OFFICE OF THE CITY ATTORNEY
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REPORT NO. R06-0370
OCT 19 2006

REPORT RE:

LEGAL ISSUES SURROUNDING MEDICAL MARIJUANA DISPENSARIES

The Honorable Public Safety Committee
City Council, City of Los Angeles
Room 395, CityHall
200 North Spring Street
Los Angeles, California 90012

Council File No. 05-0872

Honorable Members:

Council Members Zine and Reyes submitted a motion requesting that the City Attorney's Office report on "recommended actions necessary to ensure that facilities that distribute medical marijuana are operated in a legal manner and that City zoning appropriately addresses the unique citing [sic] considerations for such facilities." (Motion, Council File No. 05-0872, 2005.) Based on the legal authority detailed below, we advise that the City Council carefully consider the options presented and decide, from a policy standpoint, which approach it feels is in the best interest of the City of Los Angeles.

I. Overview

State and federal policy differs as to whether medicinal use of marijuana should be permitted. Under the federal Controlled Substances Act ("CSA") marijuana remains a Schedule I drug. The Food and Drug Administration has also announced that it does not support the use of marijuana for medical purposes. However, California voters have declared that marijuana has legitimate and acceptable medicinal uses in certain

circumstances.[1] Indeed, in October of 2005, the State Board of Equalization instituted a policy permitting medical marijuana dispensaries to obtain a seller's permit. The state thereby collects sales tax on medical marijuana sales.

Although California laws do not specifically address medical marijuana dispensaries,[2] Health and Safety Code Section 11362.83 provides that cities are free to adopt laws that are consistent with state law. Medical marijuana "cooperatives" are expressly allowed under the state's Medical Marijuana Program Act.

At issue before cities and counties throughout the State is whether medical marijuana dispensaries should be banned or allowed, and if allowed, under what conditions, both zoning and regulatory. Currently, throughout the state, cities are considering whether the federal CSA prohibits them from allowing medical marijuana dispensaries within their city limits. Approximately 27 cities and counties in California have established ordinances regulating medical marijuana dispensaries; approximately 30 have banned such facilities from their jurisdictions; while another 62 or so currently have moratoriums in place.

Those jurisdictions that allow them have ordinances regulating the location and operation of medical marijuana dispensaries under land use/zoning laws. Without land use ordinances, a city or county has no means of controlling locations or regulating the conditions under which medical marijuana dispensaries can operate. It is clear that the establishment of medical marijuana dispensaries without regulatory controls may adversely impact the public health, safety and general welfare of the residents of the city. If dispensaries are allowed, regulations are necessary to control potential negative impacts of dispensaries upon the surrounding properties and community members.

The options available to the City, discussed below, include:

- Allowing medical marijuana dispensaries in the form of cooperatives/collectives in conformity with state law;
- Banning medical marijuana dispensaries based on federal law;
- Adopting an interim ordinance establishing a moratorium until law is further clarified.
- Adopting a land use ordinance zoning and regulating medical marijuana dispensaries.

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[1] Proposition 215 "Compassionate Use Act" was approved by California voters in 1996.

[2] In this context, the term has been applied to any facility, site, location, use, cooperative or business that distributes, sells, exchanges, possesses, delivers, gives away or cultivates marijuana for medical purposes to qualified patients, health care providers, patients' primary caregivers, or physicians pursuant to the Compassionate Use Act of 1996 or the Medical Marijuana Program Act.

II. California Law Regarding Medical Marijuana

Health and Safety Code section 11362.5 codifies Proposition 215, the "Compassionate Use Act" ("CUA") which was approved by voters in 1996. One of the stated purposes of the CUA was "[t]o 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 in the treatment of [specified illnesses]."[3] (Health and Safety Code Section 11362.5(b)(1)(A)). It is also meant to ensure "that patients and their primary caregivers who obtain and use marijuana for medical purposes...are not subject to criminal prosecution or sanction" (section 11362.5(b)(1)(B) and "[t]o encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana" (section 11362.5 (b)(1)(C)). It provides that "notwithstanding any other provision of law", no physician shall be "punished or denied any right or privilege" for recommending medical marijuana (section 11362.5(b)(c)). A "primary caregiver", under section 11362.5, subd. (e), is an individual designated by the person exempted who has "consistently assumed responsibility for the housing, health or safety of that person". In a series of cases, the California Court of Appeal held that the intent of the CUA was "not to legalize any activity beyond the possession and cultivation of marijuana for personal medical use." (*People v. Galambos* (2002) 104 Cal. App.4th 1147, 1167.) While the CUA specifically decriminalized cultivation and possession of medical marijuana for the personal medical purposes of the patient, it did not mention the subject of sale. Therefore, the possession of marijuana for sale remained criminal.

In 2003, the California Legislature passed Senate Bill 420, the Medical Marijuana Program Act (Health and Safety §§ 11362.7 to 11362.83) ("MMPA"), which supplemented and sought to clarify the scope of the application of the CUA, promote uniform and consistent application of the CUA within the state, and enhance access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. The MMPA became effective on January 1, 2004 and, among other things, created a state-approved medical marijuana identification card program and set forth the quantity of marijuana that a qualified patient or primary caregiver could possess.

The MMPA provided non-exclusive examples of who may be a primary caregiver. Significantly, an owner or operator of a dispensary is not listed as an example of a qualified "primary caregiver". In fact, neither the original CUA, nor the additions

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[3] The "seriously ill" requirement is satisfied if the patient has any of the listed conditions, which are: Cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, "or any other illness for which marijuana provides relief." This language is clearly meant to ensure that the enumerated conditions are not deemed to be an exhaustive list and essentially leaves it to the patient's physician to determine whether any "illness" would benefit from the use of marijuana as a treatment.

contained in S.B. 420 speak to regulation of medical marijuana dispensaries or specifically mention them at all.

A. Medical Marijuana Dispensaries As "Primary Caregivers"

Neither the CUA nor the MMPA specifically allow medical marijuana dispensaries as "primary caregivers". The definition of a primary caregiver is basically the same under both acts and refers to "the individual" designated by a qualified patient or person with an identification card "who has consistently assumed responsibility for the housing, health, or safety of that person." Based on the case law discussed below, particularly the leading case of *The People v. Peron*, it appears that medical marijuana dispensaries do not qualify as primary caregivers. Thus, they are not exempt from prosecution for violation of state criminal statutes related to the possession, distribution, and sale of marijuana and they clearly are not legal under federal law.

The California Court of Appeal has held that the defendants/respondents, who operated the Cannabis Buyers' Club in San Francisco, did not meet the statutory definition of primary caregivers because they did not consistently assume responsibility for the health or safety of the thousands of individuals to whom the club furnished marijuana. Thus, the respondents were not immune from enforcement of section 11570 (which prohibits the use of a building or place to unlawfully sell, manufacture, store, or give away marijuana) simply because they allegedly conducted the proscribed activities in the capacity of "primary caretakers of the health and safety of their numerous purchasers". (*The People ex rel. Daniel E. Lungren, etc. v. Peron, et al.* (1997) 59 Cal. App.4th 1383.)

While *Peron* was decided prior to the passage of the MMPA--which expanded exemptions to prosecution available to qualified patients, cardholders, and primary caregivers, including exemption for the distribution and sale of marijuana—its analysis of the meaning of "primary caregiver" is still instructive, and good law. Thus, unless a *bona fide*, *consistent* primary caregiver relationship can be established, a person furnishing medical marijuana to a qualified patient is not exempt from applicable state laws, even if designated by the patient. Foreshadowing the MMPA, the court concluded that a legitimate primary caregiver could care for more than a single patient, provided the consistency requirement is satisfied and, under the proper circumstances, a qualified patient could reimburse the caregiver for his or her actual expenses incurred in cultivating and furnishing marijuana for the patient's medical treatment.

Peron's analysis of "primary caregiver" has been followed in other California appellate decisions, even after the passage of the MMPA, including the recent case of *People v. Frazier* (2005) 128 Cal.App.4th 807. The *Frazier* court explained that the *Peron* court's actual holding was that a primary caregiver who consistently grows and supplies physician-approved medicinal marijuana for a qualified patient under the CUA Act is serving a health need of the patient, and may seek reimbursement for such

services. "This language [in *Peron*] applies to primary caregivers who seek reimbursement for their services. It does not create a class of primary caregivers that does not already exist."

Federal court decisions have also cited to *Peron*'s holding regarding the applicability of "primary caregiver" status to dispensaries. In the recent Ninth Circuit Court of Appeal case of *United States v. Rosenthal* (2006) 454 F.3d 943, the court stated: "After California's approval of the Compassionate Use Act, questions surfaced as to whether cannabis dispensaries actually were immune from prosecution under state and federal drug laws. In 1997, a California Court of Appeal held that cannabis-cultivating clubs are not 'primary caregivers' within the meaning of the Compassionate Use Act and are therefore not shielded from prosecution under the state's controlled-substances laws. See *People ex rel. Lungren v. Peron* [citations omitted]." And in *U.S. v. Landa* (2003) 218 F.Supp.2d 1139, the Federal District Court for the Northern District of California quoted extensively from *Peron* and thereafter stated: "Despite popular misconception, Proposition 215 did not legalize large-scale marijuana processing and distribution—even for eventual medical marijuana uses."

B. Collectives Permitted Under State Law

Section 11362.775 of the MMPA expressly allows medical marijuana to be cultivated collectively by "qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards." These persons may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes [and] shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 1366.5, or 11570." Thus, all of the members of a medical marijuana collective must be either qualified patients or primary caregivers. It is notable that that statute specifies only cultivation as a permitted collective/cooperative activity, as opposed to distribution, sale, etc. While the exemption from criminal sanctions includes the crimes of distribution and sale, it appears that collective members are "protected" from prosecution for these crimes only to the extent that collective cultivation is the sole basis for such prosecution.

The Court of Appeal for the Third Appellate District recently decided that a defendant's distribution of marijuana from his house fell within the purview of section 11362.775, which authorizes cooperatives. *People v. Urziceanu* (2005) 132 Cal. App.4th 747. Presumably because the court found sufficient evidence that the defendant and those who obtained marijuana from Floracare were, themselves, qualified patients, it did not analyze the issue of whether the defendant and/or his cooperative constituted a "primary caregiver".

The *Urziceanu* court characterized the MMPA as a "dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are

qualified patients or primary caregivers" and "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." Certainly, the 2004 legislation went well beyond the original CUA and therefore any discussion of what is legally permissible (under state law) based on that voter-passed initiative must now incorporate the expansion and clarification of the CUA as set forth in the MMPA.

III. "Medical Marijuana" is Illegal Under Federal Law

Federal law prohibits the possession of marijuana for any purpose, including medical purposes. In June of 2005, the United States Supreme Court in *Gonzales, et. al. v. Raich, et. al.*, 125 S. Ct. 2195, ruled that under the Federal Controlled Substances Act ("CSA"), possession, cultivation and sale of marijuana, even though medically prescribed, is illegal. The Court reasoned that Congress had the authority under the Commerce Clause to prohibit the local cultivation and use of marijuana for medical purposes, even if that activity was legal under California law. Therefore, individuals who use, cultivate or dispense medical marijuana in California are subject to federal prosecution under existing federal law. Shortly after the Supreme Court's decision, the California Attorney General issued an opinion stating that although the Supreme Court upheld federal law, it did not invalidate the state's medical marijuana law. According to this opinion, the CUA was not pre-empted by federal law and the use of medical marijuana under state law was unaffected by the United States Supreme Court's ruling in *Gonzales v. Raich*.

The United States Supreme Court also considered medical marijuana in the case of *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, wherein the Court rejected the Cooperative's contention that medical necessity was an implied exception to the CSA's prohibition of the distribution or manufacture of marijuana. Because marijuana is still classified as a Schedule I drug, "the Controlled Substances Act cannot bear a medical necessity defense to distribution of marijuana."

To the extent that state law permits the cultivation, distribution, and use of medical marijuana, as set forth in the CUA and MMPA, all of these activities continue to be illegal under federal law (the CSA). Thus, there is a clear conflict between the state and federal law which has yet to be resolved.

IV. Options available regarding medical marijuana dispensaries.

Section 11362.83 of the California Health and Safety Code provides that localities are free to adopt laws that are consistent with State law. The decision regarding what to do about dispensaries (zone, regulate, ban, or take no action) is a policy decision each jurisdiction must face, but this provision means that whatever law is adopted must be consistent with the CUA and the MMPA. While neither Act imposes an explicit affirmative obligation upon local governments to allow the establishment of

marijuana dispensaries or collectives, supporters of such establishments would certainly point to language in the CUA "encouraging" the federal and state governments to "implement a plan to provide for the safe and affordable distribution of marijuana to all patients in need of marijuana." The conflicted state of the law essentially means that, whatever option a local government adopts, there are potential risks.

A. Banning Dispensaries and/or Cooperatives

California Government Code section 37100 provides that "the legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States." Thus, local laws that conflict with state or federal laws are subject to being struck down as invalid. This Government Code section provides compelling support for the position that a city (or county) cannot legally pass an ordinance permitting the existence of medical marijuana dispensaries, because these establishments are clearly in violation of federal law (and very possibly in violation of state law), and therefore such an ordinance would be unlawful under section 37100. An ordinance allowing the establishment of collectives/cooperatives in conformity with Health and Safety Code section 11362.77 would certainly be permitted under state law, but would nevertheless be in conflict with federal law. In fact, an ordinance authorizing any medical marijuana distribution establishments would appear to conflict with federal law.

An outright prohibition presents a risk that the City would be sued on the theory that it was acting in violation of the spirit, if not the actual letter, of state law. That theory was the basis for a lawsuit filed by Americans for Safe Access (ASA), an organization which supports the establishment of medical marijuana dispensaries, against the City of Fresno, which had banned dispensaries. Fresno subsequently repealed the challenged ordinance resulting in the dismissal of the lawsuit. (Fresno is reportedly planning to adopt another ordinance which will effectively result in a ban on dispensaries, and it expects that ASA will challenge that one as well.)

Approximately 30 cities and counties in the state have banned dispensaries, including Monterey Park, Pasadena, Riverside, and Torrance. The latter effectuated its ban by clarifying its business license ordinance to ensure that no licenses will be issued to individuals seeking to open a marijuana/cannabis distribution business as a "cooperative" which violates federal law. Another approach is interpreting the city's existing zoning ordinance as prohibiting medical marijuana dispensaries, to the extent that such a use is not presently permitted in the city.

While the City of San Diego has not banned dispensaries, the County of San Diego has filed a lawsuit challenging California's medical marijuana law in state court, saying it should not be required to comply with a state law directing counties to issue

state identification cards.[4] Merced, San Bernandino, and Riverside Counties are parties to the lawsuit, as is the ACLU. San Diego County's position is that the state's medical marijuana laws are expressly prohibited by federal law, as well as by a United States Treaty (Single Convention on Narcotics) which imposes strict controls on the cultivation of marijuana. Approximately 30 medical marijuana dispensaries have been shut down in the San Diego area, following raids conducted jointly by local law enforcement and Drug Enforcement Administration officers under both state and federal search warrants.

Another theory for banning, or at least not allowing, medical marijuana dispensaries is that licensing or otherwise regulating dispensaries could possibly be viewed as aiding and abetting a violation of federal marijuana laws. However, no local governments, to date, have been found in violation of this offense as it relates to the permitting of medical marijuana establishments.[5]

B. Regulating Dispensaries

Many of the counties and cities that have passed moratoriums of medical marijuana dispensaries have done so under Government Code Section 65858, which allows a City Council, without following the procedures usually required for adoption of zoning ordinances, to adopt an interim ordinance prohibiting land uses that may be in conflict with a contemplated zoning proposal when necessary to protect the public safety, health and welfare.

The majority of jurisdictions that have allowed dispensaries have done so under comprehensive zoning ordinances. Some examples include:

The ***City of Berkeley*** does not have a specific use permit or zoning regulations pertaining to medical marijuana dispensaries. Berkeley has, however, reserved the right to impose a use permit under the generally reserved powers in its zoning ordinance. It also reserved the right to deny any use permit application for a dispensary due to federal law restrictions.

The ***City of Oakland*** requires an application for a Cannabis Dispensary Permit. The number of dispensaries is limited to 4 within the City limits. There is an annual regulatory fee; the operator must obtain a City business tax certificate; and there are limitations on operating hours and a prohibition against "excessive profits".[6]

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[4] The County of Los Angeles is about to commence issuing medical marijuana ID cards pursuant to state law.

[5] Some cities and counties have attempted to deal with this issue by including a disclaimer in releases which dispensary owners are required to execute, providing that the owner shall release the local entity from liability stemming from violation of state or federal laws and indemnify the local entity for any claims arising from the use of the dispensary.

[6] Oakland's Medical Cannabis ordinance defines "excessive profits" as: the receipt of consideration of a value substantially higher than the reasonable costs of operating the facility.

The ***City of San Francisco*** adopted a comprehensive zoning ordinance. This scheme allows medical cannabis dispensaries to locate in neighborhood commercial cluster districts. Medical cannabis dispensaries must apply for a permit from the Department of Public Health, under the San Francisco Health Code. The Department of Health Services refers the application to other city departments, such as Planning, Police and Fire and provides for employment and criminal background checks. The ordinance also places restrictions on hours of operation and proximity to schools. It provides for inspections, notices of violations, revocation and suspension of permits. In its disclaimer of liability, the code states that San Francisco is assuming an undertaking only to promote the general welfare and that the City's Medical Cannabis Act does not authorize the violation of state or federal law.

The ***City of West Hollywood*** ordinance provides that standards are required to assure operations of medical marijuana dispensaries are in compliance with Proposition 215 or any state regulations adopted in furtherance thereof and to mitigate adverse secondary effects from operation of such facilities. West Hollywood has limited the number of dispensaries to seven (7), based on the small size of the city and proximity to residential zones, schools and parks. The City found that the limits were reasonable and not an obstacle to the implementation of Prop 215. Among the conditions imposed on dispensaries are requirements regarding security, hour limitations, restrictions on sale of other items, specific signage, restrictions on the amount of cash kept on the premises overnight, and required criminal background check on operators.

The ***County of Los Angeles*** adopted an ordinance regulating medical marijuana dispensaries in unincorporated areas of the county on May 9, 2006, which became effective on June 8, 2006. Section 22.56.196 amends Title 22 of the County Code, relating to Planning and Zoning, and provides a detailed regulatory framework.

The ordinance is designed to regulate medical marijuana dispensaries "in a manner that is safe, that mitigates potential impacts dispensaries may have on surrounding properties and persons, and that is in conformance with the provisions of the California Health and Safety Code section 11362.5 through section 11362.83, inclusive, commonly referred to as the Compassionate Use Act of 1996 and the Medical Marijuana Program." A conditional use permit which complies with the requirements set forth in the ordinance is required to operate a dispensary. A regular, rather than a minor, conditional use permit is required, which would allow for appeals to reach the Board of Supervisors in appropriate cases. In addition to conforming to standard permit application procedures, the application must be reviewed by the department of health services, sheriff's department, business license commission, "and all other relevant county departments for their review and comment." Additional specific findings must be made and numerous additional conditions are imposed before approval of a medical marijuana dispensary permit.

Application forms include a disclaimer stating that dispensary operators and their employees may be subject to prosecution under federal marijuana laws and the county will not accept any legal liability in connection with any approval and/or operation of a dispensary. The ordinance further requires that dispensary owners and permittees release the county from liability of any kind resulting from the arrest or prosecution of dispensary owners, operators, or clients for violation of state or federal laws. They must also indemnify and hold the county harmless for any claims or liabilities of any kind related to the operations of the dispensary and/or use of marijuana provided at the dispensary.

The County also requires medical marijuana dispensaries, and their managers, to obtain a County business license to operate. Under an ordinance amending Title 7 of the County Code, the business license commission shall hold a public hearing on every application for such a license and, if granted, annual license fees must be paid to the County by both the dispensary and the dispensary manager. The granting of a conditional use permit is a prerequisite to the issuance of a business license. No business license shall be issued or renewed unless the licensee carries and maintains approved liability insurance naming the County as an additional insured. The operation requirements for every licensed dispensary are substantially the same as the conditional use permit requirements, as set forth above.

V. Land Use Considerations and Regulatory Issues

A land use regulation lies within the police power of a city if it is reasonably related to the pubic welfare. "The reasonableness of regulation . . . is dependent upon the nature of the business being regulated and the degree of threat that the operation of such business presents to the tranquility, good order, and well-being of the community at large. So long as a 'patent relationship between the regulations and the protections of the public health, safety, morals, or general welfare' exists, the regulations will be considered reasonable." (*7978 Corporation v. Pitchess* (1974) 41 Cal. App.3d 42, 47.)

Traditionally, the City adopts a land use ordinance to address land use impacts associated with a particular use. In order to regulate land use impacts, the City can allow a medical marijuana dispensary by right if it meets certain performance standards. The City can also require the applicant for a dispensary to obtain a conditional use permit. A conditional use permit requires notice and a public hearing. In addition, the City can impose reasonable conditions such as distance requirements, security requirements, limited hours of operation, limitations on the amount of marijuana which can be stored at the facility, and restrictions on the sale of paraphernalia and/or edibles on site. As can be seen from the County's ordinance, there are numerous requirements which may be deemed appropriate and should the City decide to adopt a conditional use permitting scheme, it may well determine that stricter reasonable controls upon such businesses would be desirable. In order to approve or deny a conditional use, the City would be required to make the findings in LAMC §12.24 (E). Also, as with any

ordinance that might cause an impact to the environment, any ordinance would require a CEQA clearance.

If medical marijuana dispensaries are to be allowed in the City of Los Angeles, these establishments should only be in the form of the collectives allowed under state law, discussed above. Ensuring compliance with the provisions of CUA and MMPA—i.e., profits are prohibited and only qualified patients and primary caregivers may cultivate marijuana within specified limits—is critical. Also, regulation of the location and operation of medical marijuana dispensaries is necessary to protect the public health, safety and welfare. By adopting an ordinance addressing the impacts occurring and expected to occur from medical marijuana dispensaries, local control and policy can focus on the impacts from the land uses. The enactment of regulations, consistent with state law, governing the operation of medical marijuana dispensaries will protect residents and businesses from harmful secondary effects of these establishments.

If you have questions, please contact Heather Aubry at 213.978.8393. When this matter is addressed for your consideration, Ms. Aubry or another member of this office will be available to answer any questions you may have.

Sincerely,

ROCKARD J. DELGADILLO, City Attorney

By:
HEATHER AUBRY
Deputy City Attorney

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cc: William Bratton, Chief of Police, Los Angeles Police Department

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