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REPORT TO THE COMMITTEE ON PUBLIC SAFETY AND NEIGHBORHOOD SERVICES

MEDICAL MARIJUANA

INTRODUCTION

The Office of the City Attorney is issuing this Report in response to issues raised at the July 8, 2009 meeting of the Committee on Public Safety and Neighborhood Services [Committee] with respect to medical marijuana. The Committee asked this Office to provide information on how to establish a task force, how to enact an interim moratorium on "dispensaries,"[1] whether the amounts of medical marijuana allowed in the San Diego Municipal Code will change because of the County of San Diego's [County] issuance of identification cards, and whether cooperatives or collectives can be "police-regulated." We also take this opportunity to provide the Committee with some additional information related to medical marijuana.

BACKGROUND

In 1996, California voters approved Proposition 215, also known as the "Compassionate Use Act of 1996." Cal. Health & Safety Code § 11362.5. Proposition 215 provides seriously ill Californians the right to obtain and use marijuana for medical purposes when such use is recommended by a physician. The recommendation can be oral or written. Proposition 215 further provides that both the patient and the patient's "primary caregiver" are exempt from prosecution for violating state laws against the possession and cultivation of marijuana. "Primary caregiver" is defined as the individual designated by the patient who has consistently assumed responsibility for the housing, health, or safety of that person. *Id.*

Effective January 1, 2004, the Legislature enacted the "Article 2.5 Medical Marijuana Program" [Medical Marijuana Program], also commonly referred to as "SB 420" (Senate Bill 420). Cal. Health & Safety Code §§ 11362.7-11362.83. The legislation expanded the state law exemptions for qualified patients and primary caregivers to include exemptions from arrest and prosecution for possession for sale; transportation, distribution, and importation; maintaining

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[1] The word "dispensaries" does not appear in California's medical marijuana statutes, and is often used to describe a variety of operations related to distributing medical marijuana, which may or may not comply with state law.

a place for unlawfully selling, distributing, or using; knowingly making available a place for unlawful manufacturing, storage, and distribution; and using such a place. The legislation also allows marijuana to be collectively or cooperatively cultivated for medical purposes by qualified patients and primary caregivers. Cal. Health & Safety Code § 11362.775. Cultivating or distributing marijuana for profit is expressly disallowed. Cal. Health & Safety Code § 11362.765(a). Primary caregivers may recover reasonable compensation for services and for out-of-pocket expenses. Cal. Health & Safety Code § 11362.765(c).

State law does not authorize the smoking of marijuana in places where smoking is otherwise prohibited, nor does it authorize smoking on a school bus, in a motor vehicle that is being operated, or within 1,000 feet of a school, recreation center, or youth center, unless the medical use occurs within a residence. Cal. Health & Safety Code § 11362.79. State law does not require workplaces or jails to allow medical marijuana use. Cal. Health & Safety Code § 11362.785.

The Medical Marijuana Program also established a voluntary identification card system to be maintained by the State Department of Health Services. Cal. Health & Safety Code § 11362.71. The intent of the Medical Marijuana Program is, in part, to insure a uniform, statewide identification program for patients and primary caregivers. As part of the Medical Marijuana Program, each county health department, or the county's designee, provides applications, receives and processes completed applications, and issues identification cards. Cal. Health & Safety Code §§ 11362.71(b); 11362.72-11362.74. Participation is voluntary and possession of an identification card is not required to qualify for the protections of Proposition 215 and the Medical Marijuana Program. The County recently began issuing identification cards.

As a result of the work of the Medical Marijuana Task Force, established by the City of San Diego [City] in 2000, the City adopted San Diego Ordinance O-19036 (Feb. 25, 2002), establishing a medical marijuana verification card program. San Diego Municipal Code §§ 42.1301-42.1312. The City's verification card program was never implemented and is preempted. 88 Op. Cal. Att'y Gen. 113 (2005). The San Diego Police Department uses the ordinance as a guideline in its enforcement of the state's medical marijuana laws as it relates to the amounts of medical marijuana qualified patients and caregivers are allowed to possess or cultivate.

In 2007, this Office issued a legal opinion [Opinion] on the legality of "dispensaries" and advised that any model of distribution of marijuana not in strict compliance with state law is illegal, and that all models of distribution are illegal under federal law. Op. City Att'y 2007-3, (June 21, 2007).

QUESTIONS PRESENTED

1. What does the City Council do to establish a medical marijuana task force?

2. How does the City Council enact a temporary moratorium on "dispensaries?"

3. Do the amounts of medical marijuana allowed in the San Diego Municipal Code conflict with the County's identification card program?

4. Can collectives and cooperatives be "police-regulated?"

SHORT ANSWERS

1. The City Council can create a task force/citizen committee pursuant to Charter section 43(b). The task force can advise on questions with clearly defined objectives, is temporary, and dissolves upon completion of the objectives.

2. The City Council can enact a moratorium on any use in order to protect the public safety, health, and welfare, so long as an adequate factual record is developed and other requirements of Government Code section 65858 are met.

3. Local governments, including the City, may enact regulations that allow patients and primary caregivers to possess in amounts that meet or exceed the amounts allowed in the California Health and Safety Code. The issuance of identification cards by the County does not affect the City's ability to set forth such guidelines.

4. There is no statute or case that addresses the issue of the appropriateness of a "police permit" for a collective or cooperative. However, given the nature of the business, i.e. exempt from state prosecution and illegal under federal law, this Office recommends other options be explored, such as zoning regulations, rather than putting the San Diego Police Department in the position of providing a permit to such businesses.

DISCUSSION

1. The City Council Can Create a Task Force Pursuant to San Diego Charter section 43(b).

San Diego Charter section 43(b) allows the City Council (and Mayor or Manager) to create and establish temporary citizen committees only for the purpose of advising on questions with clearly defined objectives. The committee must also be temporary in nature and must dissolve upon the completion of the objectives for which it was created. Members serve without compensation.

The committee/task force would be subject to the Brown Act pursuant to Council Policy 000-16. Nominations and appointments typically include persons selected by the councilmembers and mayor, and may include representatives from particular fields. For example, relevant groups for this topic may be the health industry, drug prevention coalitions, youth advocacy groups, and medical marijuana advocacy groups. Such a task force can be staffed by appropriate City staff. It appears to us that the mission of the task force would likely dictate the make-up of the task force.

If the Committee desires to create a task force, the Committee should forward a recommendation to the City Council with the appropriate criteria: (1) questions with clearly defined objectives to be answered by the task force, and (2) the suggested make-up or selection

process for persons to be appointed to the task force. The City Attorney's Office would prepare a resolution creating the task force for consideration by the full City Council.

2. The City Council Can Enact an Interim Moratorium on Medical Marijuana Collectives and Cooperatives.

A. Collectives and Cooperatives.

The City Council may consider an interim ordinance as it relates to cooperatives or collectives, as those operations are recognized by state law. Any operation not following state law is otherwise illegal, and an ordinance disallowing what is already illegal is not necessary.

As noted earlier, this Office issued a legal opinion on "dispensaries." Op. City Att'y 2007-3 (June 21, 2007). We now conclude that under the current state of the law surrounding medical marijuana, the Opinion remains valid. California state law protects qualified patients and primary caregivers who collectively or cooperatively cultivate medical marijuana from state prosecution for those activities, which would otherwise be illegal. Cal. Health & Safety Code § 11362.775. Any sale or distribution by anyone other than qualified patients and primary caregivers remains illegal under state law.

Court cases have consistently held that one who maintains or supplies marijuana to qualified patients does not become a "primary caregiver." *People ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383, 1390, 1400 (1997); *People v. Urziceanu*, 132 Cal. App. 4th 747, 733 (2005). A primary caregiver is one who has consistently provided caregiving at, if not before, the time period when helping with the marijuana use begins. A supplier of marijuana is not a "caregiver." *People v. Mentch*, 45 Cal. 4th 274, 283-284 (2008).

In August 2008, the Attorney General issued "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" [Guidelines]. In those Guidelines, the Attorney General has provided some specific guidance with respect to collectively or cooperatively cultivating and distributing marijuana for medical purposes.

With respect to a "cooperative," such an endeavor must comply with the Corporations Code or the Food and Agricultural Code. The Attorney General notes that there is no statutory definition of a "collective," but that such an organization "merely facilitates the collaborative efforts of patient and caregiver members," and may have to organize as some form of business. The Attorney General recommends adequate recordation and tracking of labor, resources, money, and marijuana, as well as security measures. The cycle of cultivation and consumption should be a closed circuit, as only marijuana grown by a qualified patient or caregiver may be lawfully transported or distributed. No marijuana may be purchased outside the collective or cooperative, nor

may it be sold to non-members. The collective or cooperative may only recover overhead and operating expenses.[2]

B. California Government Code section 65858.

California Government Code section 65858 allows for a moratorium on any uses in order to protect the public safety, health, and welfare. The otherwise applicable procedures for the adoption of a zoning ordinance need not be complied with. The requirements and limitations of this section are as follows:

- The prohibited use must be in conflict with a contemplated general plan, specific plan or zoning proposal that the legislative body, planning commission or planning department is considering, studying or will consider or will study within a reasonable time.
- The urgency measure requires a four-fifths vote.
- The interim ordinance is of no effect forty-five days after adoption.
- An extension of the ordinance may be obtained for ten months and fifteen days, and a subsequent one year extension, after compliance with the requirements of California Government Code section 65090 and a public hearing. These extensions also require a four-fifths vote.
- Alternatively, an extension may be obtained for twenty-two months and fifteen days by compliance with California Government Code section 65090 and a public hearing; also with a four-fifths vote.
- The adoption and any extension must contain legislative finding that there is a current and immediate threat to the public health, safety, or welfare and that the approval of any additional entitlements would result in a threat to public health, safety, or welfare.
- Ten days prior to the expiration of the interim ordinance or any extension, the legislative body must issue a written report describing the measures taken to alleviate the condition that lead to the adoption of the ordinance.
- At the end of the effective date or any extensions, a new urgency ordinance may not be enacted to address the same threat to public safety, health and welfare as the prior interim ordinance.

In order to make the findings necessary under California Government Code section 65858, an adequate factual record needs to be developed. If the Committee

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[2] Medical marijuana transactions, including any made in a collective or cooperative, are taxable by the State and businesses engaging in such a transaction must hold a Seller's Permit. www.boe.ca.gov/news/pdf/medseller2007.pdf.

desires to recommend such an ordinance to the full City Council, we advise that this issue be heard at the Committee on Land Use and Housing for that body to develop an adequate factual record to support the findings needed for such an ordinance.

3. The Effect of the County Identification Card Program on the San Diego Municipal Code.

The Medical Marijuana Program established a voluntary statewide identification card system. The applications for and issuance of the identification cards are, pursuant to state law, handled by the County. Cal. Health & Safety Code § 11362.71. The Medical Marijuana Program also sets forth possession guidelines for patients and caregivers. Cal. Health & Safety Code § 11362.77.

San Diego Municipal Code sections 42.1301 through 42.1312 create a City verification card program. The City card program has never been implemented. The City cannot enforce its provisions relative to a card program because the card program is preempted by state law.[3] 88 Op. Cal. Att'y Gen. 113, 117 (2005).

San Diego Municipal Code section 42.1308 describes amounts of marijuana that can be possessed by a patient or primary caregiver in the City, exceeding the amounts allowed under state law, which is permissible under state law. Cal. Health and Safety Code §§ 11362.77(a) and 11362.77(c). These amounts are incorporated into the San Diego Police Department's procedure on enforcement of medical marijuana. State law specifically allows local jurisdictions to set possession amounts at or above the amounts allowed by state law, therefore anything the County does with respect to setting its own amounts does not affect the amounts allowed by the City. The identification card program does not alter the amounts allowed by the City.

4. Can Cooperatives or Collectives Be "Police-regulated?"

In San Diego, certain businesses and occupations are "police-regulated," meaning they cannot operate without a police permit, are subject to inspection by the police department, and must comply with various regulations governing their occupations and businesses. San Diego Municipal Code § 33.0101. Permittees must complete a background check and, in addition to any other penal or civil remedies, are subject to various regulatory penalties including suspension and revocation of their permit for specified violations of the San Diego Municipal Code or other applicable law. San Diego Municipal Code §§ 33.0301-33.0313; San Diego Municipal Code § 33.0401. Regulated occupations and industries include second-hand dealers, entertainment establishments, nude entertainment, massage therapists, and bingo operations.

There is no case or statute directly addressing the issue of police regulation over collectives or cooperatives. California Health and Safety Code section 11362.83 (part of Senate Bill 420, the Medical Marijuana Program) says, "Nothing in this article shall prevent a city . . . from adopting and enforcing laws consisted with this article." Generally, so long as any

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[3] San Diego Municipal Code section 42.1313, addressing smoking cannabis in public places, remains valid and is not preempted. Cal. Health & Safety Code § 11362.79.

ordinance passed by the City is consistent with state law, it is not preempted. 88 Op. Cal. Att'y Gen. 113, 117 (2005).

In this case, the "industry" is not an industry in the sense of a retail business. State law says that those who collectively or cooperatively cultivate medical marijuana are not subject to arrest and prosecution for violating California's drug laws; it does not make such endeavors "legal." And, such endeavors remain illegal under federal law. Proposition 215 and the Medical Marijuana Program provide protection from arrest and prosecution for engaging in certain activities; the cooperative or collective cultivation of marijuana by certain qualified persons means they can assert an affirmative defense. Careful consideration must be given as to whether "police" regulation makes sense in this situation.

OTHER ISSUES

This Office takes this opportunity to provide the Committee with additional information related to medical marijuana.

1. Identification Card Program and Conflict with Federal Law.

The Fourth District Court of Appeal recently answered the question of whether the statewide identification card program conflicts with the federal Controlled Substance Act. The Court concluded it does not. The County of San Diego (and others) sued the State of California (and others) alleging that the identification card program was unconstitutional because it was preempted by federal law. The Court held that the identification card program was not preempted. *County of San Diego, et al. v. San Diego NORML, et al.*, 165 Cal. App. 4th 798 (2008), rev. denied October 16, 2008.

2. Local Government's Authority to Ban "Dispensaries," Collectives, and Cooperatives.

In September of this year, the Fourth District Court of Appeal will hear oral argument in *Qualified Patients Association, et al. v. City of Anaheim* (#G040077, Fourth Dist., Div. 3). Anaheim passed an ordinance banning "dispensaries," defined as the facilities or locations where medical marijuana is made available to or distributed by or to three or more qualified patients, identification card holders, or primary caregivers. The issues on appeal include whether the ordinance is preempted by Proposition 215 and the Medical Marijuana Program, and whether Proposition 215 and the Medical Marijuana Program are preempted by federal law.

3. Return of Medical Marijuana.

Law enforcement officers, who handle controlled substances in the course of their duties, including returning medical marijuana to an authorized recipient, are immune from liability under federal law. *City of Garden Grove v. Superior Court (Kha),* 157 Cal. App. 4th 355 (2007).

4. Limits on Amount a Patient or Caregiver May Possess.

Two courts recently ruled that one portion of the Medical Marijuana Program (California Health and Safety Code section 11362.77) which sets guidelines for the amount a patient may

possess, is an unconstitutional amendment of Proposition 215. Both cases were accepted for review by the California Supreme Court, and thus are not citable authority. Cal. R. Ct. 8.1105(e). The rulings would have limited the state and local government's ability to set the amount of medical marijuana a patient or caregiver may possess. When the California Supreme Court rules, we will likely know whether local governments may set forth specific amounts a patient may possess. *People v. Kelly,* 163 Cal. App. 4th 124 (2008) rev. granted August 13, 2008, and *People v. Phomphakdy*, 165 Cal. App. 4th 857, rev. granted October 28, 2008.

5. Physicians.

Physicians may not be punished for recommending medical marijuana. However, the Attorney General confirmed in its Guidelines that the Medical Board of California can take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (August 2008), p. 3.

Respectfully submitted,

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