



BOARD OF SUPERVISORS  
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

Department Name: P&D  
Department No.: 053  
For Agenda Of: 1/19/10  
Placement: Departmental  
Estimated Tme: 1 hour  
Continued Item: From 12/8/09  
If Yes, date from:  
Vote Required: 4/5 vote

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**TO:** Board of Supervisors  
**FROM:** Planning and Development: Glenn Russell, Ph.D., Director 568-2085  
County Counsel: Dennis Marshall, County Counsel 568-2950  
Contact Info: Dianne Black, Development Services Director 568-2086  
Rachel Van Mullem, Deputy County Counsel 568-2950  
**SUBJECT: Urgency Ordinance for a Moratorium on Approval of Medical Marijuana Dispensaries**

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**County Counsel Concurrence**

As to form: Yes

**Auditor-Controller Concurrence**

As to form: NA

**Other Concurrence:**

As to form: NA

**Recommended Actions:**

That the Board of Supervisors:

- 1) Receive a report on Medical Marijuana Dispensaries;
- 2) Adopt the attached urgency ordinance for a moratorium on approval of Medical Marijuana Dispensaries (Attachment A);
- 3) Determine that the urgency ordinance is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines sections 15060(c)(2) and 15060(c)(3) and direct staff to file the attached Notice of Exemption (Attachment D) with the County Clerk; and
- 4) Direct staff to return to the Board on February 23, 2010 with a written report pursuant to Government Code section 65858 (d) and a possible moratorium ordinance extension.

## **Summary Text**

On December 8, 2009, the Board of Supervisors directed staff of County Counsel, Planning and Development, Sheriff, and Probation to return to the Board on or before January 19, 2010 with a draft ordinance establishing a moratorium on permitting of Medical Marijuana Dispensaries (MMD) to allow the County to study potential zoning ordinance amendments including the appropriate permit process or a ban of MMDs. This report discusses the legal and permitting contexts of MMDs and provides the Board with information to support an urgency ordinance for a moratorium on approval of MMDs.

## **Background/Analysis**

### **Legal Framework:**

Under the federal Controlled Substances Act, the manufacture, distribution, or possession of marijuana is a criminal offense. Marijuana is a Schedule I drug meaning the federal government considers it to be a drug that “has a high potential for abuse,” “has no currently accepted medical use” and “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.” (21 U.S.C. § 812(b)(1).)

California law is in conflict with federal law. In 1996, California voters passed Proposition 215, the Compassionate Use Act (CUA). The purpose of the CUA 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.” (Health & Safety Code § 11362.5(b)(1)(A).) In addition, patients and primary caregivers would not be subject to criminal prosecution or sanction. (Health & Safety Code § 11362.5(b)(1)(B).) A primary caregiver is an individual designated by a qualified patient “who has consistently assumed responsibility for the housing, health, or safety” of the patient. (Health & Safety Code § 11362.5(e).)

In 2003, the California legislature passed SB 420, the Medical Marijuana Program (MMP) (Health and Safety Code sections 11362.7 et. seq.). The MMP did the following:

- Created the voluntary identification card program for county health departments;
- Set the amount of medical marijuana that a patient or primary caregiver can possess (8 ounces of dried marijuana and 6 mature or 12 immature marijuana plants);
- Established the ability for qualified patients and primary caregivers to collectively and cooperatively associate to cultivate marijuana for medical purposes; and
- Specified that patients and primary caregivers who collectively and cooperatively cultivate marijuana shall not on that sole basis be subject to criminal sanctions under Sections 11357 [possession of marijuana], 11358 [cultivation of marijuana], 11359 [possession for sale], 11360 [transportation], 11366 [maintaining a place for the sale, giving away or use of marijuana], 11366.5 [making available premises for the manufacture, storage or distribution of controlled substances], or 11570 [abatement of nuisance].
- Allows cities and counties to adopt and enforce laws consistent with the MMP.

The United State Supreme Court addressed this federal/state conflict in two cases *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483 and *Gonzales v. Raich* (2005) 545 U.S. 1. In *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, the court held that there is no medical necessity exception to the federal Controlled Substances Act prohibition of the manufacture and distribution of various drugs. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 486.) The court in *Gonzales v. Raich* (2005) 545 U.S. 1 held that under the Commerce Clause the federal government has the power to prohibit the local cultivation and use of marijuana that would be allowed under California law.

Since neither the CUA nor the MMP addresses “Storefront MMDs,” confusion has arisen among these different regimes for dispensing medical marijuana:

- Storefront MMDs;
- Collectives; and
- Cooperatives.

In 2008, the California Attorney General published the Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use (AG Guidelines, Attachment B). With regard to storefront dispensaries, the Attorney General believes that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful in California if the dispensary complies with the Guidelines. (See AG Guidelines page 11.) A court of appeal agreed with this conclusion in *People v. Hochandel* (2009) 176 Cal.App.4<sup>th</sup> 997, concluding the storefront dispensaries that operated as collectives or cooperatives and complied with the CUA and MMP may operate legally. (*People v. Hochandel* (2009) 176 Cal.App.4<sup>th</sup> 997, 1002.) However, the court of appeal cautioned that a storefront dispensary does not qualify as a primary caregiver simply because it was designated by a qualified patient. A primary caregiver must have a consistent, existing and established relationship and assume responsibility for housing, health or safety of the patient. (*Id.* at p. 1016.) A primary caregiver must consistently assume responsibility including: 1) consistently providing caregiving; 2) caregiving that is independent of any assistance in taking medical marijuana; and 3) the caregiving must be at or before having responsibility to provide medical marijuana. (*People v. Mentch* (2008) 45 Cal.4<sup>th</sup> 274.)

Since the MMP does not define collectives and cooperatives, the Attorney General provided guidance through the 2008 AG Guidelines. Statutory cooperatives file articles of incorporation and must be registered with the state. Cooperatives should not sell or purchase marijuana from non-members and are not organized to make a profit. Similarly, collectives are non-profit, for members only and “should be an organization that merely facilitates the collaborative efforts of patient and caregiver members—including the allocation of costs and revenues.” (AG Guidelines p. 8.)

Due to the complicated and uncertain legal framework, some jurisdictions have elected to adopt moratoriums on MMDs to study the appropriate permit process. This approach is legally defensible. In *City of Claremont v. Kruse* (2009) 177 Cal.App.4<sup>th</sup> 1153, the court of appeal upheld a moratorium on MMDs. The court held that neither the CUA nor the MMP requires the establishment of local

regulations to accommodate dispensaries; thus the city's moratorium did not conflict with the CUA or the MMP. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4<sup>th</sup> 1153, 1176.)

Following a moratorium, some jurisdictions, including the City of Anaheim, have elected to ban MMDs. At the December 8, 2009 Board hearing, County Counsel reported on the status of the court of appeal case *Qualified Patients Association v. City of Anaheim* (G040077, app. pending, argued September 23, 2009.) The case involves a challenge to the City of Anaheim's ordinance banning MMDs. Rather than issuing a decision on December 22, 2009 as expected, the court requested additional briefing by the parties to address the connection between Health and Safety Code sections 11362.765 and 11362.775 and Health and Safety Code section 11570.

Health and Safety Code sections 11362.765 and 11362.775 provide that patients and primary caregivers engaging in medical marijuana activities shall not on that sole basis be subject to sanction under Health and Safety Code section 11570. Section 11570 provides that a building or place that unlawfully sells, serves, stores, manufactures or gives away a controlled substance is a nuisance. The court asked the parties to respond to the following questions, "Does the inclusion of section 11570 reflect a legislative intent to preempt local government action, if any, that may criminally punish medical marijuana activity as a nuisance? If so, does that lend support to the conclusion that the Medical Marijuana Program Act (MMPA) preempts local government legislation purporting to criminalize medical marijuana activities? Or does the inclusion of 11570 have some other significance?"

The letter briefs are due by January 29, 2010 and the case will be resubmitted for decision at that time. The decision by the court of appeal, or potentially the California Supreme Court, may help to clarify state law in this area.

#### Moratorium:

Government Code section 65858 generally allows your Board to adopt an urgency interim ordinance to protect public safety, health and welfare. The moratorium ordinance would prohibit approval of any uses that may be in conflict with a contemplated zoning proposal that the County is studying and intends to study within a reasonable time. Section 65868 also provides that a moratorium and any extensions:

- Cannot exceed a total of two years; and
- Must contain legislative findings that there is a current and immediate threat to the public health, safety or welfare and that the approval of additional permits or other entitlements would result in that threat to public health, safety or welfare.

A moratorium ordinance requires a four-fifths vote for adoption. If your Board elects to adopt the attached moratorium ordinance today, the ordinance will be in effect for 45 days. The ordinance will expire on March 5, 2010. Ten days prior to expiration which would be February 23, 2010, Government Code section 65858 (d) requires that your Board issue a written report describing the measures taken to alleviate the condition which led to the ordinance. Because this 45-day ordinance would be adopted following notice pursuant to Government Code section 65090 and public hearing, your Board may by four-fifths vote extend the interim ordinance for 22 months and 15 days. For economy of scheduling, it is recommended that your Board direct staff to return to the Board on February 23, 2010 to issue the

written report pursuant to Government Code section 65858 (d) and, at the same hearing, consider an extension of the interim ordinance.

Adoption of the draft moratorium ordinance will prohibit the establishment and operation of new MMDs: storefront facilities and locations in which collectives and cooperatives dispense medical marijuana. To avoid the risk of preemption by the CUA and MMP, the moratorium is not drafted to ban collectives and cooperatives. MMDs that are retail establishments, not operated by and for collectives and cooperatives, are likely illegal and the operators of such establishments may be subject to arrest and criminal prosecution under California law. (AG Guidelines, p.11.)

#### Environmental Review:

The draft moratorium ordinance is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines sections 15060(c)(2) [activity will not result in a direct or reasonably foreseeable indirect physical change in the environment] and 15060(c)(3) [activity is not a project as defined in Section 15378]. The draft ordinance has no potential for resulting in a physical change to the environment directly or indirectly as it prevents change to the environment pending completion of the County's contemplated research and study.

#### Current Permit Process:

As was outlined in the Board Agenda Letter on the Board's Administrative Agenda for January 5, 2010, the County's Land Use and Development Code (LUDC) provides that when a use is not specifically enumerated, it is prohibited unless the Planning Commission makes a Use Determination. MMDs are not an enumerated use in the LUDC. Following the Board hearing on December 8, 2009, Planning and Development, in consultation with County Counsel, has interpreted the LUDC to require a Use Determination by the Planning Commission for any MMD prior to its establishment. Without a Use Determination, any new MMD would be a zoning violation. The Use Determination requires the Planning Commission to make a finding that the MMD is "similar in character to those permitted uses" and that "the proposed use is not more injurious to the health, safety or welfare of the neighborhood (LUDC Section 35.82.190(E)(1).) The attached draft moratorium would prohibit the approval of any new MMDs, including through a Use Determination.

The Use Determination approach was upheld by the court of appeal in *City of Corona v. Naulls* (2008) 166 Cal.App.4<sup>th</sup> 418. Under the City of Corona's municipal code, which is similar to the County of Santa Barbara's Land Use and Development Code, any use not enumerated was presumptively prohibited. The applicant to the City provided incomplete information about the intended business purpose listing it as "Misc. Retail." (*Id.* at p. 421.) Once the City learned the true nature of the business, the City sought an injunction. The court granted injunctive relief and upheld the City's approach that the use was prohibited absent a "similar use" finding by the City's planning commission.

Existing MMDs in the County's Jurisdiction:

As was discussed at the Board hearing on December 8, 2009, four known MMD currently exist within the jurisdiction of the County of Santa Barbara: two in Summerland, and two in unincorporated area near Goleta/Santa Barbara. These MMDs did not receive Land Use or Coastal Development Permits. Additionally, an approval of a Land Use Permit for an MMD is on appeal to the County Planning Commission for an MMD located on Calle Real at El Sueno Road in an existing commercial facility. Inquiries and/or permit requests have been received for many of the urban areas within the County's jurisdiction, including Old Town Orcutt, Orcutt, Santa Ynez, Los Olivos, Eastern Goleta and Summerland but no applications have been received.

As a general rule, after the passage of a new ordinance, existing legal establishments will become legal non-conforming and can continue to operate. A jurisdiction seeking to eliminate nonconforming uses can either: (1) eliminate the use immediately by payment of just compensation; or (2) require removal of the use without compensation following a reasonable amortization period (*City of Los Angeles v. Gage* (1954) 127 Cal App 2d 442, 459; *Castner v. City of Oakland* (1982) 129 Cal.App.3d 94). However, an ordinance may add a provision for the immediate elimination of the use if the use becomes a nuisance, as long as there is due process. (*Livingston Rock & Gravel Co. v. Los Angeles* (1954) 43 Cal 2d 121, 128.)

The reasonableness of an amortization period "depends upon the particular property in use in issue and each case must be determined on its own facts." (*Bohannon v. City of San Diego* (1973) 30 Cal.App.3d 416, 426; See also *National Advertising Co v. County of Monterey* (1970) 1 Cal 3d 875, 879.) Placing a time limit on the continuance of existing nonconforming uses is logical and reasonable as long as the approach is "commensurate with the investment involved and based on the nature of the use; and in cases of nonconforming structures, on their character, age, and other relevant factors." (*City of Los Angeles v. Gage* (1954) 127 Cal App 2d 442, 459.)

In passing its ban on MMDs, the City of Goleta followed the general rule of applying the ordinance only to new MMDs. Presumably taking the nuisance approach, the City of Anaheim's ordinance prohibits even existing MMDs. Prior to the recent December 8, 2009 moratorium, the City of Santa Barbara applied the amortization method, allowing a 3-year amortization period. During the 3-year period, the MMDs need to obtain a dispensary permit or discontinue operation. (Santa Barbara City Ordinance No. 5449, Section 3.)

Based upon your Board's direction, Planning and Development will study the following four options for regulating existing MMDs as part of the work plan discussed at the end of this Board letter:

- Allow existing legal MMDs to continue to operate as legal non-conforming;
- Eliminate the existing MMDs by payment of just compensation;
- Require removal of existing MMDs without compensation after a reasonable amortization period; or
- Determine that the existing MMDs are a nuisance and provide for immediate elimination.

The court of appeal decision in *Qualified Patients Association v. City of Anaheim* (G040077, app. pending, argued September 23, 2009.) on the City's Anaheim's ordinance may provide some guidance on the defensibility of the final option. A decision is expected by spring/summer 2010, but the case may be appealed to the California Supreme Court.

#### State of Permitting in Nearby Jurisdictions:

All of the cities in the County of Santa Barbara, with the exception of the City of Santa Barbara, have enacted bans or otherwise prohibited the legal establishment of MMDs. The City of Santa Barbara previously adopted regulations to govern the location, concentration, and operation of MMDs. Most recently, on December 8, 2009, the City of Santa Barbara adopted an ordinance temporarily suspending the opening or operation of new MMDs otherwise allowed under the Santa Barbara Municipal Code on an interim basis to consider significant revisions to the City's Dispensary Ordinance reflecting state law limitations to collectives and cooperatives.

The County of San Luis Obispo has adopted an ordinance regulating MMDs through a minor use permit, with standards on the location (outside the central business district and at least 1,000 feet from schools, libraries, parks, playgrounds or recreation or youth centers), hours of operation and other limits on use, submittal of a security plan, and notification to the Sheriff.

The County of Ventura has not yet addressed MMDs. According to the Planning Director for the County of Ventura, the County has only received one inquiry about MMDs which did not result in a permit request. The City of Ventura has banned MMDs.

#### Status of Permitting throughout the State of California:

A number of Cities and Counties in California have addressed permitting of MMDs. According to the website SafeAccessNow (updated November 19, 2009), 31 cities and 9 counties have ordinances which provide for the permitting of MMDs. An additional 77 cities and 8 counties have instituted moratoriums for permitting MMDs and 120 cities and 8 counties have banned the establishment of MMDs.

#### Summary of Testimony at December 8, 2009 Hearing:

At your hearing on December 8, 2009, your Board received testimony from the Sheriff, the Probation Department and the public on the effects on MMDs in the community. Sheriff Brown testified that MMDs are attractive targets for criminals, both for the drug itself and the money collected at the dispensaries. MMDs attract illegal activities such as money laundering, felonious assaults, robberies and illicit sales of drugs. Sheriff Brown provided the Board with a number of examples of crimes that have occurred as a result of MMDs since 2007. Karen Wheeler, Deputy Chief Probation Officer, Adult Services, testified regarding the policy of the Probation Department for probationer use of medical marijuana. She also testified about an incident of assault and robbery of a probationer related to the use of medical marijuana. Several community members also testified about increases in crime and other substantial negative impacts on the community as a result of MMDs. One member of the public expressed her concern that absent a regulatory approach to MMDs, the community is left to convince property owners not to lease to parties interested in operating MMDs.

Summary of White Paper:

The California Police Chiefs Association's Task Force on Medical Marijuana Dispensaries prepared a White Paper on Marijuana Dispensaries dated April 22, 2009 (see Attachment C). The White Paper reviews Federal and State Law, including a discussion of collectives and cooperatives and how medical marijuana dispensaries operate. The bulk of the White Paper identifies and discusses in detail, including case studies, the adverse secondary effects of marijuana dispensaries and similarly operating cooperatives. Ancillary crimes include armed robberies and murders; burglaries; traffic, noise and drug dealing; organized crime, money laundering and firearms violations; and, poisonings, both intentional and unintentional. Also of concern are adverse community impacts associated with unjustified and fictitious physician recommendations; proliferation of grow houses in residential areas; life safety hazards created by grow houses; increased organized gang activities; exposure of minors to marijuana; impaired public health; loss of business tax revenue; and, decreased quality of life in deteriorating neighborhoods, both business and residential. The report concludes that any benefits of medical marijuana are outweighed by the many secondary adverse effects.

Ordinance Amendment Work Plan:

Should the Board of Supervisors adopt the moratorium ordinance and direct staff to pursue ordinance amendments to specifically regulate MMDs, Planning and Development Department would include the project in the 2010-2011 Annual Work Program and Departmental budget. The scope of work to develop proposed ordinances would include:

1. Research other jurisdictions regulatory approaches to MMDs.
2. Conduct public outreach on potential approaches.
3. Prepare draft ordinance to regulate or ban MMDs.
4. Conduct required CEQA analysis.
5. Present draft ordinances to the Planning Commission and Board of Supervisors for recommendation and adoption.
6. Submit to and process amendments with California Coastal Commission (for changes to the Coastal Zoning Ordinance).

**Attachments:**

- A. Urgency Ordinance for a Moratorium on Medical Marijuana Dispensaries
- B. California Attorney General Guidelines for the Security and Non-Diversion of Medical Marijuana Grown for Medical Use
- C. White Paper on Marijuana Dispensaries prepared by the California Police Chiefs Association's Task Force on Marijuana Dispensaries
- D. Notice of Exemption



**Fiscal and Facilities Impacts:**

Budgeted in the FY 2009-2010 Planning and Development adopted budget, under the Administration Division, page D-300. Future ordinance development would be included in the proposed budget for FY 2010-2011.

**Authored by:**

Dianne Black, Development Services Director, P&D  
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