



Memorandum

TO: Mayor and City Council

FROM: Angelique Gaeta-Nedrow
Deputy City Attorney

SUBJECT: Medical Marijuana

DATE: June 18, 2010

SUPPLEMENTAL

The Compassionate Use Act of 1996 ("CUA") provides a narrow affirmative defense to individual patients and their primary caregivers who are charged with criminal prosecution for the possession and cultivation of medical marijuana. The CUA, enacted by the passage of Proposition 215, provides as follows:

"Section 11357 [of the California Health & Safety Code] 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."
(Health & Safety Code § 11362.5(d))

A "patient," under the CUA, is a "seriously ill" person whose use of marijuana "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." Health & Safety Code § 11362.5(d). A "primary caregiver" is defined 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." Section 11362.5(e)

In 2003, the Legislature passed Senate Bill 420, known as the Medical Marijuana Program ("MMP") to "[c]larify the scope of the application of the [Compassionate Use] act." The MMP provided:

"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 11370." (Health & Safety Code § 11362.775)

On October 19, 2009, the U.S. Attorney General issued formal guidelines to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. While declaring its commitment to the enforcement of the Controlled Substances Act ("CSA") in all States, the U.S. Attorney General stated that the Department is "committed to making efficient and rational use of its limited investigative and prosecutorial resources." The U.S. Attorney General further stated that as a general matter, pursuit of significant traffickers of illegal drugs should not focus federal resources on individuals whose actions are in "clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." At the same time, however, the U.S. Attorney General stated that 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... 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... this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion."

Since the release of the U.S. Attorney General guidelines, there has been a proliferation of medical marijuana facilities in San Jose, which, because such uses are not permitted under the City's zoning code, are operating illegally. In response, on March 30, 2010, the City Council requested staff bring forward a draft ordinance establishing regulations for the control and taxation of medical marijuana establishments. The ordinances reflect the CUA's intent while recognizing the limitations placed on the use of medical marijuana by the CUA, the MMP, case law and the U.S. Attorney General's guidelines.

To assist in understanding the legal principles behind the ordinances, this Office has developed a "Medical Marijuana Legal Q & A," attached hereto for reference.

RICHARD DOYLE
City Attorney

By: 
ANGELIQUE GAETA-NEDROW
Deputy City Attorney

MEDICAL MARIJUANA LEGAL Q & A

1. How does State law regulate Medical Marijuana in California?

The cultivation, possession, transportation and sale of marijuana is illegal under both federal and state criminal law. The Compassionate Use Act, approved by the voters in 1996, provides seriously ill patients and their caregivers with *immunities from prosecution* under state law for the possession and cultivation of marijuana for personal medical use, upon the recommendation of a physician. The Medical Marijuana Program Act (MMP) enacted by the Legislature in 2003 provides additional immunities from prosecution of patients and their caregivers for violation of other state criminal laws related to marijuana:

- (1) transportation or processing of marijuana for personal use by a qualified patient or person with an identification card;
- (2) transportation, processing, delivery, or giving away marijuana for medical purposes by a primary caregiver to a qualified patient or person with an identification card; and,
- (3) assistance by any individual to a qualified patient or person with an identification card in administering marijuana or acquiring skills to cultivate it related to the transportation, processing and delivery of marijuana for personal use.

2. Who can be a primary caregiver?

The CUA defined "primary caregiver" to be an individual designated by the patient who has consistently assumed responsibility for the housing, health, or safety of the patient. The MMP expanded the definition to include certain licensed facilities or agencies, such as clinics, hospices and home health care agencies. The California Supreme Court in *People v. Mentch*, has held that the provision of medical marijuana on a consistent basis does not by itself satisfy the definition of the primary caregiver. The primary caregiver must also (1) be designated by the patient and (2) have assumed responsibility for the housing, health or safety of the patient at or before the time he or she began providing medical marijuana to the patient.

Therefore, a medical marijuana collective cannot be a primary caregiver unless it is also a state licensed facility or agency.

3. Does State law allow for the sale of medical marijuana?

No.

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4. What is a marijuana cooperative or collective?

The terms cooperative and collective are not specifically defined in State law. The MMP provides that:

“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...”

The MMP does not require the formation of a legal “cooperative” or some form of a “collective”. Instead, the words “collectively” and “cooperatively” are used to describe the process by which protected cultivation activities must occur, not the form the “group” ultimately takes.

The Attorney General Guidelines issued pursuant to the MMP provide that “cooperatives” must be organized and registered as a “cooperative corporation” under either the Corporations Code or the Food and Agricultural Code.

The Guidelines also specify that “a collective should be an organization that merely facilitates the collaboration of 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.”

5. Are medical marijuana dispensaries that operate as retail establishments allowed under State law?

State law does not provide for medical marijuana dispensaries. The Guidelines note that although dispensaries have been in operation for years, “... they are not recognized under the law. The only recognized group entities are cooperatives and collectives.” The Guidelines also state the Attorney General’s opinion that “a properly organized and operated collective or cooperative that dispenses marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the Guidelines are likely operating outside the protection of” the CUA and the MMP. The Guidelines gave as an example, “dispensaries that merely require e patients to complete a form designating the dispensary as their primary caregiver -- and then offer marijuana in exchange for cash “donations”-- are likely unlawful and cited *People ex. Rel. Lungren v. Peron*.

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6. What is the current legal status of existing medical marijuana establishments in San Jose?

There is currently no City ordinance allowing a medical marijuana establishment as a permitted use anywhere within the City.

7. Are non-profits operating in violation of the MMP if they re-invest profits back into their association?

The law does not recognize the type of business entity formed by a collective in determining whether it is immunized from criminal prosecution. It is the sale of medical marijuana, whether for profit or not, that is the relevant act which takes the business outside of the protections of the MMP.

8. Do medical marijuana patients have a right to privacy in their membership in a medical marijuana establishment? In their health information?

The ordinance is drafted so not to impact any privacy rights a qualified patient or primary caregiver may have in conjunction with his or her membership in a registered collective.

The ordinance does not require a collective to provide the City with names or other information about their members as part of the registration process, except with respect to members who are acting in an owner or management capacity. The ordinance does require the collective to keep an updated list of all members as well as copies of the identification cards and/or physician's recommendations for each member. The collective is also required to provide the City with access to these records for enforcement purposes.

The proposed ordinance requires registered medical marijuana collectives to obtain consent from their members for the inspection and copying of the records required to be held by the collective as described above. The ordinance specifically provides that it does not require the disclosure of any member's private medical information

It should also be noted that any records copied would be pursuant to a police investigation and therefore not subject to disclosure under the California Public Records Act.

9. What is the legal effect of the registration process?

The purpose of the proposed medical marijuana regulatory ordinance and the accompanying zoning ordinance, is to provide a land use designation for medical marijuana collectives, and to provide regulations to protect the health, safety and

welfare of the surrounding neighborhoods from potential public nuisance that may be created if left unregulated.

10. What alternatives does the City have to the proposed registration/regulatory approach?

If the City Council does not wish to allow regulated medical marijuana establishments in San Jose, it could adopt an ordinance affirmatively banning such uses. A ban on medical marijuana establishments would prohibit any such establishments, regardless of the form they took (collective, cooperative or dispensary) and regardless of whether they are already operating here, from operating at all in the City. The benefit of an affirmative ban is that it leaves nothing to interpretation. The public, property owners, and potential medical marijuana providers would be on notice that such uses are specifically prohibited in the City.

If the City Council does not pass any ordinance related to medical marijuana, the status quo will continue. The uses will continue to be not permitted, and the City would have to bring nuisance actions on a case by case basis to have the establishments closed.

A moratorium would not apply in this situation because the purpose of a moratorium is put a hold on the number of existing legal uses until the City decides how it may want to change particular land use provisions. The uses in existence at the time the moratorium is imposed are then grandfathered in under the new law. In this case, the existing medical marijuana establishments are illegal uses and cannot be grandfathered.

11. Why does the ordinance require medical marijuana to be grown onsite?

This is a policy recommendation from the Police Department and the City Manager's Office and is not required by state law.

12. Can medical marijuana collectives hire employees to work at the collective?

No. As stated above, the courts, acknowledge that the collective cultivation of marijuana supposes that each member will contribute to the overall collective effort through in-kind services. The collective cultivation needs to occur between the patient and the primary caregiver.

Furthermore, under the MMP, only a primary caregiver is allowed to be compensated for services related to the cultivation of medical marijuana. A primary caregiver may receive compensation for "actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an

identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both...” As pointed out above, a collective cannot be a primary caregiver.

These provisions taken together lead to the conclusion that the collective cannot hire someone to cultivate marijuana for its members. Even if the employee is a bona fide member of the collective as a primary caregiver for one or more of the qualified patients, the primary caregiver would have to be an employee of the patient(s) and not the collective.

The ordinance provides that members can make in-kind, property, or monetary contributions toward the collective's overhead expenses, but that overhead does not include salary, wages or benefits paid to members of the collective.

13. How would a gross receipts tax on medical marijuana collectives work since the proposed ordinance prohibits the sale of marijuana and any other goods and services at a registered collective?

The State Board of Equalization considers the barter and exchange of goods and services as taxable transactions under the state Sales and Use Tax regulations. Therefore an operator of an exchange where customers pay for their “purchases” with in-kind contributions is taxed on gross receipts. The tax is based on fair retail market value.

The State Board of Equalization has also issued a Special Notice confirming its policy of taxing medical marijuana transactions and requiring such establishments to hold a Sellers Permit. However, the SBE has clarified that the taxation of such a transaction does not make it legal, it only provides a way to remit any sales and use taxes due.

Therefore, the prohibition in the proposed ordinance on the sales of marijuana does not mean that the exchange of marijuana for in kind contributions cannot be valued and taxed under the state Sales and Use Tax. A local gross receipts business tax could be implemented in the same manner.

The proposed ordinance also provides that members can make monetary contributions to cover the overhead expenses of the collective. Taxes would be considered an element of overhead.