granted an extension of time.~~

**E. Effect of Other Permits or Licenses.** The fact that an applicant possesses other types of state or City permits or licenses does not exempt the applicant from the requirement of obtaining a dispensary permit.

**F. Notices to schools, neighborhood organizations, Community Advisory Panels.** Before Public Hearings are held by the Planning Commission to review and determine the top three Request For Proposal Responders, Public Notices must be served to schools, neighborhood organizations, community advisory panels, business organizations and houses of worship within the area where a dispensary CAP vacancy exists. Such notice must be given to these groups for the site specific Land Use Performance Standard dispensary permit as well.

## **G. Notices to Property Owners**

When a site specific Land Use Performance Permit Application is ready for Public Hearing Public Notices must be served to residents and businesses within the standard required radius area of 300 feet, in addition to groups noted in item F. within one half mile of the proposed dispensary location.

### **28.80.090 Criteria for Review of Dispensary Application by Staff Hearing Officer. ~~the Planning Commission.~~**

**A. Decision on Application.** Upon an application for a Dispensary permit being deemed complete, ~~the Staff Hearing Officer~~ the Planning Commission ~~or the City Council on appeal of a decision of the Planning Commission~~ ~~on appeal of a decision of the Staff Hearing Officer~~, shall issue a Dispensary permit with conditions in accordance with this chapter, or deny a Dispensary permit.

**B. Criteria for Issuance.** The ~~Planning Commission~~ ~~Staff Hearing Officer~~, or the ~~City Council~~ ~~Planning Commission~~ on appeal, shall ~~make written findings for each of the following~~ ~~consider the following criteria~~ in determining whether to grant or deny a dispensary permit:

1. That the dispensary permit is consistent with the intent of the State Health & Safety Code for providing medical marijuana to qualified patients and primary caregivers, and the provisions of this Chapter and the Municipal Code, including the application submittal and operating requirements herein.

2. That the proposed location of the Dispensary is not identified by the City Chief of Police as an area of high crime *activity* ~~(e.g., based upon crime reporting district statistics as maintained by the Police Department)~~ ~~as evidenced by a written and submitted record of five back years of statistics indicating all crime reports within a radius of one-half mile of the proposed location of the dispensary.~~

3. For those applicants operating other Dispensaries within the ~~State City~~, that there *have* not been significant numbers of calls for police service, crimes or arrests ~~associated with those other locations or the area~~, or to the applicant's existing dispensary location, ~~in the event it is operating as a legal non-conforming dispensary.~~

4. That all required application fees *have* been paid and reporting requirements *have* been satisfied in a timely manner.

5. That issuance of a dispensary permit for the dispensary size requested is justified to meet needs of community.

6. That issuance of the dispensary permit would serve needs of City

residents within a proximity of one mile to this location.

7. That the location is not prohibited by the provisions of this chapter or any local or state law, statute, rule or regulation, and no significant nuisance issues or problems are anticipated or resulted, and that compliance with other applicable requirements of the City's Zoning Ordinance will be accomplished.

8. That the site plan, floor plan, and security plan *have* incorporated features necessary to assist in reducing potential crime-related problems and as specified in the operating requirements section. These features may include, but are not limited to, security on-site; procedure for allowing entry; openness to surveillance and control of the premises, the perimeter, and surrounding properties and good neighbor public areas; reduction of opportunities for congregating and obstructing public ways and neighboring property; illumination of exterior areas; and limiting furnishings and features that encourage loitering and nuisance behavior.

9. That all reasonable measures *have* been incorporated into the security plan or consistently taken to successfully control the establishment's patrons' conduct resulting in disturbances, vandalism, crowd control inside or outside the premises, traffic control problems, cannabis use in public, or creation of a public or private nuisance, or interference with the operation of another business.

10. That the dispensary would not *adversely* affect the health, peace, or safety of persons *living* or working in the surrounding area, *overly* burden a specific neighborhood, or contribute to a public nuisance; or that the dispensary will generally not result in repeated nuisance activities, including disturbances of the peace, illegal drug *activity*, cannabis use in public, harassment of passerby, *excessive* littering, *excessive* loitering, illegal parking, *excessive* loud noises, especially *after dark* late at night or early in the morning hours, lewd conduct, or police detentions or arrests.

11. That any provision of the Municipal Code or condition imposed by a City-issued permit, or any provision of any other local or state law, regulation, or order, or any condition imposed by permits issued in compliance with those laws, will not be *violated*.

12. That the applicant has not knowingly made a false statement of material fact or has knowingly omitted to state a material fact in the application for a permit.

13. That the applicant has not engaged in unlawful, fraudulent, unfair, or deceptive business acts or practices with respect to the operation of another business within the *State of California City*.

14. *If the Planning Commission approves a dispensary within proximity to a residential use property, irrespective of the zone it is in, a written statement of findings must be included in the approval stating justifications for allowing such proximity and noting any objections which may have been stated by others in written or oral testimony.*

**28.80.100 Appeal from ~~the Planning Commission Staff Hearing Officer~~ Determination.**

**A. Appeal to the ~~City Council Planning Commission~~.** An applicant or any interested party who disagrees with the ~~Planning Commission's Staff Hearing Officer's~~ decision to ~~issue~~, issue with conditions, or to deny a dispensary permit may appeal such decision to the ~~City Council City Planning Commission~~ by filing an appeal pursuant to the requirements of subparagraph (8) of Section 28.05.020 of the Municipal Code.

Note: This Section 28.05.020 must be checked to insure it covers appeals from the Planning Commission to the City Council.

**B. Notice of ~~City Council Planning Commission Appeal Hearing~~.** Upon the filing of an appeal pursuant to subparagraph (A) above, the Community Development Director shall provide public notice in accordance with the notice provisions of SBMC Section 28.87.380 and public notices specified in the Ordinance.

NOTE: Section 28.87.380 must be checked to insure it relates to Planning Commission appeals to City Council.

**C. Planning Commission Appeal to City Council.** ~~Notwithstanding subparagraph (C) of Section 28.05.020, Section 28.87.360, and Section 1.30.050, A~~ decision by the Planning Commission ~~may be appealed to the City Council.~~

~~the on appeal of the Staff Hearing Officer pursuant to this Chapter can not be appealed to the City Council.~~

**D. Notice of City Council Appeal Hearing.** Upon the filing of an appeal pursuant to subparagraph (C) above, the Community Development Director shall provide public notice in accordance with the notice governing appeals from the Planning Commission, as well as other Public Notices noted in this Ordinance. ~~provisions of SBMC Section 28.87.380.~~

**28.80.110 Suspension and Revocation by Planning Commission.**

**A. Authority to Suspend or Revoke a Dispensary Permit.** Consistent with Section 28.87.360, any dispensary permit issued under the terms of this chapter may be suspended or revoked by the Planning Commission ~~at the Annual Review public hearing~~ or when ~~evidence is presented to the Planning Commission at a Public Hearing that shall appear to the Commission that~~ the permittee has violated any of the requirements of this chapter, or the dispensary is operated in a manner that violates the provisions of this chapter, including the operational requirements of this Chapter, or in a manner which conflicts with state law. ~~This section does not abrogate the right of the~~

police department to immediately close down a dispensary if deemed necessary as a result of it being part or party to a crime associated with the dispensary.

**B. Suspension or Revocation - Written Notice.** Except as otherwise provided in this chapter, no permit shall be revoked or suspended by virtue of this chapter until written notice of the intent to consider revocation or suspension of the permit has been served upon the person to whom the permit was granted at least ten (10) days prior to the date set for such review hearing, and the reasons for the proposed suspension or revocation have been provided to the permittee in writing. Such notice shall contain a brief statement of the grounds to be relied upon for revoking or suspending such permit. Notice may be given either by personal delivery to the permittee, or by depositing such notice in the U.S. mail in a sealed envelope, postage prepaid (via regular mail and return receipt requested), addressed to the person to be notified at his or her address as it appears in his or her application for a dispensary permit.

**C. Appeal of Planning Commission Decision.** Notwithstanding subparagraph (C) of Section 28.05.020, Section 28.87.360, and Section 1.30.050, a decision by the Planning Commission to suspend or revoke a permit issued pursuant to this Chapter ~~may be appealed to the City Council.~~ shall be final and may not be appealed to the City Council.

#### **28.80.120 Transfer of Dispensary Permits.**

**A. Permit - Site Specific.** A permittee shall not operate a dispensary under the authority of a dispensary permit at any place other than the address of the dispensary stated in the application for the permit. All dispensary permits issued by the City pursuant to this chapter shall be non-transferable.

**B. Transfer of a Permitted Dispensary.** A permittee shall not transfer ownership or control of a dispensary or attempt to transfer a dispensary permit to another person or entity.

~~The Permit is site-specific and applicant specific and terminates without right upon dispensary closing. If a closure results in a vacancy in the CAP then the RFP process shall be initiated to locate the best model operation available to fill the CAP as noted in above sections.~~

~~the transferee obtains an amendment to the permit from the Staff Hearing Officer pursuant to the permitting requirements of this chapter, stating that the transferee is now the permittee.~~

~~Such an amendment may be obtained only if the transferee files an application with the Community Development Department in accordance with all provisions of this chapter accompanied by the required application fee.~~

~~**C. Request for Transfer with a Revocation or Suspension Pending. No**~~

~~dispensary permit may be transferred (and no permission for a transfer may be issued) when the Community Development Department has notified the permittee in writing that the permit has been or may be suspended or revoked, and a notice of such suspension or revocation has been provided.~~

**D. Transfer Without Permission.** Any attempt to transfer a permit either directly or indirectly in violation of this section is declared void, and the permit shall be deemed revoked.

**28.80.130 Medical Marijuana Vending Machines.**

No person shall maintain, use, or operate a vending machine which dispenses marijuana in the City of Santa Barbara, including inside an approved dispensary.

to a qualified patient or primary caregiver unless such machine is located within the interior of a duly permitted dispensary.

**SECTION THREE.** Those Dispensaries which were authorized pursuant to the Santa Barbara Municipal Code Chapter 28.80 prior to the date of the adoption of the ordinance enacting this Chapter shall be deemed pre-existing legal uses of real property upon which they are situated for a period of ~~three (3) years~~ **six (6) months** from the date ~~this ordinance was returned to the Ordinance Committee for revision,~~ **this ordinance was returned to the Ordinance Committee for revision,** of the adoption of this Ordinance, provided the following operational conditions are complied with:

**1.0 All legal non-conforming dispensaries shall comply with this ordinance and revisions within six months of the date this Ordinance was returned to Ordinance Committee for revisions.**

1. The dispensary shall not be relocated nor shall it be discontinued for a period of time in excess of thirty (30) days without obtaining a dispensary permit pursuant to this Chapter;

2. The dispensary shall comply with all portions of Chapter 28.80 (as enacted by this Ordinance) ~~except for the locational provisions of Section 28.80.060;~~ and

3. the dispensary shall be subject to the requirements for nonconforming uses of SBMC Section 28.87.030 until such time that they have been permitted under this Ordinance. Prior to the expiration of the ~~three (3) year~~ **six (6) month** nonconforming period ~~from the date this ordinance was returned to Ordinance Committee~~ , all medical marijuana dispensaries operating as allowed dispensaries which pre-date the adoption of this Ordinance shall either obtain a dispensary permit (as required by and in full accord with this Ordinance) or shall discontinue such use not later than the end of the ~~three (3) year~~ **six (6) month** amortization period. No such pre-existing legal dispensary shall be assigned or otherwise transferred to a new owner or owners.

~~, whether voluntarily or by operation of law, without having obtained a permit pursuant to this ordinance.~~

**SECTION FOUR.** The requirements of this Chapter shall apply to all dispensaries which are not permitted or authorized by the Municipal Code prior to the date of the adoption of the ordinance enacting this chapter.

**CITIZEN REVISED ORDINANCE NO. 5449**

**Supporting Documentation for Changes**

**Final Draft Copy**

**Produced by a coalition formed between members of:**

**West Downtown Neighborhood Group  
The Downtown Business Association  
Franklin Neighborhood Group  
Franklin Neighborhood Advisory Council  
Westside Advisory Council**

**Drafted by:  
Sharon Byrne and Tony Vassallo**

**This document explains the reasoning behind the changes introduced in the Citizen-Revised Ordinance.**

**Section 2, 28.80.020 Definitions – inclusion of preschools and daycares.**

The reason for the inclusion of preschools and daycares is that children are present in these facilities, and should no more be exposed to dispensary operations than children in elementary, junior high or middle, or high schools. Further, older siblings of preschool children are known to accompany these smaller children to their preschool. If dispensaries are allowed to exist near preschools or daycares, it would expose this older set of children to the dispensaries, and thus defeat the purpose of not locating them near environments where children are continually present or routes that children frequent. It would further be inconsistent with language in the ordinance prohibiting dispensaries near schools that serve K-12.

**28.80.030 Dispensary Permit Required to Operate – inclusion of appeal to City Council.** Appeal to City Council is a legal and normal "Due Process" issue. All other Land use matters involving discretionary approvals can be appealed to the City Council. Dispensaries should be no different. This gives both Opponents and proponents the right to carry their case to City Council for final decision.

Non-permitted dispensaries will not be allowed to operate at all, and should be subject to any penalties provided for in municipal code. Dispensaries that operate without permits cannot be said to be in compliance with California state law, and therefore may be open to prosecution under state or federal agencies.

**28.80.040 Business License Tax Liability.**

The inclusion of a cost-recovery for enforcement fee is to allow the city to recuperate its costs from having a dispensary in operation. The **WHITE PAPER ON MARIJUANA DISPENSARIES** by **CALIFORNIA POLICE CHIEFS ASSOCIATION'S TASK FORCE ON MARIJUANA DISPENSARIES** (Appendix A) notes that dispensary operations are accompanied by a documented increase in criminal activities. The city should not be expected to bear this burden, but should seek to recover its costs from the dispensaries wishing to conduct business within its boundaries.

**28.80.050 Imposition of Dispensary Permit Fees.**

The city should collect a renewing annual permit fee from dispensaries to cover its cost of administration of these businesses. The fee should be set fairly high as there are administrative costs incurred by the city that should be covered. This is consistent with a best-in-class dispensary operator's viewpoint. Further, dispensaries should be subject to review so that they remain compliant with the ordinance and standards of operation therein. This duty should be given to a sworn officer(s) that manage dispensary compliance on behalf of the city. We would like to see such a position created called something like City

Compliance Officer.

Dispensaries that are not compliant should not be allowed to obtain their annual renewal for their permit. They may be given 30 days to come into compliance, or the city will take the appropriate steps to revoke their permit.

**28.80.055 Cost Recovery Mechanism.**

This language is adopted from the fact sheet from the LAPD Narcotics Division on medical marijuana dispensaries in the Los Angeles area (Appendix A). This cost recovery mechanism will ensure that the city does not assume additional financial burdens should problems arise from the operation of the medical marijuana dispensaries.

**28.80.060 Limitations on the Permitted Location of a Dispensary.**

**A. Permissible Zoning for Dispensaries.**

There have been issues with the concentration of dispensaries into neighborhoods which are over-burdened by homeless, liquor stores, gang activity, and other urban issues. Currently, Oakland and Palm Springs have implemented caps, at 4 for a population of 400,000, and 2 or a population of 50,000, respectively. Ideally, Santa Barbara should be engaged in the cultivation of businesses that serve the tourist industry and grow jobs and commerce within our city. A high density of dispensaries does not serve the city in cultivating the image of a premiere tourist destination. 4 dispensaries can more than adequately serve the population of the city, and provide all the compassionate care needed for medical marijuana patients.

The placement of a dispensary within each of the four geographical areas noted ensures that everyone in the city has ease of local access to medical marijuana as needed for their healthcare concerns.

**B. Storefront Locations**

~~A best-in-class dispensary operator has suggested this language to ensure that the dispensary is top-notch in its operations, and that law enforcement has easy visibility into the dispensary's operations.~~

**C. Areas and Zones Where Dispensaries Not Permitted**

1. Dispensaries should not be anywhere near schools, parks, playgrounds, or routes that children are known to frequent. The narcotics division of the Los Angeles Police Department has prepared a fact sheet (Appendix B) that shows that dispensaries located near schools or routes children frequent leads to a dramatic increase in juvenile marijuana offenses, to dealing at the schools, and to an increase in juvenile crimes in the area. Given this, and given that the city of Santa Barbara should not seek to put its children at risk in any way, dispensaries should be as far as possible from any schools or routes children are known to

frequent. Anything less than ½ mile from the nearest school, park, or route that children frequent is unacceptable.

The Santa Barbara School District agree with this thinking. According to an article in Noozhawk, September 4, 2009:

“The Santa Barbara School District recommended that the Board of Education urge the city to further restrict dispensaries. According to its statistics, there were 178 secondary suspensions for a controlled substance in the 2008-09 school year, which amounted to 890 days of suspension.

The district also was encouraged to ask for notification of dispensaries near schools and for dispensaries to be closed for a half-hour right before and after school hours and during lunch breaks.

The board meeting attachment also stated that “based on interviews with student users and sellers going through the disciplinary process (either suspension or expulsion), their marijuana originates either directly or indirectly (intermediaries) from medical marijuana dispensaries.”

Not to be located within ½ mile of any sober-living facility, special needs facility, Housing Authority project with residents who are in recovery from substance abuse problems, or house of worship. To do so would be an inappropriate mix of business use, as such placement puts the people in sober-living facilities at risk unnecessarily.

2. To avoid clustering of medical marijuana dispensaries within the city, no dispensary should be permitted within one mile of another dispensary. This also ensures that medical marijuana patients will have dispensaries located across the city within easy access for their healthcare needs.

3. No dispensaries in El Pueblo Viejo. To protect the businesses engaged in tourism, the Downtown Business Association has recommended that NO dispensaries be located in the Pueblo Viejo.

5. Brinkerhoff District: We are including Brinkerhoff as an off-limits zone due to the following:

Brinkerhoff district is the only district in Ca. that has all its original buildings difficult to modify for such a use. It's 70 percent residential in use with a distinctly residential historic character and little or no off street parking Retail uses that attract a constant customer stream would disrupt the harmony of the district Bringing a building up to present building codes to meet commercial standards would impair the Historic Character of the District. Such use would disrupt the

historic and residential quality of the District. It is located near many "Special Needs" facilities such as Salvation Army, Newhouse and Lighthouse where residents are trying to recover from drug abuse. It houses up to 25 or more Santa Barbara City College International exchange students. Such a use would overly burden a specific and bonafide Historic District only one block in length. Brinkerhoff District is overwhelmingly in support of such a restriction.

## **28.80.070 Operating Requirements for Dispensaries.**

### **A. Criminal History**

This change puts teeth into the ordinance to ensure that persons with criminal backgrounds do not own, operate, or work in dispensaries. Currently, applicants just check the box on the permit application. But there is a growing sense within the city that some of the dispensary operations are little more than organized crime houses. A letter of clearance from the Department of Justice and fingerprint background checks establish that clearance.

### **C. Dispensary Size and Access.**

1. Size should not be increased without submitting through the current process, which is the Planning Commission.
2. Some dispensary operators might feature a retail area that sells an array of herbal products. They might have a separate section within their retail store that sells medical marijuana. Given that, we've tried to incorporate here language to support such an operation.

### **D. Dispensing Operations.**

Amendments 4 + 5 are from a best-in-class dispensary operator, and will ensure that the medical cannabis complies with California State law. These recommendations also deter profiteering, which has been a consistent problem in the LAPD's experience with dispensaries in the greater Los Angeles area. Not allowing more than one ounce of dried marijuana to be dispensed per customer per day is sufficient for medical use, but limits secondary selling opportunities.

Amendment 6 ensures that customers do not come back to the dispensary more than once per day to obtain medical marijuana, which is consistent with pharmacy operations. Repeat visits to dispensaries within a day indicate likely secondary drug-dealing.

Amendment 7 is for clear accounting and accountability. Having accurate ledger information is consistent with pharmaceutical operations, and will enable any auditing or enforcing entity to ensure that the dispensary is operating soundly.

## **E. Consumption Restrictions**

2. We've added the cost recovery mechanism for investigation and prosecution from illegal re-distribution of medical marijuana to ensure dispensaries are truly dispensing in accordance with compassionate care as allowed by state law. The Santa Barbara School District has already encountered a significant increase in the number of controlled substance offenses on campus, and all of the marijuana in these cases had come from dispensaries. Given that, the city should not face either the problem of an increase in illegal re-distribution, nor should it bear the financial burden from illegal re-distribution. Rather, the dispensary owner / operator / investors should ensure that their product does not become illegally re-distributed.

## **G. Operating Plans**

We recommend removing the Staff Hearing Officer from the process. The first body a dispensary should deal with is the Planning Commission, as caps and zoning requirements fall in their jurisdiction. Removing the Staff Hearing Officer eliminates an unnecessary step in the process, which should reduce costs for the city. Additionally we have added in that the City Council will now become the last appeal. Previously, appeal stopped at the Planning Commission. This arrangement is more reflective of due process.

1. The floor plan, according to a best-in-class dispensary, should be similar to a retail pharmacy operation. Herbal medicines and other wellness products should be sold in a facility that has a retail layout. This enhances the dispensary's business and image, as well as providing the community with true health care cooperatives and collectives that sell an array of wellness products in addition to medical marijuana.

2. Storage – the language included here is bolstered to reflect tighter security measures for after-hours storage. This is to deter crime.

3. Security personnel should not be armed and they should undergo a thorough background check before being hired, as per the California Department of Consumer Affairs process. They do a California Department of Justice background check. Some security firms currently issue 'temporary' cards until their employees can pass clearance, but since 25% of these temporary employees do NOT pass clearance, we recommend that only those who have cleared be permitted for dispensaries.

4. This language is adopted from the LAPD's recommendations on medical marijuana dispensary operations (Appendix B). The intent here is to provide the Santa Barbara Police with the means to be able to investigate and prosecute subjects who commit crimes in and around the dispensary. It will help make the dispensary a safer place, and aid the police department in enforcement.

6. **Emergency contact:** the police, the city council, and any neighbors within 300 ft of an operating dispensary must have contact information of a community liaison in the event problems arise with the dispensary. This is also adopted from the LAPD's recommendations on medical marijuana dispensary operations (Appendix B). It makes for a good neighbor policy for dispensary owner / operators to be quickly notified of problems arising from their operations so that they can be attended to in a timely manner.

7. **Hours of Operation.** This is in accord with LAPD's recommendations for dispensary operations (Appendix B). The Santa Barbara School District also requested dispensaries be closed for ½ hour before and after school lets out, and during school lunch breaks as they've seen 178 more incidences of controlled substance suspensions due to marijuana either procured directly from schools, or as an intermediary sale from dispensary-procured marijuana.

8. **After-hours and during hours of darkness.** The intent here, following the LAPD's recommendations for dispensary operations, is to ensure that the dispensary is secure, well-lit, and that police personnel will have visibility into the dispensary after-hours for enforcement purposes. This is part of being a good neighbor, and will ensure the dispensary operates in a safe manner. All exterior lighting should be approved by either the ABR or the HLC at the time of application reviews.

9. **Community Meetings.** This was added to ensure dispensaries act as a good neighbor within the neighborhoods in which they operate. This creates a forum in which the police and community have the ability to meet with the dispensary operator, examine crime statistics since the dispensary opened, and discuss issues that might arise. This is required for the dispensary to pass the annual audit / review and continue being permitted to operate. The City Compliance Officer is responsible for organizing these meetings, ensuring that the following attend:

1. The dispensary operator / owner
2. The City Compliance Officer
3. The local beat officer from the Santa Barbara Police Department
4. Businesses, residents, community organizations and neighborhood groups in the neighborhood

These meetings should be part of the annual permit review and renewal process. Dispensaries that meet with the neighborhood to address concerns and who interact with their community are acting as good neighbors, and would pass this section of the audit. Dispensaries who don't attend, or don't address valid neighborhood concerns with their operations are not necessarily acting as good neighbors, and could be detrimental to the city. Therefore it is suggested that dispensaries that don't act as good neighbors not be renewed.

## **H. Dispensary Signage and Notices.**

5. Dispensaries must not hand out flyers promoting the dispensary. This is to ensure that children do not receive such advertisements.

6. Dispensaries must not under any circumstances direct advertisements to children under 18 or in areas in which they congregate. Los Angeles has had many incidents with dispensaries advertising on student's windshields, and leaving flyers up on stores children are known to frequent. This should not ever be permissible in Santa Barbara.

7. All print and electronic advertisements for medical marijuana dispensaries shall include the following language: "Only individuals 18 years of age and older with legally recognized doctor's prescriptions and /or Medical Marijuana Identification Cards may obtain medical marijuana from medical marijuana dispensaries." The text shall be a minimum of two inches in height except in the case of a general advertising sign, where it shall be a minimum of six inches in height. Oral, video, and internet advertisements for medical marijuana shall use the same language.

This language is inserted to ensure that dispensaries operate in a manner consistent with cigarette and alcohol sales.

**R. Annual Audit / Review for Renewal of Permit.** This section has been added to provide a mechanism for dispensaries to be audited annually to ensure they are in compliance with all provisions of the ordinance. We ought to do the same with liquor stores to create 'good neighbors' of these kinds of businesses that want to operate in our city. The audit checks that the ledgers are in order and complete, that taxes due are current, that crime has not increased as a result of the dispensary, and that the dispensary is meeting with the community quarterly. If the dispensary does not pass the audit, they have 30 days to get into compliance and try again. If they again fail the audit, they must have their permit revoked, and be closed.

### **28.80.075 Dispensary Request For Proposal Process.**

This is a new section that enables the city to fairly and equitably fill the cap of 4 dispensaries across the city, 1 per selected geographical area as outlined in the ordinance. In utilizing the RFP process, the city can look over the proposals of various dispensaries that would like to operate here, and select the best-in-class operation most suited to the city's provisions, business districts and neighborhood concerns. The city can examine the revenue projections with an eye to revenues generated for the city through taxes and fees. It gives the city a chance to review different proposals and select only the cream of the crop to open here.

### **28.80.080 Dispensary Permit Application - Preparation and Filing.**

The following section has been added:

**F. Notices to schools, neighborhood organizations, Community Advisory Panels, residents and businesses.** Dispensary operators are responsible for notifying community groups, schools, residents and businesses that they are applying for a permit to operate in the neighborhood. All businesses / groups / residents falling within a 1 mile radius of the proposed dispensary should be notified in writing once the permit has been applied for. Dispensary operators are responsible for issuing notices in English and Spanish, and should coordinate meetings with the neighborhood to explain their operation, answer questions, and assuage concerns. Evidence should be submitted to the city that this need has been met via newspaper ad receipts in local media outlets and/or mailing cost receipts for notifications from the US Post Office. This evidence should be submitted as part of the permit filing documentation. The Staff Hearing Officer shall deem the application incomplete without this.

Many of the appeals from the existing dispensary process would be eliminated, saving the city considerable costs, if dispensary operators acted as good neighbors, and began the process of integrating within the neighborhood in which they desire to operate. Schools, residents, and businesses have been surprised and upset when learning dispensaries are opening in their neighborhood, and the decision has already been made by the Staff Hearing Officer, yet the neighborhood at-large was unaware that they were about to have a dispensary move in. Learning about it after the permit has been granted is a poor way to do business, and causes neighborhood upset, costly appeals, and expensive delays for the potential operator. Having the dispensary take on the burden of working with the neighborhood during the permit filing process ensures the effect of notification is budget-neutral on the city, while giving the neighborhood a chance to meet the dispensary operator and learn about the proposed dispensary. It also gives neighborhood groups a chance to work out potential issues with the dispensary before the Planning Commission reviews the application.

#### **28.80.100 Appeal from Staff Hearing Officer Determination**

This section has been reworked to allow appeal from the Planning Commission to City Council.

#### **28.80.110 Suspension and Revocation by Planning Commission.**

**A. Authority to Suspend or Revoke a Dispensary Permit.** The following has been added to this section: As part of the annual review and audit process, a dispensary may be found to be out-of-compliance with the standards set forth within this chapter and may either be shut down immediately, or given 30 days to

come into compliance. If after 30 days the dispensary is still not in compliance, its permit will be permanently revoked.

The reason for this provision is enforcement, so the police are able to close non-conforming dispensaries that do not pass audit.

**B. Transfer of a Permitted Dispensary.** The following has been added to this section: No transfer of a permit is possible.

**SECTION THREE.** This section deals with pre-existing dispensaries opened before the ordinance was passed. Three years is entirely too long to bring into compliance. We have reduced that timeframe to 3 months. Additionally, given the number of non-compliant dispensaries in town, if one does qualify to be compliant within the timeframe, it should be the only dispensary allowed within the zone in which it operates, and the others should be closed immediately.

# Appendix A

# Appendix B

## **White Paper**

# **Medicinal Cannabis Dispensaries in the City of Santa Barbara**

**“Thoughts and Suggested Amendments to Standing Ordinance”**

*Addressed to:*

**Mayor Marty Blum**

**Councilmember Helene Schneider**

**Councilmember Iya G. Falcone**

**Finance Committee, Chair Roger L. Horton**

**Mayor Pro Tempore Dale Francisco**

**Councilmember Grant House**

**Ordinance Committee, Chair Das Williams**

**City Attorney Stephen Wiley**

**Senior Planner Danny Kato**

**Planning Technician Betsy Teeter**

### **Limiting the number of dispensaries:**

One of the aspects of the ordinance that raises questions is that there are no set limits to the amount of dispensaries that can exist within the City of Santa Barbara. As it stands now the limit will be determined by the radius of dispensaries to schools, parks and to each other in the designated zones. It is recommended that a limit be set for the quantity of permits issued.

### *Potential Problem:*

Many applications are being received by the City's Planning Department. If limits are to be set, then who receives the permits? The following might help in determining the criteria essential for selecting applicants:

Is the applicant a resident of the City of Santa Barbara and for how long?

Did the person or persons move to Santa Barbara to set up shop as you will?

Is there a true medical aspect to the proposed dispensary of the applicant?

After determining allowable number of dispensaries, then which of applicants will be turned away. Most people will simply pack up and go away. The worst that could happen is that the denied applicant, based on a recent amendment to the ordinance setting limits, could sue the City for expenses accrued. This is improbable, but must be taken into consideration.

### **Revenue for the City of Santa Barbara:**

As changes and amendments to the existing ordinance are considered, this would be an ideal time to create a revenue model for the City. A tax of let's say \$20.00 per \$1,000.00 of gross receipts is very realistic and most of the dispensaries would abide by a voluntary or perhaps even a mandated tax structure for their dispensary.

Just like hotels and other businesses based in Santa Barbara provide revenue for the City, there is no reason that the City can't impose a tax with this ordinance.

One could use the language of a "Fee" instead of taxes if the nomenclature is of legal consideration.

Steve Wiley would be best suited to examine the legalities of an imposed fee as an amendment to the revised ordinance. If Mr. Wiley does not feel that the City can mandate such an action, then a ballot measure would be a remedy for accessing income from the dispensaries.

Attached you will find the full text of Oakland's Measure F. Measure F was a voter-passed tax rate for Cannabis Dispensaries based in the City of Oakland. The amount of the new tax imposed on the dispensaries is \$18.00 per \$1,000.00 of gross receipts. The measure was passed by over eighty percent of the voters.

The City of Santa Barbara's amended ordinance's new tax or fee of 2% as recommended above would save the time, trouble and cost of a Santa Barbara measure akin to Oakland's Measure F. Based on the City's voting record on both Proposition 215 and the City's Measure P, it is the assumption that if a measure such as Oakland's Measure F be placed on the ballot that a majority of the citizenry would vote it through, especially given our current economic situation.

### **Checks and Balances:**

#### *Notice of Illegal Resale Posted in Lobby of Each Dispensary*

One of the main concerns of the community in general is the reselling of cannabis from a dispensary, especially to minors.

In order to deter patients of a collective dispensary from reselling their cannabis, the following is recommended.

That a sign be posted in the waiting room of the dispensary stating the following:

"As a patient of the Collective it is forbidding to resell your cannabis to anyone. If you are caught by the Dispensary or Law Enforcement, or if we are notified of such an action, then you will no longer be permitted to purchase cannabis from this or any other sanctioned dispensary in the City of Santa Barbara. A report of the

aforementioned violation will be furnished to the Santa Barbara Police Department, the City of Santa Barbara and all other permitted dispensaries.”

If such an action as reselling cannabis is verified, then that person will be banned and placed on a list furnished to the Police, the City and all other permitted dispensaries. If a dispensary is caught distributing to said person after a notice is issued, then they will be in violation of the ordinance and it is recommended that the dispensary be cited and fined \$1,000 (If a dispensary feels that they could be in jeopardy of losing their permit and being shut down due to violations, this action would help insure that these new imposed parameters be taken seriously - in effect encouraging the dispensaries to police themselves.)

If a second violation occurs either for reselling cannabis, or another infraction of the ordinance, then it is recommended that a \$5,000 fine be applied. As is the case with many things in life, applying the “three strikes and you’re out” policy can be a great deterrent. One would effectively lose their permit and be forced to shut down. The citation process to enforce responsible behavior is a strong remedy for keeping everything in check.

Departments within the City of Santa Barbara currently conduct sting operations for sales of alcohol and cigarettes to minors. It is recommended that that same principle be applied to dispensaries. The sting would help enforce the following: Does the patient in question possess a current and valid Doctor’s recommendation? Is that person known to be reselling their cannabis and no action is taken on behalf of the dispensary in question?

**Proposed amendments or changes:**

*Section 28.80.020*, Definitions, should have a new category for Patients Sanctioned for Resale, which could say something like “Patient identified as having engaged in illegal resale activities of prescribed and assigned medical marijuana”

*Section 28.80.040*, Business Tax Liability would require the language for the proposed tax or fee of \$20.00 per \$1,000 of gross receipts.

*Section 28.80.050* Dispensary Permit Fees should have a new item which would speak to the city establishing a permit fee for any new, renewal or transfer of a permit. The fee, which obviously needs some thought, could easily be simplified to follow a:

1. New license
2. Renewed license (captures those clubs that were grandfathered in.)
3. License Transfer Request (but if there was a problem operator, it might be worthwhile for the City to establish additional conditions for those locations that are problematic.)

*Section 28.80.070*, Operating Requirements for Dispensaries would be the area I presume that would incorporate the resale sanctions, including the Posting of Patient Notice Forbidding Resale. There would need to be a new section dealing with sanctions and violation fees against operators.

*Section 28.80.080*, Dispensary Permit Application would also need to have a reference to paying all appropriate permitting fees

*Section 28.80.090* Criteria for Review of Permit would also need to add a new Item 14 that addresses compliance to the fee process above.

# Full Text of Oakland's Measure F

## ORDINANCE AMENDING THE CITY OF OAKLAND'S BUSINESS TAX TO ESTABLISH A NEW TAX RATE FOR "CANNABIS BUSINESSES"

**WHEREAS**, through the passage of Proposition 215, the ...- voters of California authorized the use of cannabis for medical purposes in 1996; and

**WHEREAS**, by a 79% vote in favor of the proposition, the voters of Oakland overwhelmingly approved Proposition 215; and

**WHEREAS**, the City Council of the City of Oakland has adopted medical cannabis permitting regulations to prevent nuisance, provide for effective controls, enable medical cannabis patients to obtain cannabis from safe sources, and provide appropriate licensing and revenues for the City in a manner consistent with state law; and

**WHEREAS**, every person engaged in business activity in the City of Oakland is required to obtain a business tax certificate and to pay the City's business tax; and

**WHEREAS**, the City of Oakland has a business tax system which applies to all businesses in the City, and which contains a list of categories of types of businesses, and provides for the collection of business taxes at specified rates based on the classifications of the businesses operating in the City; and

**WHEREAS**, because permitted medical cannabis dispensaries did not exist at the time the business tax system was created, Oakland's current business tax category list does not contain a specific tax category for cannabis businesses; and

**WHEREAS**, cannabis businesses are currently taxed under the business classification of general retail at a business tax rate of \$1.20 per \$1,000 of gross receipts, rather than under a specific category; and

**WHEREAS**, under the newly created business classification cannabis businesses will be taxed at a rate of \$18 per \$1,000; and

**WHEREAS**, accordingly, the City Council of the City of Oakland desires to amend Chapter 5.04, adding section 5.04.480 to the Oakland Municipal; and

**WHEREAS**, all revenues received from the tax will be deposited in the general fund of the City to be expended for general fund purposes; now, therefore, be it

**RESOLVED:** That the City Council of the City of Oak.. land does hereby request that the Board of Supervisors of Alameda County order the Special Municipal election, consistent with the provisions of state law; and be it

**FURTHER RESOLVED:** That the City Council of the City of Oakland does hereby submit to the voters at the special election, not more than 88 days and not more than 150 days from the date of passage of this resolution, the text of the proposed ordinance, which shall be as follows; and be it

**FURTHER RESOLVED:** That each ballot used at said municipal election shall have printed therein, in addition to any other matter required by law the following:

**ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO MODIFY THE BUSINESS TAX BY CREATING A NEW "CANNABIS' BUSINESS CLASSIFICATION**

Be it ordained by the People of the City of Oakland:

**Section 1.** The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in bold type; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or ~~strike-through~~ type are not changed).

**Section 2. Code Amendment.** Chapter 5.04 of the Oakland Municipal Code is hereby amended adding Section 5.04.480 to read as follows:

**5.04.480 Cannabis.**

A. Every person engaged in a cannabis business not otherwise specifically taxed by other business tax provisions of this chapter, shaH pay a business tax of eighteen dollars \$18 for each one thousand dollars (\$1,000.00) of gross receipts or fractional part thereof.

B. For the purpose of this section, "cannabis business" means business activity including, but not limited to, planting, cultivation, harvesting, , transporting , manufacturing, compounding, converting, processing, preparing, storing, packaging, wholesale, and/or retail sales of marijuana, any part of the plant Cannabis sativa L. or its derivatives.

**Section 3. Severability.** Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shaH have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

**Section 4. California Environmental Quality Act Requirements.** This Ordinance is exempt from the California Environmental Quality Act, Public Resources Code section 21000 et seq., including without limitation Public Resources Code section 21065, CEQA Guidelines

15378(b)(4) and 15061(b)(3), as it can be seen with certainty that there is no possibility that the activity authorized herein may have a significant effect on the environment.

**Section 5. Majority Approval; Effective Date.** This Ordinance shall be effective only if approved by a majority of the voters voting thereon and after the vote is declared by the City Council. The effective date of this Ordinance shall be January 1, 2010.

**Section 6. Council Amendments.** The City Council of the City of Oakland is hereby authorized to amend Section 5.04.480 of the Oakland Municipal Code as adopted by this Ordinance in any manner that does not increase the tax rate, otherwise constitute a tax increase for which voter approval is required by Article XIII C of the California Constitution or entirely dispense with the requirement for independent audits stated in Section 4.28.190.

**FURTHER RESOLVED:** That the City Council of the City of Oakland does hereby find and determine that pursuant to Article xmc, section 2(b) of the California Constitution the City Council of the City of Oakland has adopted a resolution declaring the existence of a fiscal emergency in the City of Oakland that necessitates asking the voters to approve the proposed medical cannabis tax before the next regular election of the Oakland City Council;

ORDINANCE NO. 09-833

AN ORDINANCE OF THE CITY OF WEST HOLLYWOOD CHANGING MEDICAL MARIJUANA COLLECTIVES FROM A CONDITIONALLY PERMITTED USE TO A PERMITTED USE IN CERTAIN COMMERCIAL ZONES SUBJECT TO SPECIFIED RESTRICTIONS, REQUIRING SUCH COLLECTIVES TO OBTAIN A REGULATORY BUSINESS LICENSE, MAINTAINING THE CURRENT MAXIMUM LIMIT OF FOUR COLLECTIVES IN THE CITY AND LOCATIONAL RESTRICTIONS FOR NEW COLLECTIVES AND AMENDING THE WEST HOLLYWOOD MUNICIPAL CODE

THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Findings. Section 19.36.165 of the West Hollywood Municipal Code currently establishes a land use category and regulations for medical marijuana dispensaries, and consolidates the City's regulations for medical marijuana dispensaries in the Zoning Ordinance. The City Council finds that the public interest would be better served by regulating the day-to-day management and operations of medical marijuana collectives through its regulatory business licensing ordinance. This ordinance tightens the operating requirements for dispensaries, changes their nomenclature from "dispensaries" to "collectives," shifts the regulatory provisions from the zoning ordinance to the business license ordinance, maintains the cap of four collectives citywide and retains existing locational restrictions for establishment of new collectives. This ordinance further eliminates the deadline for closure previously established for nonconforming collectives in existence and operating continuously under the same ownership on or before January 16, 2007.

SECTION 2. Purpose. The purposes of this Ordinance are to recognize and protect the rights of qualified patients and primary caregivers through implementation of California Health & Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") (the "Act") and any State regulations adopted in furtherance thereof, and to promote the safe use of and the safe and affordable access to medical marijuana pursuant to the Act. In support of these purposes, the Council recognizes that the assistance of medical marijuana collectives, as defined herein, may in some situations help promote that safe and lawful access to and consistent and affordable distribution of medical marijuana as permitted by the Act. In further support of the stated purposes, the Council additionally recognizes that lawful remuneration consistent with state law may occur between qualified patients and primary caregivers,

including those qualified patients and primary caregivers who associate collectively or cooperatively to produce medical marijuana in accordance with state law. Standards are required to assure that the operations of medical marijuana collectives are in compliance with the Act and any State regulations adopted in furtherance thereof, and to mitigate the adverse secondary effects from operations of collectives. The City Council finds that the numerical limits on medical marijuana collectives provided by this Ordinance are necessitated by the small size of the City and the proximity of these uses to residential zones, schools and parks; and further, that the limit is reasonable and not an obstacle to the implementation of Proposition 215. This Ordinance is enacted as a health and safety measure pursuant to the City's police powers as prescribed in Art. XI, Sec. 7 of the California Constitution. Nothing in this Ordinance shall permit an activity that is prohibited by the Act, nor is it intended to interfere with a patient's right to cultivate, possess or use medical marijuana as provided for in California Health & Safety Code Section 11362. Nothing contained in this Ordinance shall excuse, facilitate or promote a violation of federal law.

SECTION 3. Section 5.08.010 of Title 5, Chapter 5.08 of the West Hollywood Municipal Code is amended by adding in alphabetical order a new category (and renumbering the ensuing categories accordingly) as follows:

17. Medical Marijuana Collective<sup>13</sup>

SECTION 4. Chapter 5.70 is hereby added to Title 5 of the West Hollywood Municipal Code to read as follows:

**Chapter 5.70**

**MEDICAL MARIJUANA COLLECTIVES**

**5.70.010 Definitions.**

For purposes of this chapter, a "medical marijuana collective" means a collective, cooperative, association or similar entity that cultivates, distributes, dispenses, stores, exchanges, processes, delivers, makes available or gives away marijuana in the City for medical purposes to qualified patients, or primary caregivers of qualified patients pursuant to Health & Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any state regulations adopted in furtherance thereof, including Health & Safety Code Section 11362.7 *et seq.* (adopted as the "Medical Marijuana Program Act"). The word "marijuana" shall have the same meaning as the definition of that word in Health & Safety Code Section 11018. Nothing in this section shall be interpreted to conflict with the foregoing provisions of the Health & Safety Code.

**5.70.020 Application Information.**

In addition to the information prescribed by the Director pursuant to the authority set forth in Section 5.08.040, all applications for a license to conduct a medical marijuana collective shall contain the following information:

1. In the event the applicant is not the owner of record of the real property upon which the collective is, or is to be, located the application must be accompanied by a notarized statement and consent from the owner of the property acknowledging that a collective is or will be located on the property. In addition to furnishing such notarized statement, the applicant shall furnish the name and address of the owner of record of the property, as well as a copy of the lease or rental agreement pertaining to the premises in which the collective is or will be located.

2. A security plan, including but not limited to lighting, alarms and security guard arrangements.

3. An executed release of liability and hold harmless in the form set forth in the City's application form.

4. A description of the procedure for documenting the source of the marijuana to be dispensed by the collective. If the marijuana is cultivated off-site, documentation that the off-site location is compliant with the zoning regulations of the jurisdiction in which it is located.

5. Text and graphic materials showing the site in the context of the immediate neighborhood and floor plan of the facility.

6. A description of the screening, registration and validation process for qualified patients.

7. A description of qualified patient records acquisition and retention procedures.

8. A description of the process for tracking medical marijuana quantities and inventory controls, including on-site cultivation (if any), processing and medical marijuana products received from outside sources.

9. A description of measures taken to minimize or offset energy use from the cultivation or processing of medical marijuana.

10. A description of chemicals stored or used on-site and any effluent proposed to be discharged into the City's wastewater or stormwater systems.

11. Authorization for the City to verify the information and representations contained in the application

**5.70.030 Criteria for Issuance of a License.**

1. The applicant, and any existing or prospective manager, must be at least twenty-one years of age.

2. The applicant, or any existing or prospective manager, must not have had a similar type of license previously revoked or denied for good cause within the immediately preceding two years prior to the license application.

3. The applicant and proposed manager shall undergo a background investigation by the Los Angeles County Sheriff's Department. Neither the applicant nor any proposed or prospective manager or employee shall have been convicted of:

(a) Any offense relating to possession, manufacture, sales, or distribution of a controlled substance, with the exception of marijuana related offenses;

(b) Any offense involving the use of force or violence upon the person of another;

(c) Any offense involving theft, fraud, dishonesty or deceit.

For purposes of this paragraph 3, a conviction includes a plea or verdict of guilty or a conviction following a plea of *nolo contendere*.

4. The location for which the license is sought shall not be located within five hundred feet of a public or private day care center or school, or a public park, and otherwise comply with Section 19.36.165, except the specific operators open and in continuous operation at the same location on or prior to January 16, 2007.

5. The location for which the license is sought is not located within 1,000 feet from any other premises operated by a medical marijuana collective and otherwise comply with Section 19.36.165, except the specific operators open and in continuous operation at the same location on or prior to January 16, 2007.

6. There shall be no more than four collective business licenses issued at any one time. Priority consideration for the first four licenses issued in this category shall be given to the operators that were open and in continuous operation as of January 16, 2007. In the event that fewer than four collectives are operating under valid licenses at any time, consideration for additional

licenses will be given in the order prospective applicants are placed on a wait list to be maintained by the City.

7. The applicant must provide a copy of a valid seller's permit issued by the California Board of Equalization.

**5.70.040 Operating Requirements.**

All collectives in the City shall operate in conformance with the following operating requirements:

1. Security shall comply with the following minimum standards:
  - i. Collectives shall provide adequate security and lighting on-site to ensure the safety of persons and protect the premises from theft at all times.
  - ii. All security guards employed by collectives shall be licensed and possess a valid Department of Consumer Affairs "Security Guard Card" at all times. Collectives shall not employ security guards who possess firearms or tasers.
  - iii. Collectives shall provide a neighborhood security guard patrol for a two-block radius surrounding the collective during all hours of operation.
2. No recommendations for medical marijuana shall be issued on-site.
3. There shall be no on-site sales of alcohol or tobacco, and no on-site consumption of marijuana (including food containing marijuana as an ingredient), alcohol, or tobacco by patrons or employees.
4. Hours of operation shall be limited to: Monday - Saturday, 10.00 a.m. - 8.00 p.m. and Sunday noon - 7.00 p.m.
5. Collectives shall only dispense medical marijuana to qualified patients and their caregivers as defined by California Health and Safety Code Section 11362.5 (Proposition 215) and any state regulations adopted in furtherance thereof, including Health & Safety Code Section 11362.7 *et seq.* (adopted as the "Medical Marijuana Program Act") and who are members of the collective. This shall include possession of a valid doctor's recommendation, not more than one-year old, for medical marijuana use by the patient.

6. Collectives shall notify patrons of the following verbally and through posting of a sign in a conspicuous location readily visible to persons entering the premises:

i. Use of medical marijuana shall be limited to the patient identified on the doctor's recommendation. Secondary sale, barter or distribution of medical marijuana is a crime and can lead to arrest.

ii. Patrons must immediately leave the site and not consume medical marijuana until at home or in an equivalent private location. Collective staff shall monitor the site and vicinity to ensure compliance.

iii. Forgery of medical documents is a felony crime.

iv. Entry into the premises by persons under the age of 18 is prohibited unless they are a qualified patient and accompanied by a parent or legal guardian.

7. Collectives shall only provide marijuana to an individual in an amount consistent with personal medical use

8. Collectives shall not store more than two hundred dollars (\$200.00) in cash reserves overnight on the premises and shall make at least one daily bank drop that includes all cash collected on that business day.

9. Any patient under 18 years of age shall be accompanied by a parent or legal guardian.

10. Collectives shall provide law enforcement and all neighbors within 100 feet of the collective with the name and phone number of an on-site community relations staff person to notify if there are operational problems with the establishment.

11. Collective operator(s) must attend regular meetings with the Los Angeles County Sheriff's Department and City Public Safety Division staff to review public safety issues associated with the operations.

12. Collectives shall dispense marijuana to their members only from the following sources:

i. Limited cultivation of marijuana on-site is permitted. The space devoted to cultivation shall not exceed twenty-five percent (25%) of the total floor area, but in no case more than 1,500 square feet nor greater than ten feet in height.

ii. From an off-site location cultivated by the collective in accordance with applicable zoning regulations in the jurisdiction in which it is cultivated.

iii. From an individual qualified patient who is a member of the collective. The patient may receive monetary compensation only in accordance with Health & Safety Code Section 11362.765(c).

iv. Collectives shall not acquire marijuana from persons who are not constituent members of the collective.

13. West Hollywood City Code Enforcement Officers, West Hollywood Sheriff's Deputies or other agents or employees of the City requesting admission for the purpose of determining compliance with these standards shall be given unrestricted access.

14. Collectives shall comply with the provisions of Health & Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any State regulations adopted in furtherance thereof.

15. Collectives shall develop and implement a program subject to approval of the City to provide subsidized medical marijuana to income eligible patients, ("compassion program") in accordance with the following criteria:

- i. Minimum 25% discount to all qualified patients based upon need.
- ii. Collectives shall not be obliged to provide more than 100 grams per month to eligible patients.
- iii. Program administration
  - Social service provider to qualify patients on an annual basis
  - Patients will be provided with a letter as proof of eligibility that expires one year after the date it is issued
  - Collectives will accept eligible patients and keep a record of qualified compassion program patients
- iv. Onsite/Instant Medical and Financial Need Eligibility Criteria
  - SSDI
  - Medi-Cal
  - Unemployed with verification
- v. Social Service Agency Verified Medical/Financial Need Eligibility
  - Section 8 housing verification
  - 200% income below Federal Poverty Level
  - Proof of disability
  - Medical need such as terminal illness, cancer treatment, etc.
- vi. Residency Requirement
  - Program for West Hollywood residents only

16. Collectives shall have a responsible person on the premises to act as manager and supervise employees at all times during business hours. Such manager shall be licensed pursuant to Sections 5.04.050 and 5.08.040.

17. Collectives shall occupy a space not to exceed 4,500 square feet in size.

18. Collectives shall be organized as nonprofit or not-for-profit cooperative, collective or collaborative associations whose constituent members qualify as "primary caregivers" or "qualified patients" within the meaning of California Health & Safety Code Section 11362.7 *et seq.* These associations shall be formed for the benefit of their members and shall require membership applications and verification. The organization shall verify status as a caregiver or qualified patient, maintain membership records, track expiration of recommendations, and refuse membership to those who divert marijuana for non-medical use. Members shall agree not to distribute the marijuana to non-members or to use the marijuana for non-medicinal purposes. Collectives shall only acquire marijuana from constituent members (patients and/or caregivers) and only then allocate it to members of the group.

**5.70.050 Duration of Marijuana Collective License – Renewal.**

All licenses issued pursuant to this chapter shall expire one year after the date of issuance; provided, however, that a license may be renewed pursuant to Section 5.08.130 for additional one-year periods upon approval of an application for renewal that complies with all provisions of this Title.

**5.70.060 Assignment of License Prohibited.**

The assignment of or attempt to assign any license issued pursuant to this chapter is unlawful and any such assignment or attempt to assign a license shall render the license null and void.

**5.70.070 Noncompliance Prohibited.**

No person or entity shall dispense, distribute, sell, convey, exchange or give away medical marijuana in the City except in compliance with the provisions of this chapter and Section 19.36.165 of this Code.

SECTION 5. Section 19.36.165 of Title 19, Chapter 19.36 is amended in its entirety to read as follows:

**Section 19.36.165 Medical Marijuana Collectives.**

*A. Definitions.* For purposes of this section, a "medical marijuana collective" means a collective, cooperative, association or similar entity that

cultivates, distributes, dispenses, stores, exchanges, processes, delivers, makes available or gives away marijuana in the City for medical purposes to qualified patients, or primary caregivers of qualified patients pursuant to Health & Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any state regulations adopted in furtherance thereof, including Health & Safety Code Section 11362.7 *et seq.* (adopted as the "Medical Marijuana Program Act"). The word "marijuana" shall have the same meaning as the definition of that word in Health & Safety Code Section 11018. Nothing in this section shall be interpreted to conflict with the foregoing provisions of the Health & Safety Code. For purposes of this section, the word "collective" shall refer to the same uses and activities referred to as "dispensaries" in the prior iteration of this section.

**B. *Location Criteria.*** A proposed medical marijuana collective shall be located in compliance with the following requirements:

1. The use shall not be located within a 1,000-foot radius of any other medical marijuana collective located within or outside the city.
2. The use shall not be located within a 500-foot radius of a church, temple, or other places used exclusively for religious worship, or a playground, park, child day care facility, or school that is located within or outside the city. For the purposes of this requirement, "school" shall mean any property containing a structure which is used for education or instruction, whether public or private, at grade levels preschool and kindergarten through 12.
3. The collective shall have its primary frontage on one of the following commercial streets: Santa Monica Boulevard, Sunset Boulevard, La Cienega Boulevard, Melrose Avenue, Beverly Avenue, La Brea Avenue or Fairfax Avenue. The use shall not have its primary frontage on a local residential street providing local circulation.

**C.** The exterior appearance of a collective shall be compatible with commercial structures already constructed or under construction within the immediate neighborhood, to ensure against blight, deterioration, or substantial diminishment or impairment of property values in the vicinity and shall comply with all other applicable property development and design standards of the Municipal Code.

**D.** No more than four (4) medical marijuana collectives shall be permitted to operate in the City at any time. Notwithstanding the foregoing, a medical marijuana collective that was (i) open and in operation on January 16, 2007 under the same continuous ownership and at the same location and (ii) does not meet the location requirements of this section, shall be allowed to continue operation in accordance with the regulations for non-conforming land uses in Section 19.72.050 subject to compliance with the standards of Chapter 5.70. Any collective that does not meet the location requirements of this section and is

discontinued or has ceased operations for 30 days or more shall not be re-established on the site and any further use of the site shall comply with all applicable provisions of the Municipal Code. Any collective that was (i) open and in operation on January 16, 2007 under the same continuous ownership and at the same location and (ii) does not meet the location requirements of this section shall not be permitted to change ownership or control without losing the rights afforded by this paragraph D; any such change in ownership or control shall result in the immediate discontinuance of the collective.

SECTION 6. Section 19.10.030, Table 2-5, Allowed Uses and Permit Requirements for Commercial and Public Zoning Districts, of Title 19, Chapter 19.10 of the West Hollywood Municipal Code is amended to read as follows:

LAND USE	PERMIT REQUIRED BY ZONE						Specific Use Regulations
	CN	CC/SSP	CA	CR	PDCS P	PF	
Medical Marijuana Collectives	P	P	P	P	--	--	19.36.165, Chap. 5.70

SECTION 7. The definition of "Plant Nurseries and Garden Supply Stores" in Section 19.90.020 of Title 19, Chapter 19.90 is amended to read as follows:

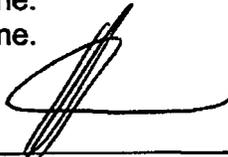
**Plant Nurseries and Garden Supply Stores.** Commercial agricultural establishments engaged in the production of ornamental plants and other nursery products grown under cover or outdoors. Cultivation of marijuana for medicinal or any other purpose is prohibited. Includes stores selling these products, nursery stock, lawn and garden supplies and commercial scale greenhouses. The sale of house plants or other nursery products entirely within a building is also included under "General Retail Stores." Home greenhouses are addressed under "Residential Accessory Uses and Structures."

SECTION 8. Severability. If any part or provision of this Ordinance or the application to any person or circumstance is held invalid, the remainder of this Ordinance, including the application of such part of provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Ordinance are severable.

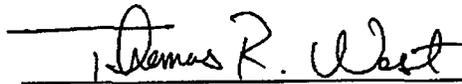
SECTION 9. Notwithstanding the provisions of subparagraph 17 of Section 5.08.010 of the Municipal Code, a public hearing shall not be required for the initial business licenses issued pursuant to the provisions of this Ordinance

PASSED, APPROVED AND ADOPTED by the City Council of the City of West Hollywood at a regular meeting held this 16<sup>th</sup> day of November, 2009 by the following vote:

AYES:	Councilmember:	Duran, Horvath, Prang, Mayor Pro Tempore Heilman, and Mayor Land.
NOES:	Councilmember:	None.
ABSENT:	Councilmember:	None.
ABSTAIN:	Councilmember:	None.

  
\_\_\_\_\_  
ABBE LAND, MAYOR

ATTEST:

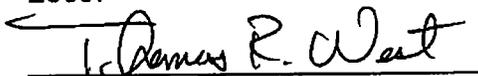
  
\_\_\_\_\_  
THOMAS R. WEST, CITY CLERK

STATE OF CALIFORNIA       )  
COUNTY OF LOS ANGELES   )  
CITY OF WEST HOLLYWOOD   )

I, THOMAS R. WEST, City Clerk of the City of West Hollywood, do hereby certify that the foregoing Ordinance No. 09-833 was duly passed, approved and adopted by the City Council of the City of West Hollywood at a regular meeting held on the 16<sup>th</sup> day of November, 2009, after having its first reading at the regular meeting of said City Council on the 2<sup>nd</sup> day of November, 2009

I further certify that this ordinance was posted in three public places as provided for in Resolution No. 5, adopted the 29<sup>th</sup> day of November, 1984.

WITNESS MY HAND AND OFFICIAL SEAL THIS 17<sup>th</sup> DAY OF NOVEMBER, 2009.

  
\_\_\_\_\_  
Thomas R. West, City Clerk