



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Angelique Gaeta

SUBJECT: SEE BELOW

DATE: April 15, 2015

Approved

D. D. Syl

Date

4/15/15

SUBJECT: THE HISTORY OF SAN JOSE'S MEDICAL MARIJUANA PROGRAM, AN UPDATE OF THE CITY'S IMPLEMENTATION OF THE PROGRAM AND A COMPARISON WITH THE INITIATIVE FILED BY MEDICAL MARIJUANA ADVOCATES TO REPLACE THE PROGRAM

RECOMMENDATION

Council discussion of the following:

- (1) History of the City's Medical Marijuana Program;
- (2) Update on the implementation of the City's Medical Marijuana Program, including: the registration of dispensaries operating in San José, the City's enforcement actions against non-compliant dispensaries, and the City's collection of the Marijuana Business Tax; and
- (3) Comparison of the City's Medical Marijuana Program with the Initiative filed by medical marijuana advocates, going to the Ballot in June 2016.

OUTCOME

This study session is intended to inform the Council about the City's Medical Marijuana Program, the status of its implementation, and the Initiative filed by medical marijuana advocates. The meeting will provide a public discussion of these complex policy issues and an opportunity for Council to ask questions about these topics.

BACKGROUND

Since 2009, the San José City Council has held numerous public hearings and regular and special meetings to determine the best course of action with respect to how medical marijuana is cultivated, produced, and dispensed within the City. The Council has considered policy options ranging from banning medical marijuana establishments to regulating their locations and operations. Throughout the process, the Council has expressed an interest in supporting compassionate use, but has grappled with how to regulate medical marijuana establishments,

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including, but not limited to collectives, cooperatives, dispensaries and delivery service businesses (hereafter collectively referred to as “dispensaries”).

As with all land use decisions, the Council is charged with making difficult decisions to protect neighborhoods and businesses, protect the City’s long-term economic goals, and ensure the safety of its residents. To that end, on June 10, 2014, the Council adopted ordinances amending both Title 20 of the San José Municipal Code, to provide siting criteria for dispensaries (Land Use Ordinance); and Title 6 of the San José Municipal Code, to provide operational regulations for dispensaries (Regulatory Ordinance). Together, these ordinances make up the City’s current Medical Marijuana Program. The Medical Marijuana Program (Program) is a balance between allowing safe access to medical marijuana by qualified patients (as defined by state law) and existing state law, federal law and enforcement priorities of the United States Attorney General. **Attachment A** to this memorandum is a detailed history on how the Council came to approve the current Program.

The City’s Medical Marijuana Program:

Included in the City’s Program are provisions regarding where the dispensaries can locate, who can operate the dispensaries, and how dispensaries can operate. For example, the Council-adopted ordinances provide that dispensaries can locate in the following Zoning Districts¹:

- CIC – Combined Industrial / Commercial
- LI – Light Industrial
- DC – Downtown Primary Commercial²
- HI – Heavy Industrial
- IP – Industrial Park

With regard to protected areas of the City and buffers between dispensaries and sensitive uses, the Council-adopted ordinances provide that dispensaries cannot be located:

- Within the following development policy areas:
 - North San José Development Policy Boundary;
 - International Business Park Boundary; and
 - Edenvale Area Development Policy Boundary
- Within 1,000 feet of:
 - A public or private preschool, elementary school, or secondary school;
 - A child day care center;
 - A community or recreation center;
 - A park; or
 - A library

¹ Further, the adopted Program provides that no dispensary shall locate or operate on any floor of a retail commercial shopping center located on a parcel(s) totaling over forty (40) acres in size.

² For those dispensaries seeking to locate in the DC Zoning District, the Program provides that they shall not be located on the ground floor of structures or buildings.

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- Within 500 feet of:
 - A substance abuse rehabilitation center; or
 - An emergency residential shelter

- Within 150 feet of:
 - A place of religious assembly;
 - An adult day care center; or
 - A residential use (including legal non-conforming residential use)

- Within 50 feet of another dispensary.³

To address the Council's concern that a dispensary dispense only medical marijuana that is cultivated by the dispensary, the Program included a provision allowing for a dispensary to either cultivate at its dispensing site or at no more than one off-site cultivation-only location. Council further approved a provision that allowed the off-site cultivation-only location to be situated in San José, elsewhere in Santa Clara County, or in any one of the following counties: Alameda, Merced, Monterey, San Benito, San Mateo, San Joaquin, Santa Cruz, or Stanislaus, provided the cultivation site was in compliance with State and local law.

Where dispensary operators were concerned, the Council-approved ordinances require that they undergo a criminal background check and cannot be any of the following:

- Be on parole or probation for the possession, sale, distribution, or transportation of a controlled substance;
- Have been convicted of:
 - a crime of moral turpitude, or
 - convicted within the last ten years of any misdemeanor or felony involving:
 - the use of violence, force, fear, fraud or deception;
 - the unlawful possession, sale, manufacture, use, distribution or transportation of a controlled substance; or
 - the use of money to engage in criminal activity; or
- Be under the age of twenty-one.

The Council also required dispensaries to comply with a number of operational regulations, including, but not limited to the following:

- No retail sales of any products shall occur at the dispensary or cultivation site;
- No one under the age of 21 may be on the premises and no medical marijuana transfers may be made to individuals under the age of 21;
- Medical marijuana may not be ingested or consumed onsite;
- Dispensaries may only be open between 9 a.m. and 9 p.m.;
- Medical marijuana must be packaged in opaque childproof containers;

³ Distance between dispensaries must be measured using a straight line running between the closest parcel boundary lines of each site.

- Edibles must be manufactured/processed on-site at the dispensing location, in compliance with health regulations, and packaged in opaque packaging without pictures of food or candy on the label;
- Packaging that makes the product attractive to children or imitates candy is prohibited;
- At least one security personnel shall be on duty during hours of operation for the dispensing site;
- Off-site cultivation sites must have a minimum of one security personnel on duty 24 hours a day, seven days a week;
- Security cameras must be used and video retained and made available to San José Police Department upon request;
- Collectives must install and use air purification systems and air scrubbers;
- Financial records must be maintained, audited annually, and made available to the City;
- Operators are to keep the dispensary property in a clean and safe condition by removing trash and graffiti, maintaining landscaping, and providing adequate lighting;
- Dispensaries must not create or allow a public nuisance on the premises or within 300 feet of the premises, including:
 - disturbance of the peace;
 - illegal drug activity;
 - public drunkenness;
 - drinking in public;
 - gambling;
 - prostitution;
 - sale of stolen goods;
 - public urination;
 - theft; assaults;
 - batteries; or
 - acts of vandalism
- To ensure marijuana is not coming from illegal sources, including gangs and drug cartels, a dispensary must operate a “closed-loop” system and can only dispense medical marijuana cultivated by the dispensary on-site at the dispensing location or off-site at the one allowed cultivation-only location.

The Registration Process:

The Program ordinances took effect on July 18, 2014 and thereafter, the Council allowed ninety (90) days from that date (*or until October 17, 2014*) for dispensaries to apply to register with the City under the Program as a compliant dispensary; and a full year (*or until July 17, 2015*) for dispensaries to relocate to an area identified in the ordinances approved by the Council.

The registration process outlined in the ordinances requires dispensaries to submit both:

- (1) An Application for a Zoning Code Verification Certificate (Zoning Application), establishing that they are operating in an area that complies with the Program’s Land Use Ordinance; and
- (2) An Application for Registration as a Medical Marijuana Collective (Registration Application), establishing that they will operate in compliance with the Program’s Regulatory Ordinance. Applications submitted after October 17, 2014, were not considered.

Registration Update:

It is estimated that 90 dispensaries were operating in the City on October 17, 2014. Of those dispensaries, 63 submitted applications by the October 17, 2014 deadline to be considered for registration with the City.⁴

To date, 23 of those dispensaries have been denied a Zoning Code Verification Certificate (Zoning Certificate) for being in a prohibited zoning district or too close to a sensitive use; and five dispensaries were disqualified for failing to pay the processing fee for the Zoning Application or failing to provide information necessary for the City to make a determination on the Zoning Application.

Conversely, 30 dispensaries have received a Zoning Certificate and are currently proceeding through the second phase of the registration, the review of the Registration Application.

The remaining dispensaries' zoning applications are still under review.

Review of the Registration Application is conducted by the City's Finance Department, Planning's Code Enforcement Division and the Police Department and involves a check for payment of the City's Marijuana Business Tax (see discussion below), a criminal background check of individuals involved in dispensary operations and a site inspection to ensure both dispensary operations and the dispensary location are in compliance with the Regulatory Ordinance. According to staff, a preliminary review of each application has been completed; however, a majority of the dispensaries have failed to pursue building permits required to build out their dispensing and/or cultivation locations in a manner that complies with the Regulatory Ordinance. As a result, no final inspection can be conducted by the Police Department to ensure compliance with the Program. In fact, to date, only nine of the 30 dispensaries with Zoning Certificates have submitted to the preliminary plan review and/or special tenant improvements review with staff from Planning's Development Services Division (the first step in obtaining their building permits). Of those dispensaries, only one has provided necessary information to the City and has received the building permits required to begin building out its facility for final inspection by the Police Department.

Dispensaries that did not submit both applications by the given deadline or have had one of the required applications denied and failed to submit another application by the deadline were required to immediately cease operations.

Non-Compliant Dispensaries:

In the case of dispensaries that chose to continue to operate following a denial or disqualification from the registration process, or that did not submit either of the applications required for

⁴ Eleven (11) dispensaries submitted only a Zoning Application early in the 3-month application period and were denied a Zoning Certificate for being in a prohibited Zoning District or for locating too close to a sensitive use. Following the denial, these dispensaries chose not to submit either a second Zoning Application or a Registration Application for a different location.

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registration, the Code Enforcement Division has sent letters to the owners of the property where those dispensaries are located to advise them that the dispensary is not allowed at that location and must immediately cease its operations. To date, City staff has confirmed that 23 of the dispensaries at these locations have closed their doors for business, and three are currently facing eviction proceedings by the property owners. The City has also issued citations to property owners leasing property to the following dispensaries, with fines in the following amounts: Cookie Company, Inc., \$75,000; Platinum Society, \$50,000; San José Organics, \$57,500; Herb's, \$5,000; Blue Sky, \$72,500; All American Cannabis Club (A2C2), \$30,000; San José Medicinal, \$35,000; and Delta Health, \$20,000; and, has filed a lawsuit against San José Organics seeking injunctive relief from the Court to prohibit the dispensary from further operations in the City.

The Marijuana Business Tax:

On August 3, 2010, the Council voted to place Measure U, the Marijuana Business Tax (MBT), on the November 2010 ballot. Measure U authorized a gross receipts tax of up to 10% on all marijuana transactions, medicinal or otherwise, legal or illegal. San José voters passed Measure U and it went into effect in March 2011 at a rate of 7% of gross receipts. On July 1, 2013, the Council voted to increase the MBT from 7% of gross receipts to 10% of gross receipts. To date, the City has collected \$19,003,679 in MBT taxes, broken down by fiscal year as follows:

- ✓ FY 2010-2011: \$1,254,478, with an average of 105 dispensaries remitting
- ✓ FY 2011-2012: \$4,001,132, with an average of 107 dispensaries remitting
- ✓ FY 2012-2013: \$4,216,341, with an average of 87 dispensaries remitting
- ✓ FY 2013-2014: \$6,065,913, with an average of 73 dispensaries remitting
- ✓ 7/1/14-2/28/15: \$3,455,815, with an average of 45 dispensaries remitting

Currently, 34 dispensaries are paying the City's MBT.

The Medical Marijuana Advocates' Initiative:

While implementation of the City's Program was underway, a number of medical marijuana advocates gathered signatures and qualified a local initiative that would replace the City's Program with an entirely different framework. An overview of the initiative and a comparison of the initiative with the City's Program is **Attachment B** to this memorandum. In addition, a comparison of parcels available for dispensaries to locate within under the City's Program (A total of 623 parcels) versus the parcels that would be available under the advocates' initiative (A total of 31,517 parcels) can be found in the maps located at the following links:

<http://www.sanjoseca.gov/DocumentCenter/View/39411>

<http://www.sanjoseca.gov/DocumentCenter/View/39412>

Faced with the option of adopting the advocates' initiative outright or placing it before the voters of San José, the Council chose to place it on the June 2016 ballot.

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CONCLUSION

The City is reaching the one-year anniversary of the Council's adoption of the Program and the deadline for dispensaries to relocate and be in full compliance with the Program provisions. In addition, the City has a new Mayor and five new councilmembers. Given these facts, staff was directed to conduct a study session to inform the full Council about the history and implementation of the Program, as well as the initiative that will be placed on the June 2016 ballot.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office.

/s/

ANGELIQUE GAETA

Assistant to the City Manager

For questions, please contact Angelique Gaeta, Assistant to the City Manager, at (408) 535-8253.

Attachment A: History of Medical Marijuana in San José

Attachment B: Initiative Overview and Comparison

ATTACHMENT A

Overview and History of Medical Marijuana in San José

Overview of Medical Marijuana in San Jose:

Prior to the adoption of the City's Medical Marijuana Program, it was illegal to operate a dispensary in San José. However, between 2009 and 2014, faced with declining resources and staffing in San José, a challenging legal process to close dispensaries, and a change in federal enforcement guidelines related to marijuana, the City was faced with taking enforcement action against as many as 100 dispensaries that were operating in San Jose. A detailed timeline with reports and draft ordinances is available on the City's Medical Marijuana website:

<http://www.sanjoseca.gov/medicalmarijuana>.

History of Medical Marijuana in San José:

The City's history with dispensaries dates back nearly twenty years to November 5, 1996, when the voters of California approved Proposition 215, the Safe and Compassionate Use Act, commonly referred to as the "Compassionate Use Act." The Compassionate Use Act (CUA) provides an affirmative defense to individual patients and their primary caregivers, charged with criminal prosecution for the possession and cultivation of medical marijuana, and using marijuana for medicinal purposes as follows:

"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.***" (Health & Safety Code § 11362.5(d))

The CUA defines a "patient" as 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." (Health & Safety Code §11362.5(e)) The CUA did not regulate the cultivation, manufacturing, transporting, or dispensing of medical marijuana within the state. (See **Attachment A-1** for the full text of Proposition 215.)

In 1998, following the passage of Proposition 215, the Council approved zoning regulations for dispensaries and charged the Police Department, Narcotics Division, with overseeing dispensary operations. However, federal enforcement of federal drug regulations ended medical marijuana distribution in San José and the medical marijuana zoning regulations were not included in the comprehensive update of the Zoning Ordinance adopted by the Council in February 2001.

On October 12, 2003, Governor Gray Davis signed into law Senate Bill 420 known as the Medical Marijuana Program Act (MMPA). The MMPA expanded on the CUA by permitting qualified patients and primary caregivers to join together and collectively cultivate medical marijuana. The bill also provided clarity around the definition of “serious medical condition,”⁵ as well as the quantity of marijuana and number of plants a qualified patient or primary caregiver could possess⁶. Specifically, the MMPA 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..." (Health & Safety Code § 11362.775)

In February 2007, the California State Board of Equalization notified dispensaries that they were required to pay sales tax and obtain a seller’s permit to dispense medical marijuana in California.⁷

In August 2008, the California Attorney General issued “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use”⁸ to clarify existing state law. At this time, there were no dispensaries operating in San José.

On October 19, 2009, the U.S. Attorney General issued a memorandum that outlined priorities for marijuana investigations and prosecutions.⁹ The memorandum was addressed to federal prosecutors in states that enacted laws authorizing the medical use of marijuana. While declaring his commitment to the enforcement of the Controlled Substances Act ("CSA"), the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain substances is regulated, the U.S. Attorney General stated that the Department was "committed to making efficient and rational use of its limited investigative and prosecutorial resources" and 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.***

⁵ SB 420 defined serious medical condition as:

“all of the following medical conditions: (1) Acquired immune deficiency syndrome (AIDS); (2) Anorexia; (3) Arthritis; (4) Cachexia; (5) Cancer; (6) Chronic pain; (7) Glaucoma; (8) Migraine; (9) Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis; (10) Seizures, including, but not limited to, seizures associated with epilepsy; (11) Severe nausea; (12) Any other chronic or persistent medical symptom that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

⁶ SB 420 authorized a qualified patient or primary caregiver to possess no more than eight ounces of dried marijuana and no more than six mature plants or 12 immature plants per qualified patient.

⁷ See <http://boe.ca.gov/news/pdf/medseller2007.pdf>.

⁸ See http://oag.ca.gov/system/files/attachments/press_releases/n1601_medicalmarijuanaguidelines.pdf.

⁹ See <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

When the U.S. Attorney General issued his memorandum, dispensaries were not legal in the City. Nevertheless, following the release of the memorandum and faced with extreme fiscal difficulties and resources for enforcement, the City experienced a proliferation of dispensaries in San Jose. By early 2010, staff from the City's Code Enforcement Division had received and investigated complaints of seven (7) dispensaries operating illegally in the City and by March 2010, staff had mailed letters to seventeen (17) businesses suspected of operating as dispensaries to inform them they were operating in violation of the City's Code.

In response, on March 30, 2010, the Council requested staff bring forward a draft ordinance establishing regulations for the control and taxation of medical marijuana establishments.

By August 2010, the number of dispensaries had increased to fifty-seven (57) and on August 3, 2010, the Council voted to place Measure U, the Marijuana Business Tax (MBT), on the November 2010 ballot. Measure U authorized a gross receipts tax of up to 10% on all marijuana transactions, medicinal or otherwise, legal or illegal. On the California ballot that November 2010, was California State Proposition 19, which would have legalized marijuana in the state. Measure U passed in San José while Proposition 19 failed statewide.

On September 13, 2011, after years of community outreach and hearings, the Council adopted a medical marijuana land use ordinance and a medical marijuana regulatory ordinance. However, on October 28, 2011, medical marijuana advocates filed a "Petition for Referendum" challenging the regulatory ordinance and forced the Council to either repeal the regulatory ordinance or put it to a vote of San José residents. The Council chose to repeal the ordinance and to suspend the land use ordinance, as the two were intended to work in tandem. **At this time, more than 100 collectives were operating in San José. None of them were legal.**

Faced with limited resources, the absence of medical marijuana regulations and over 100 dispensaries operating illegally in the City, on February 14, 2012, the Council directed staff to deploy the limited City enforcement resources on dispensaries that:

1. Operated in a manner that created a public nuisance;
2. Failed to pay the Marijuana Business Tax; or
3. Located too close to schools in violation of state law.

On May 6, 2013, **the California Supreme Court** decided the case of *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* and **confirmed local governments' land use authority to regulate or ban dispensaries.**

On September 10, 2013, the Council deemed medical marijuana regulation to, again, be a top ten priority and directed the Administration to explore expanding enforcement and to return to the Council with new regulations.

On December 10, 2013, Council approved expanding the enforcement priorities established on February 14, 2012 to include dispensaries operating:

- Within 1,000 feet of public and private schools, child daycare centers, churches with daycare centers, community/recreation centers, parks, libraries, and other medical marijuana establishments;
- Within 500 feet from substance abuse rehabilitation centers; or

- Within 150 feet from residential uses.

Council also directed staff to take immediate enforcement action against dispensaries sharing a “zero lot line” with a residential use.

On June 10, 2014, as detailed above, the Council adopted the Land Use Ordinance and the Regulatory Ordinance. Together, these ordinances make up the City’s Medical Marijuana Program.

END OF REPORT

Attachment A-1: Full Text of California’s Proposition 215

ATTACHMENT A-1

Proposition 215: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds a section to the Health and Safety Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Section 11362.5 is added to the Health and Safety Code, to read:

11362.5. (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.

(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.

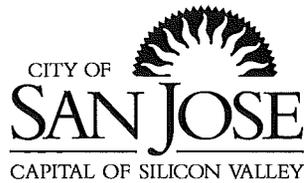
(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(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.

SEC. 2. If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure that can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

For more information: <http://vote96.sos.ca.gov/bp/215text.htm>.



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Angelique Gaeta

**SUBJECT: MEDICAL MARIJUANA
BALLOT INITIATIVE**

DATE: October 17, 2014

Approved

Date

10/17/14

RECOMMENDATION

- (a) Accept staff's report analyzing "An Initiative Ordinance Amending Title 6 and Title 20 of the San José Municipal Code to Include Medical Marijuana Collectives As An Allowed Land Use In Agricultural, Commercial Pedestrian, Commercial Neighborhood, Industrial Park, Light Industrial and Heavy Industrial Zoning Districts, and to Establish a Registration Process and Zoning Code Verification Certificate Process" (Initiative) pursuant to California Elections Code Section 9212; and
- (b) Direct staff to return on November 4, 2014, to approve one of the following options:
 - (1) Adopt the proposed Initiative as submitted;
 - (2) Adopt a resolution calling an election to submit the Initiative to the voters at a Special Municipal Election on a date to be decided; or
 - (3) Adopt a resolution calling an election to submit the Initiative to the voters at the next General Election on Tuesday, June 7, 2016.

OUTCOME

Should the City Council accept staff's report and staff's recommendation, staff will return on November 4, 2014 for the Council's discussion regarding the Initiative and the Council's direction whether to adopt the Initiative or call an election to submit the Initiative to the voters at either a Special Municipal Election or at the next General Election.

EXECUTIVE SUMMARY

On September 30, 2014, the City Clerk advised the Council that pursuant to the California Elections Code, the County Registrar issued a Certificate of Sufficiency certifying enough signatures had been gathered for the Initiative to move forward for consideration by the Council. In response, the Council directed staff to prepare a California Elections Code Section 9212 report regarding the effects of the Initiative, to be presented to the Council no later than October 30,

2014. In addition, the Council directed staff to address the questions raised in the Mayor's September 29, 2014 memorandum found at <http://sanjoseca.gov/DocumentCenter/View/35701>.

Attachment "A" to this memorandum is the Section 9212 report the Council requested. It summarizes the impacts the Initiative would have on the City's regulation of medical marijuana establishments operating in San José and responds to the Mayor's questions.

BACKGROUND

On March 21, 2014, advocates for "The City of San José Control and Regulate Medical Cannabis Act" filed a Notice of Intent to Circulate Petition (Notice) to effectively begin the process of gathering signatures in support of the Initiative. The purpose of the Initiative was to replace the City's Medical Marijuana Regulatory Program (Program) approved by the City Council on June 17, 2014 to regulate medical marijuana establishments, including collectives, cooperatives and dispensaries (hereafter individually referred to as "dispensary" and collectively referred to as "dispensaries") that cultivate, manufacture or dispense medical marijuana in San José with provisions that would:

- Permit dispensaries in the Agricultural, Commercial Pedestrian, Commercial Neighborhood, Industrial Park, Light Industrial and Heavy Industrial zoning districts of the City;
- Modify the fee schedule put in place by the Council to recover the City's cost of allowing dispensaries to operate in the City and regulate those dispensaries;
- Reduce the fine amounts for violation of the City regulations; and
- Remove distance restrictions put in place by the Council to maintain a buffer between dispensaries and residential uses; places where youth congregate; substance abuse treatment facilities; emergency housing facilities; adult day care facilities; and, places of religious assembly.

On September 30, 2014, the City Clerk advised the Council that enough signatures had been gathered by the advocates of the Initiative and that in accordance with the California Elections Code, the Council had three options:

- (1) Adopt the Initiative exactly as written;
- (2) Place the Initiative on the ballot, either at a Special Election or General Election; or
- (3) Order a report on the effects of the Initiative, to be presented in 30 days.

Council chose the third option and directed staff to write a "Section 9212 report" and include in that report answers to the questions raised by the Mayor's September 29, 2014 memorandum.

ANALYSIS

After Council is presented with the Section 9212 report, Council has the following options:

- (1) Adopt the Initiative exactly as written;
- (2) Place the Initiative on the ballot at a Special Election; or
- (3) Place the Initiative on the ballot at the next General Election Date.

Adopt The Initiative Exactly As Written:

Under City Charter Section 1603 (a) (1) and California Elections Code §9214 (a), the Council may adopt the Initiative, without alteration, at the regular meeting at which the Section 9212 report is presented; or, within 10 days after the report on the Initiative is presented. Therefore, if the Council wishes to adopt the Initiative exactly as written, the Council must do so no later than November 7, 2014.

Place the Initiative on the ballot at a Special Election:

If the Council does not adopt the proposed Initiative in its entirety, then under City Charter Article 16, Section 1601 (e), a vote of ten Council Members can call a Special Municipal Election. By November 4, 2014, the Council would have to adopt a resolution with a vote of at least 10 affirmative votes calling an election to submit the Initiative to the voters at a Special Municipal Election on a date to be decided by the Council. The date of that Special Election could be no earlier than 88 days from the date of said resolution;

Place the Initiative on the ballot at the next General Election:

If the Council does not adopt the proposed Initiative in its entirety or vote to call a Special Municipal Election, then under City Charter Article 16, Section 1603 (a) (2), if the petition supporting the proposed Initiative is signed by at least five percent (5%) of eligible registered voters in effect at the time the Notice is published, then the Initiative, without alteration, shall be submitted by the Council to the voters at the next General Election. The next General Election is June 7, 2016. Therefore, the Council should adopt a resolution to submit the proposed Initiative to the voters by November 4, 2014.

COST SUMMARY/IMPLICATIONS

In considering election costs, one of the biggest variables is whether or not the election is consolidated with any other election. For a special election, not consolidated with another election, the City of San José would bear the full cost of the election, including: printing, mailing and personnel costs with the Santa Clara County Registrar of Voters. The Office of the City Clerk obtained cost projections from the Santa Clara County Registrar of Voters and for a stand-alone San José Citywide Measure; the estimated total cost to the City is \$3,797,115. For a

consolidated election at the next General Election in June 2016, the estimated total cost to the City is \$894,189.

EVALUATION AND FOLLOW-UP

Following presentation of the Section 9212 report to the Council, staff will update the Council on a quarterly basis with information regarding the status of the Program approved by the Council and support for the Initiative.

POLICY ALTERNATIVES

Alternative #1: The Council could elect to hold a Special Election

Pros: The time allowed to see whether the community favored the Initiative over the City's Medical Marijuana Regulatory Program would be lessened.

Cons: The cost for the special election could exceed \$3.5 million.

Reason for not recommending: The City needs time to see whether the Medical Marijuana Regulatory Program approved by the Council could be successful. The cost for a Special Election is high.

Alternative #2: The Council could elect to consolidate to the next General Election.

Pros: The next General Election is in June 2016.

Cons: None.

Reason for recommending: Placing the Initiative on the June 2016 ballot would provide the City with time needed to fully implement its Medical Marijuana Regulatory Program and study the effects of the Medical Marijuana Regulatory Program on the community and the industry.

Alternative #3: The Council could choose to adopt the Initiative exactly as written.

Pros: None

Cons: The Initiative ignores the work staff has done for the past four (4) years to create a Medical Marijuana Regulatory Program that would allow for safe access while protecting the public's health, safety and welfare.

Reason for not recommending: The Initiative undoes a substantial amount of the Medical Marijuana regulations approved by the Council on June 17, 2014. There are also serious concerns as to the Initiative's compliance with recent Federal guidelines regarding enforcement in states allowing the medicinal use of marijuana.

PUBLIC OUTREACH

This memorandum will be posted on the City's website for the October 28, 2014 Council Meeting Agenda.

HONORABLE MAYOR AND CITY COUNCIL

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Subject: Medical Marijuana Ballot Initiative

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COORDINATION

This memorandum was coordinated with the Police Department, the Department of Planning, Building and Code Enforcement, the Finance Department, the Clerk's Office, and the City Attorney's Office.

CEQA

Not a Project, File No. PP 10-069, Staff reports and informational memos.

/s/

ANGELIQUE GAETA

Assistant to the City Manager

For questions please contact Angelique Gaeta, Assistant to the City Manager, at (408) 535-8253.

CALIFORNIA ELECTIONS CODE SECTION 9212 REPORT MEDICAL MARIJUANA BALLOT INITIATIVE

INTRODUCTION

California Elections Code Section 9212 provides that the City Council may order a report on the effect of a proposed initiative and may refer the initiative measure to any city agency or agencies for such report. In ordering the report, the Council may request that the city agency or agencies address the following: fiscal impact, effect on the City's general and specific plans, including the housing element and the consistency between planning and zoning; effect on land use, including the impact on availability and location of housing; infrastructure impact; ability to attract and retain business and employment; impact on use of vacant parcels; impact on agricultural lands, open space, traffic congestion, existing business districts and areas designated for revitalization; and any other matters the Council requests to be in the report.

BACKGROUND

On September 30, 2014, pursuant to California Elections Code Section 9212, the City Council directed the City's Administration to prepare a report regarding the effects of the "Initiative Ordinance Amending Title 6 and Title 20 of the San Jose Municipal Code to Include Medical Marijuana Collectives As An Allowed Land Use In Agricultural, Commercial Pedestrian, Commercial Neighborhood, Industrial Park, Light Industrial and Heavy Industrial Zoning Districts, and to Establish a Registration Process and Zoning Code Verification Certificate Process" (Initiative). Specifically, the City Council directed the Administration to address both the list of potential impacts listed in California Elections Code Section 9212 and the questions raised in the Mayor's September 29, 2014 memorandum.¹ This report responds to that direction.

ANALYSIS

This analysis is based upon information available as of October 17, 2014. If the law develops further in this area or other factors change, the analysis may change.

A. CALIFORNIA ELECTIONS CODE SECTION 9212 ANALYSIS

(1) Fiscal Impact

As discussed in the August 5, 2014 memorandum to the City Council, staff anticipates returning to the City Council in January 2015 to establish the final staffing plan needed to operate the Medical Marijuana Regulatory Program (Program) approved by the City Council on June 17, 2014 to regulate medical marijuana establishments including but not limited to collectives, cooperatives and dispensaries (hereafter individually referred to as "dispensary" and collectively referred to as "dispensaries") that cultivate, manufacture or dispense medical marijuana in San

¹ The Mayor's memorandum can be found at: <http://sanjoseca.gov/DocumentCenter/View/35701>.

José. At that time, staff will discuss the fees associated with operating the Program on an annual basis, including an annual operating fee to be charged to each dispensary registered to operate in San Jose. The amount of that fee is dependent upon the number of dispensaries registered with the City and the final identification of resources necessary to maintain the Program on an annual basis. These variables are unknown at this time; however, by way of comparison, in 2011, the City calculated the annual costs to the City to regulate ten (10) dispensaries at approximately \$1.4 million dollars, resulting in a (cost recovery) fee of approximately \$140,000 per dispensary, per year.

The proposed Initiative would reduce any annual operating, registration and processing fees approved by the Council to a level which would not support a cost-recovery Program for the City. Specifically, the Initiative proposes a \$4,000 Biennial Operating Fee (\$2,000 annually), to be paid by dispensaries in quarterly installments of \$500. In sum, the Initiative could reduce any annual operating fee approved by the Council and charged to dispensaries from an estimated \$140,000 per dispensary to \$2,000 per dispensary.

While the Initiative acknowledges that its proposed fees will not be enough for the City to recover its costs, it contends that because the City collects a Marijuana Business Tax (MBT) from each dispensary (currently at the rate of 10% of gross receipts), there is no need for the City to seek to recover its costs to regulate dispensaries. However, the MBT is a voter-approved general tax with revenues generated budgeted in the City's General Fund. The General Fund supports many of the City's operations and programs, including but not limited to: the Fire Department, the Police Department, the Code Enforcement division of the Department of PBCE, parks, libraries, community centers, street and sidewalk repair programs, etc. Any funds paid from the General Fund to cover the cost of allowing and regulating dispensaries in the City would reduce the funds available for critical City operations and programs.

With regard to the amount the City can fine a dispensary or its owners or operators for failing to comply with the Program regulations, the Council recently adopted a Resolution setting fine amounts that range from \$2,500 per violation to \$50,000 per violation – depending on the type of violation and the number of times a particular violation has occurred. The Initiative; however, limits the fine amount for all violations to \$100 per violation, regardless of the type of violation or the number of times a particular violation has occurred.

(2) Consistency with the City of San Jose's General Plan and Specific Plans

There are twelve Major Strategies contained in the Envision San Jose 2040 General Plan (General Plan). Of these twelve, the Initiative is potentially inconsistent with four.

- ❖ Major Strategy #2 – Form Based Plan: This strategy is included in the General Plan to address the form and character, as well as land uses and densities, for the future development of San José, including addressing neighborhood concerns about compatibility of new development, land uses, and the ongoing development of complete, cohesive neighborhoods. However, for three (3) years, the proposed Initiative prohibits any modifications to the provisions of the Initiative that could address neighborhood level

compatibility issues, unless said modifications are approved by a vote of San Jose citizens, State legislation or a State election. As a result, any neighborhood concerns that may arise during the first three years following any adoption of the Initiative would have to wait for an election or State legislation to be addressed. It is likely that by the time an election occurs or State legislation is passed, properties could already be developed with dispensaries, potentially making objections difficult to address by the City.

- ❖ **Major Strategy #4 – Innovation/Regional Employment Center:** This strategy focuses on growing San Jose’s role as a major employment center for the Bay Area. The City Council has repeatedly expressed the concern that should dispensaries open in the North San Jose Development Policy Area, the Edenvale Development Policy Area or the International Business Park Area, desired companies in driving industries would locate elsewhere. This Initiative would allow dispensaries and cultivation sites in all of these areas.
- ❖ **Major Strategy #8 – Fiscally Strong City:** This strategy focuses on establishing a land use planning framework that enables the City to balance revenue needed to cover the costs of delivering high-quality municipal services. However, because this Initiative does not allow the City to establish fees high enough to recover the anticipated costs of regulation associated with implementation of this Initiative, revenue that would otherwise be available for critical City services would be spent on the regulation of dispensaries.
- ❖ **Major Strategy #10 – Life Amidst Abundant Natural Resources:** This strategy focuses on preserving the City’s natural resources including the surrounding hillsides, in addition to establishing and maintaining parks and other recreational amenities. Because the Initiative contains no restrictions as to where cultivation may occur, it is possible that there could be cultivation in the open spaces that are identified for protection as natural resources in the General Plan. In addition, because the Initiative requires at least three playground apparatus in an area for purposes of establishing a minimum distance for a buffer that would limit the potential locations for dispensaries, the City would be unable to prohibit a dispensary from locating next to a park unless the requisite playground equipment were installed.

(3) Impact on the Availability and Location of Housing

This Initiative does not require buffer distances between dispensaries and residential uses. Therefore, a dispensary could locate immediately adjacent to housing.

(4) Impact on Funding for Infrastructure

Should this Initiative pass, as indicated above, the City would not be able to fully recover its regulatory costs. As a result, money in the City’s General Fund, which may have otherwise been used for critical infrastructure and maintenance needs, would instead be spent on regulating dispensaries.

(5) Ability to Attract and Retain Businesses and Employment

One continuing concern of the City Council is the potential land use incompatibility of dispensaries with other types of businesses that are located, or are considering locating, in San Jose. To protect these businesses, the City Council approved Program specifically prohibits dispensaries from locating in the Edenvale Development Policy Area, the International Business Park, and the North San Jose Development Policy Area. This Initiative would undo this part of the Program approved by Council and allow dispensaries in these areas. Allowing dispensaries in these designated areas could deter the very businesses the City is trying to attract from locating or staying in the City.

(6) Impact on Uses of Vacant Parcels of Land

Council approved dispensaries to be located in the following zoning districts:

- ❖ DC (Downtown Primary Commercial);
- ❖ CIC (Combined Industrial/Commercial);
- ❖ IP (Industrial Park);
- ❖ LI (Light Industrial); and
- ❖ HI (Heavy Industrial).

The Zoning Code provisions also potentially allow dispensaries to be located in effectuated Planned Development Zoning Districts where the General Development Standards of each effectuated Zoning District specifically allows uses of at least one of the following zoning districts, as amended: DC, CIC, IP, LI, or HI zoning district.

By contrast, the Initiative proposes allowing dispensaries to be located in the following zoning districts:

- A (Agricultural);
- CP (Commercial Pedestrian);
- CN (Commercial Neighborhood);
- IP (Industrial Park);
- LI (Light Industrial);
- HI (Heavy Industrial); and
- **All** Planned Development zoning districts, including but not limited to A(PD) [Agricultural (Planned Development)] Zoning Districts, regardless of the range of uses otherwise allowed in each specific effectuated Planned Development Zoning District, and regardless of the underlying General Plan land use designations for the areas within each Planned Development Zoning District, **and** regardless of whether or not the Planned Development Zoning District has been effectuated or not, **and** regardless of whether or not a Planned Development Permit has been filed, approved, or denied.

With the expansion of Zoning Districts allowed by the Initiative, any parcel, vacant or occupied, located in one of the listed Zoning Districts is a potential location for a new dispensary. Given the huge quantity and range of land uses located throughout the City, including but not limited to: residential, public/quasi-public, recreational, commercial, and religious assembly uses in the A-Agricultural, (PD) Planned Development, CP-Commercial Pedestrian, CN-Commercial Neighborhood, IP-Industrial Park, LI-Light Industrial, and HI-Heavy Industrial Zoning Districts, the Initiative would extensively expand the areas where dispensaries could locate, and potentially create significant land use conflicts with surrounding development.

(7) Impact on Agricultural Lands, Open Space, Traffic Congestion, Existing Business Districts and Areas Designated for Revitalization

Should this Initiative be approved, Agricultural Lands, Open Space, more Existing Business District areas, and more Areas Designated for Revitalization could become allowable locations. Therefore, additional traffic congestion and negative impacts on surrounding businesses would likely ensue. In addition, agricultural lands and open spaces are becoming scarcer in the City. Because this Initiative would allow these lands to be used for dispensaries, fewer of these lands would be available for recreation or more conventional agricultural uses.

(8) Other Matters

(a) Delivery Services

In addition to the above, this Initiative would allow for delivery-only medical marijuana businesses. By contrast, the City's Program requires all transfers of medical marijuana to occur inside the premises of the dispensary and prohibits persons under the age of twenty-one from being at the dispensary.

(b) Approval/Denial of Applications for Zoning & Registration

Under the City's Program, dispensaries have until October 17th to apply for a Zoning Code Verification Certificate and for registration as a dispensary; and, until July 17, 2015 to obtain a certificate and registration. In addition, the Program provides City staff until July 17, 2015 to review the information submitted by each dispensary in support of each application and provides staff with the time needed to do necessary inspections, investigations, background checks and requests for further information. Under the Initiative, there is no deadline by which dispensaries must apply for or obtain a Zoning Code Verification Certificate or registration. In addition, the Initiative provides the City with only thirty (30) days from the date an application for a Zoning Code Verification Certificate is submitted to issue an approval or denial; otherwise, the application will be deemed approved, whether or not the dispensary is located in an approved Zoning District. Similarly, the Initiative provides the City with only sixty (60) days from the date an application for registration is submitted to issue an approval or denial; otherwise, the application is deemed approved, whether or not any inspection, investigation or criminal backgrounding of individuals has occurred.

(c) Inspections/Investigations

Under the Initiative provisions, prior to the City Manager or the Police Department inspecting dispensaries for compliance, they must provide reasonable notice and request that they be allowed to inspect the premises. In contrast, the City's Program allows for inspection at any time during the dispensary's normal business hours and upon reasonable notice when the dispensary is closed. This approach provides enforcement staff with the element of surprise by allowing staff to drop in on the dispensaries and check for compliance with the City's Program regulations. Under the Initiative, dispensaries would have time to temporarily change their behavior to comply with the Initiative provisions during the agreed upon inspection day and time and return to noncompliance after the inspection.

(d) Restrictions on the Use of City Funds

The Initiative expressly prohibits the City from using City resources to assist in the enforcement of Federal controlled substance laws to the extent that they are inconsistent with California medical cannabis laws unless such assistance is required by Federal or State statute, regulation or court decision. The City's Program has no restrictions on the City's ability to cooperate with a Federal investigation or Federal enforcement activities.

(e) Restrictions on Federal Funding

The Initiative expressly prohibits the City from accepting any Federal funding that would be used to investigate, cite, arrest, prosecute or seize property used on offenses otherwise legal under California medical cannabis laws. The Initiative further prohibits the City from participating in any task force that accepts any Federal funding and investigates, cites, arrests, prosecutes, or seizes property based on offenses otherwise legal under California medical cannabis laws. The City's Program has no restrictions on the City's ability to cooperate with a Federal investigation or Federal enforcement activities.

B. CONCERNS RAISED IN MAYOR'S SEPTEMBER 29, 2014 MEMORANDUM

(1) Zoning And Locations

(a) Would this Initiative allow a medical marijuana dispensary to locate next door to a home?

Yes. There are no distance requirements from residential uses provided in the Initiative.

(b) Under this Initiative, could a dispensary open next door to a day care center? Does this Initiative completely replace the medical marijuana rules that the City Council put in place earlier this year?

There are no distance requirements from day care centers provided in this Initiative. The Initiative would eliminate the provisions regarding day care centers and all other buffers from

sensitive uses that the City Council put in place with the Program it approved on June 17, 2014. For example, the proposed Initiative eliminates the following distance requirements previously approved by the Council following four years of public outreach and staff working with neighborhood communities, committees and the dispensaries:

- 1,000 feet from preschools, elementary schools, and secondary schools;
- 1,000 feet from child day care centers;
- 1,000 feet from community and recreation centers;
- 1,000 feet from libraries;
- 1,000 feet from parks;
- 500 feet from substance abuse rehabilitation centers;
- 500 feet from emergency residential shelters;
- 150 feet from adult daycare centers;
- 150 feet from religious assembly uses;
- 150 feet from residential uses; and
- 50 feet from other dispensaries

(c) Would this Initiative allow onsite consumption of medical marijuana? Would consumption be allowed in the parking lot? Or in the surrounding neighborhood? On an outdoor patio?

There are no restrictions on consumption contained in this Initiative. Therefore the only restrictions on consumption would be those that are set forth in State law, which prohibits consumption as follows:

1. Any place where smoking is prohibited by law
2. In or within 1,000 feet of a school recreation center or youth center;
3. On a school bus;
4. While in a motor vehicle that is being operated; and
5. While operating a boat.

The City's Program not only adopts the State law restrictions, it further prohibits the consumption or use of medical marijuana at any dispensary, in the parking areas of any dispensary, and on the public right of way within three-hundred (300) feet of any dispensary.

(d) Under this Initiative, could a neighborhood business district like Lincoln Avenue in Willow Glen be turned into Little Amsterdam, with dispensaries taking over entire blocks?

Because the Initiative contains no distance requirements between dispensaries, and because the Initiative allows dispensaries in the CN-Commercial Neighborhood and CP-Commercial Pedestrian Zoning Districts, such as Lincoln Avenue, multiple dispensaries could be located within the same block.

(2) Source Of Marijuana

(a) Does this Initiative provide any protection for seriously ill patients about the source of the medical marijuana they are buying?

This Initiative contains no explicit restrictions or regulations as to where the medical marijuana is originating from or what chemicals are used in its cultivation. Under this Initiative, the dispensaries are expected to self-regulate, with no accounting as to compliance with the provisions of the Initiative.

By contrast, the City's Program requires a "closed loop" system in which all medical marijuana must be cultivated at one location that is controlled by the dispensary.

(b) Does this Initiative place any restrictions or create any framework for where cannabis sold at dispensaries can be grown?

This Initiative will allow medical marijuana to be grown in any zoning district in the City where a dispensary can locate. It would also allow the growing of medical marijuana to occur outdoors. Finally, the Initiative does not limit medical marijuana cultivation to Santa Clara County or adjacent counties.

By contrast, the City's Program requires cultivation to occur indoors and limits cultivation to the County of Santa Clara and other contiguous counties so that enforcement staff can still conduct inspections and investigations to ensure compliance with the City's regulations.

(c) Under this Initiative, could a dispensary source its products from illegal grow houses or drug cartels?

Unlike the City's Program, this Initiative contains no requirement that dispensaries document where the medical marijuana originates from. Therefore, the medical marijuana could be supplied by a local or international cartel and unless there is a law enforcement investigation, City regulators or members of the dispensary would not know this information.

(3) Standards For Operators And Staff

(a) Under this Initiative, could a former leader of a narcotics ring who was convicted ten years ago open a dispensary in San Jose but has served their time and isn't on parole or probation?

The Initiative provides that an individual interested in opening a dispensary only provide information regarding criminal convictions that occurred within the last 7 years. In addition, the Initiative requires only "senior managers" to go through a criminal background check and defines "senior managers" as those employees who are in charge of the organization, registration, supervision or oversight of the operation of the dispensary. Therefore, the employee selling medical marijuana at the counter, or the one who is growing the product, could be a

convicted felon still on probation or parole. In contrast, the City Program requires the criminal background check for any person who is an owner or manager or any person who participates in the cultivation, processing, manufacturing, transporting or dispensing of marijuana and requires those individuals to provide a criminal history for the past 10 years.

In addition, the Initiative only disqualifies from the registration process senior managers who:

- Are on parole or probation for the possession, sale, distribution or transportation of a controlled substance; or
- Have been convicted of a felony within the last seven years involving:
 - Use of violence, force, fear, fraud or deception
 - Unlawful possession, sale, distribution or transportation of a controlled substance;or
 - The use of money to engage in criminal activity.

The City Program, by contrast, disqualifies any owner, manager or person involved in the cultivation, processing, manufacturing, transporting or dispensing who is or has been:

- On parole or probation for the possession, sale, manufacture, use, distribution or transportation of a controlled substance;
- Convicted of a crime of moral turpitude;
- Convicted of a misdemeanor or felony within the last 10 years involving
 - The use of violence, force, fear, fraud or deception;
 - The unlawful possession, sale, manufacture, use, distribution or transportation of a controlled substance; and
 - Use of money to engage in criminal activity.

(b) What about someone convicted of gang activities?

If it has been longer than 7 years since that person was convicted of gang activity or if the individual is not considered to be a “senior manager,” under this Initiative, that person can potentially open a dispensary.

(c) What about someone convicted of operating illegal grow houses?

If it has been longer than 7 years since that person was convicted, or if that person is not considered to be a “senior manager,” under this Initiative, that person can potentially open a dispensary.

(4) Applicability Of The Ordinance To Recreational Marijuana Sales

(a) Does this mean that, should the voters of California legalize recreational marijuana, recreational marijuana would be allowed to be sold next door to homes? Within 101 feet of a youth center? Next door to a day care center?

Unless the voters of California choose to approve more stringent distance requirements, then the distance requirements contained in this Initiative will remain.

(b) Does Section 14 mean that if problems develop – for example, with consumption in parking lots – the City Council could only amend the Title 6 operational regulations by going to the voters? Or waiting three years for the time limit to pass?

The City Council could only amend the provisions of the proposed Initiative by going to the voters or by waiting 3 years for the time provided in the Initiative for amendments to be brought forward to expire. Specifically, if passed, the Initiative could only be amended by the following actions:

- City of San Jose voter approval;
- State Legislation;
- State of California voter approval; or
- Three (3) years have passed since the effective date of the Initiative

(5) Compliance with Federal Guidelines and State Laws

(a) Is this Initiative in compliance with the federal guidelines on cannabis cultivation and sales?

On February 14, 2014, the United States Attorney General issued a memorandum containing eight guidelines regarding enforcement where medical marijuana is involved. Those guidelines and an analysis of whether they meet the guidelines follow:

- **Preventing the distribution of marijuana to minors:** This Initiative grants minors access to the dispensary provided that they are accompanied by their parent, documented legal guardian, or physician. The Program adopted by the Council does not allow anyone under the age of 21 on the dispensary premises. Additionally, the Program adopted by Council contains provisions on the packaging and labeling of medical marijuana, including child-proof containers.
- **Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels:** The Initiative does not contain any record keeping requirements as to how or from where the medical marijuana was obtained or to whom and in what quantities it was dispensed. By contrast, the Program adopted by Council requires every dispensary to maintain complete records regarding the amount of medical marijuana it cultivates, produces, harvests, stores and packages. In

addition, under the City’s Program, each dispensary is required to maintain complete records regarding medical marijuana transfers from the dispensary’s cultivation site to its dispensing site if they are not one and the same. Further, on the fifteenth day of each month, each dispensary must provide a detailed accounting of expenses to its membership. And, all accounting and record keeping must be submitted to the City’s Director of Finance on a quarterly basis.

- **Preventing the diversion of marijuana from States where it is legal under State law in some form to other States (where it is not):** As stated above, the Initiative does not require recordkeeping by a dispensary documenting where the medical marijuana being dispensed was obtained.
- **Preventing State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or illegal activity:** Unlike the Program approved by Council, the Initiative does not require dispensaries to have annual audits completed by a CPA or quarterly accountings of overhead expenses filed with the City.
- **Preventing violence and the use of firearms in the cultivation and distribution of marijuana:** The Initiative contains provisions specifying when and how firearms may be present on the premises of a dispensary.
- **Preventing drugged driving and exacerbation of other adverse public health consequences associated with marijuana use:** The only requirement in the Initiative pertaining to driving is the posting of a sign stating that it “may impair a person’s ability to operate a motor vehicle.” The Program approved by Council prohibits onsite consumption at dispensaries and on public property within 300 feet of a dispensary; thereby limiting the possibility of drugged driving from the dispensary.
- **Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands:** Due to the lack of a requirement for recordkeeping in the Initiative concerning where medical marijuana originated, there is no way of knowing whether or not the medical marijuana is grown on public or private lands.
- **Preventing marijuana possession or use on federal property:** California State law prohibits the consumption of medical marijuana in any location that is prohibited by law. The Initiative does not directly address this.

(b) Is this Initiative in compliance with State law?

The Initiative states that, “It shall be the responsibility of the senior managers of the collective to ensure that the collective is at all times operating in a manner compliant with all applicable State and local laws. Nothing in this Chapter shall be construed as authorizing any actions that violate State law with regard to the cultivation, transportation, provision, and sale of cannabis.” The

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Initiative also requires members of a dispensary to sign an agreement with the dispensary stating that they will not distribute medical marijuana to nonmembers and that they will not use medical marijuana for other than medicinal purposes.

However, the Initiative does not contain explicit record keeping requirements that would document where a dispensary's medical marijuana was cultivated or how much medical marijuana was dispensed to each member. This lack of record keeping, coupled with the requirement that the City must provide reasonable notice before inspecting a dispensary's premise and records, may make it difficult for the City to determine if State law is being followed (e.g. that medical marijuana is only being dispensed to qualified patients and their primary caregivers and that medical marijuana is being cultivated for the collective only by members of the collective).

COORDINATION

This report was coordinated with the Police Department, the Department of Planning, Building and Code Enforcement, the Finance Department, the Clerk's Office, and the City Attorney's Office.

/s/

ANGELIQUE GAETA

Assistant to the City Manager