



City Manager's Report
November 22, 2011 City Council Meeting
Prepared by: John Driscoll, City Attorney
George Nielsen, Chief of Police

Item #: 10.1


Subject: Waive the Second Reading of an Ordinance Banning the Establishment and Operation of Medical Marijuana (Cannabis) Dispensaries within the City, and Adopt Said Ordinance.

Discussion: At the November 8, 2011 City Council meeting, the City Council introduced this Ordinance and waived the first reading. A copy of the November 8, 2011 staff report, with the background information on this issue, is attached to this staff report and listed as "Exhibit A".

Cost: There is no direct fiscal impact associated with Option 1, while Options 2 and 3 will result in codification costs for either of the new Ordinances.

Budget Impact: Although there are costs involved with codification, those costs should be absorbed in the current budget. Therefore, no budget amendment is necessary.


Recommendation: Waive the Second Reading of an Ordinance Banning the Establishment and Operation of Medical Marijuana (Cannabis) Dispensaries within the City, and adopt said Ordinance.



John Driscoll, City Attorney



M. Cleve Morris, City Manager



George Nielsen, Chief of Police

EXHIBIT A



November 8, 2011 Staff Report

City Manager's Report

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Prepared by: John Driscoll, City Attorney

George Nielsen, Chief of Police

Item #: 10.1

Subject: Waive the Second Reading of an Ordinance Banning the Establishment and Operation of Medical Marijuana (Cannabis) Dispensaries within the City, and Adopt Said Ordinance.

Discussion: In 2006, the City added Chapter 25, Sections 1-25, to Title 5 of the Placerville City Code, which provided for the operation and permitting of Medical Cannabis Dispensaries, also known as Medical Marijuana Dispensaries (MMDs). At the same time, the City added Chapter 10, Sections 1-3, to Title 10 of the City Code, which established zoning regulations for MMDs.

Since these Ordinances were added, two MMDs have operated in the City. Both operated at the same location, one after the other. The last MMD ceased operations in April 2009, at which time it was denied renewal of its operating permit following an appeal to the City Council. Since that MMD ceased operation, the Police Department has received several applications for permits to operate MMDs. Three such applications have been processed and all were denied. One applicant actually tried to commence operation before the processing of the application was completed. A fourth application was withdrawn. Because of the limited staff resources and the extensive review required to process an MMD application, only one permit can be processed at a time and the process is somewhat lengthy and labor intensive.

Because of some recent case decisions, as well as the ongoing problems associated with the operation of an MMD, as discussed herein below and further set forth in the attached report presented by the California Chiefs of Police Association (see Attachment A hereto), staff recommended in February 2010 that the Council adopt an Urgency Ordinance placing a moratorium on MMDs in the City of Placerville.

On February 9, 2010, the City Council adopted an Urgency Ordinance enacting a moratorium on the establishment and operation of MMDs. That moratorium was extended for a period up to six months by the City Council at its March 23, 2010 meeting. On August 24, 2010, the moratorium was extended for an additional period of up to 16 months. The moratorium and extensions thereof were prompted in part because of ongoing problems that the City had experienced with the operation of MMDs in the City, as well as information contained in the report by the California Chiefs of Police Association.

The Compassionate Use Act (CUA) was adopted by voter initiative in 1996 (Proposition 215). It permits patients and their primary caregivers to possess and cultivate marijuana for medical purposes where marijuana use has been recommended by a physician. Although an initial goal of the CUA was to encourage cooperation between state and federal officials, the Federal Drug Enforcement Agency (DEA) has continued to enforce the Controlled Substances Act against

dispensary operators and others who supply patients in California with medical marijuana. The Controlled Substances Act (CSA) states that the manufacture (including cultivation), distribution and dispensing of marijuana are illegal for any purposes, including medical use. Moreover, the U.S. Supreme Court and lower federal courts have upheld the enforcement actions by the DEA, thus placing California state and local officials in the difficult position of implementing the CUA in direct opposition to federal law.

The State of California adopted SB 420 in 2004, which is known as the Medical Marijuana Program Act (MMP). While the MMP deals with many issues that were not addressed in the CUA, the state has not given direction with respect to a city's role in regulating the dispensing of marijuana, the potential conflict between federal and state law, and concerns regarding the secondary impacts of dispensaries on communities.

As enacted, the CUA did not define how much marijuana a patient could legally possess or cultivate, and the definition of "primary caregiver" was vague, resulting in the creation of numerous marijuana dispensaries throughout the state of California operating with no standards or local control. As previously indicated, the California legislature, in 2004, enacted the MMP, which, among other things, did the following: 1) redefine the definition of "primary caregiver"; and 2) set out a maximum amount of marijuana a patient or caregiver could possess and cultivate. A recent California Supreme Court decision, as well as State of California Attorney General Guidelines (Guidelines) have further clarified the definition of "primary caregiver," while an even more recent California Supreme Court decision has invalidated the provisions of MMP with respect to the maximum amount of marijuana a patient or caregiver could possess or cultivate.

On January 21, 2010, the California Supreme Court, in *People v. Kelly*, basically eliminated the restrictions on the amount of marijuana a qualified patient can possess. The Court ruled that the MMP, which limited the amount of marijuana that a "primary care giver" or "qualified patient" can possess to no more than eight ounces of dried marijuana and no more than six mature or twelve immature plants, was unconstitutional. The Court found that the establishment of limitations on the amount of marijuana to be possessed and/or cultivated conflicted with the intent of Proposition 215, which set no such limits. Rather, the Court held that the only "limit" on how much marijuana a person falling under the CUA may possess is that it must be "reasonably related to the patient's current medical needs."

One of the impacts of the *Kelly* case is that from a practical perspective, law enforcement is presently without guidance as to what amount of marijuana a qualified patient can possess. When is an arrest appropriate and when is it not? Each individual case will vary depending on the qualified patients' needs. This creates an impossible situation for law enforcement in any attempt to enforce operating requirements and restrictions for MMDs. These are the same quantity restrictions that are found in the City's Medical Cannabis Dispensaries Ordinance, City Code Section 5-25-13.

It should be noted that what the case does, however, is reinforce that marijuana is still illegal and that Proposition 215 and the MMP merely provide for a defense against criminal prosecution. Proposition 215 and the MMP did not make marijuana legal in California; they just create an exemption from prosecution for those who can prove that they are qualified patients or primary caregivers, and that the amount of marijuana in their possession is justified under the law.

The other area of the law which makes enforcement of regulations for MMDs practically impossible involves the definition of a “primary caregiver.” While the MMP defines a “primary caregiver,” the California Supreme Court, in *Mentch v. Superior Court*, decided in November 2008, explained that definition in detail. The Supreme Court held that the statutory definition has two parts: (1) a primary caregiver must have been designated as such by the medical marijuana patient; and (2) he or she must be a person who has consistently assumed responsibility for the housing, health or safety of the patient. The Court concluded that a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided care giving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. Primary caregiver status requires an existing established relationship. Someone who merely maintains a source of marijuana does not automatically become the party who has consistently assumed responsibility for the housing, health or safety of that purchaser.

The key word in the Court’s analysis is “consistently,” which suggests an ongoing relationship marked by regular and repeated actions over time. The Court then discussed “cannabis clubs,” where customers execute a pro forma designation of the club as their primary caregiver. The Court commented that these clubs would not qualify as a primary caregiver, stating that, “A person purchasing marijuana for medicinal purposes cannot simply designate seriatim, and on an ad hoc basis...sales centers such as the Cannabis Buyers’ Club as the patient’s primary caregiver.”

The effect of this is that it will be very difficult for an MMD to qualify as a primary caregiver, and the enforcement of regulations for them to qualify as such even more difficult. How is a peace officer going to determine efficiently whether or not the supplier of medical marijuana consistently assumed responsibility for the housing, health or safety of the purchaser?

Also important to this discussion is the Anaheim case, *Qualified Patients Association v. City of Anaheim*, pending in the California Court of Appeals, 4th District. On August 18, 2010, the Fourth District Court of Appeals rendered its position in *Qualified Patients Association v. City of Anaheim*. The decision is quite lengthy and despite its length, the Court did not decide the pivotal question as to whether a City could ban outright MMDs. Rather, the appellate court sustained the City’s demurrer and remanded the case to the trial court. Since then, the trial court has rendered its decision upholding the City of Anaheim’s ban on MMDs. This decision coincides with a number of trial court decisions upholding such a ban as well as an appellate court decision upholding a ban based on land use.

The moratorium was designed to allow the City time to determine if it wanted to prohibit MMDs altogether, or continue to allow them with amended operating rules based upon the *Kelly* and *Mentch* decisions, as well as the California Attorney General’s Guidelines. Also, Proposition 19, which would have legalized the possession of limited quantities of marijuana, was before the voters for a vote in November 2010. That proposition was defeated by the voters. Staff now feels that the law will not become any “clearer” in the near future and the City must take some action at this time as the moratorium will expire on January 26, 2012.

Staff is not in favor of allowing dispensaries to continue to operate within the City. Dispensaries that have been operating in California are not recognized under California law. Dispensaries tend to be storefront operations and generally require that patients merely complete a form

summarily designating the business owner as their primary caregiver and offering marijuana in exchange for cash. This type of operation is clearly unlawful under California law.

It should also be pointed out that some cities have taken the position that cities may not authorize the operation of dispensaries or even collectives or cooperatives because the distribution and cultivating of marijuana is a violation of federal law, and California Government Code Section 37100 prohibits cities from passing laws in conflict with the laws of the United States. As a result, there are approximately 112 cities that ban MMDs; 29 cities with moratoria; and 31 cities with ordinances allowing but regulating MMDs.

While the City did not experience any known criminal activity associated with the two dispensaries that have operated in the City, the last dispensary to operate did not maintain sufficient records to demonstrate that they were operating within the law. Other communities have experienced significant problems relating to the operation of MMDs, many of which are reflected in the attached report presented to the California Chiefs of Police Association.

A number of sources, including the United States Department of Justice's California Medical Marijuana Information Report, have concluded that the establishment of MMDs can lead to an increase in crime. Among the crimes cited as typical examples are burglaries, robberies, and sales of illegal drugs in areas immediately surrounding such dispensaries, as well as other public nuisances such as loitering, smoking marijuana in public places, sales to minors and driving under the influence of marijuana.

Staff is concerned that if new MMDs are established under the current Ordinances, it will not be possible to properly regulate them according to California law and will create the potential for criminal activity such as seen in other cities. The current situation represents a danger to the health and safety of the public.

Staff is presenting to the Council tonight three options:

1. Take no action, thereby allowing the moratorium to expire and the City's MMD Ordinances to become operative again on January 27, 2012;
2. Determine to prohibit MMDs and adopt an Ordinance banning the establishment and operation of MMDs within the City (see Attachment B to this staff report); or
3. Determine to allow MMDs and introduce an Ordinance revising the City's existing MMD Ordinances so that they conform to recent court decisions in the Attorney General's Guidelines.

Staff does not feel that letting the moratorium expire and proceeding under the City's current Medical Marijuana Ordinances is a viable option (Option 1). As discussed above, the current Ordinances violate the *Kelly* decision and do not meet the provisions of the *Mentch* decision, making them virtually impossible to enforce.

Staff is also concerned that if the City's Medical Marijuana Ordinances are amended (Option 3) (as set forth in Attachment C hereto), the Ordinances will be extremely difficult to enforce due to ambiguities and uncertainties created by the *Kelly* and *Mentch* decisions. Further, the federal enforcement agencies have recently commenced an intensive "crackdown" on MMDs. Allowing

dispensaries to operate in violation of federal law is not only a disservice to the City generally, but also to the property owners and operators who are subject to arrest and property seizure.

Staff is therefore recommending that the Council tonight adopt an Ordinance banning the establishment and operation of MMDs within the City. By doing so, the City will be in compliance with Government Code Section 37100 and not in conflict with federal law. The proposed Ordinance banning dispensaries will not prevent qualified patients from obtaining medical marijuana from a primary caregiver in circumstances other than a storefront dispensary operation. The proposed Ordinance will not conflict with the CUA or SB 420 because it will not impact a qualified patient's or primary caregiver's right to cultivate or possess medical marijuana under state law. The proposed ban simply prevents the storefront dispensing of medical marijuana.

Cost: There is no direct fiscal impact associated with Option 1, while Options 2 and 3 will result in codification costs for either of the new Ordinances.

Budget Impact: Although there are costs involved with codification, those costs should be absorbed in the current budget. Therefore, no budget amendment is necessary.

Recommendation: Waive the Second Reading of an Ordinance Banning the Establishment and Operation of Medical Marijuana (Cannabis) Dispensaries within the City, and adopt said Ordinance.

John Driscoll, City Attorney

M. Cleve Morris, City Manager

George Nielsen, Chief of Police

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PLACERVILLE
BANNING THE ESTABLISHMENT AND OPERATION OF MEDICAL MARIJUANA
DISPENSARIES WITHIN THE CITY OF PLACERVILLE**

WHEREAS, in 1996, California voters enacted the Compassionate Use Act (CUA), which permits qualified patients and their primary caregivers to possess and cultivate marijuana for medical purposes where the medical use has been recommended by a physician; and

WHEREAS, the State enacted Senate Bill 420 to clarify the terms of the CUA, extend the scope of the CUA, and permit cities to adopt rules and regulations consistent with the CUA and Senate Bill 420; and

WHEREAS, SB 420 permits qualified patients and their primary caregivers to collectively or cooperatively cultivate marijuana for medical purposes; it does not, however, address the role of dispensaries, nor does it require municipalities to provide for medical marijuana dispensaries (MMDs); and

WHEREAS, although an initial goal of the CUA was to encourage cooperation between state and federal officials, the federal Drug Enforcement Agency has enforced the Controlled Substances Act against dispensary operators and others who help supply patients in California with medical marijuana; and

WHEREAS, under the Controlled Substances Act, marijuana is a "Schedule I Drug," which is defined as a drug or other substance that has a high potential for abuse, with no currently accepted medical use, and Section 841 of the Controlled Substances Act prohibits the manufacture, distribution or dispensing of marijuana; and

WHEREAS, the United States Supreme Court has held that the federal government has the authority to prohibit the manufacture, distribution and dispensing of marijuana under the Controlled Substances Act, regardless of whether these acts are done pursuant to the CUA; and

WHEREAS, on February 9, 2010, the City Council adopted an Urgency Ordinance imposing a 45-day moratorium on the establishment and operation of MMDs within the City; and

WHEREAS, on March 23, 2010, the City Council voted to extend the 45-day moratorium on MMDs for an additional 6 months, to September 23, 2010; and

WHEREAS, on August 24, 2010, the City Council extended the moratorium for an additional 16 months, to January 26, 2012, to allow City staff to monitor local, state and national developments with respect to MMDs; and

WHEREAS, during the period of the moratorium, City staff and the City Attorney have consulted with other jurisdictions, including those within El Dorado County, regarding issues relating to the establishment and operation of MMDs; and

WHEREAS, some communities with MMDs have reported adverse impacts on the health, safety and welfare of the community, such as criminal activity in and around the dispensaries, loitering, noise, traffic, complaints from neighbors regarding the smell, and inadequate property maintenance; and

WHEREAS, the operation of MMDs results in increased demands for police patrols and responses, which the City's Police Department is not adequately staffed to handle; and

WHEREAS, this Ordinance will not conflict with the CUA or SB 420 because it will not impact a qualified patient or primary caregiver's right to cultivate and possess medical marijuana under state law; and

WHEREAS, at the November 8, 2011 meeting, the City Council heard and considered a staff presentation by the Placerville Police Chief, as well as testimony and arguments of all persons desiring to be heard; and

WHEREAS, on November 8, 2011, the City Council accepted the recommendations of the Placerville Police Chief and directed staff to draft an Ordinance banning MMDs in the City,

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PLACERVILLE AS FOLLOWS:

Section 1: Findings.

In adopting this Ordinance, the City Council finds as follows:

1. Section 841 of the Controlled Substances Act prohibits the manufacture, distribution or dispensing of marijuana, and the United States Supreme Court has held that the federal government has the authority to prohibit the manufacture, distribution and dispensing of marijuana under the Controlled Substances Act, regardless of whether these acts are done pursuant to the Compassionate Use Act.

2. State law permits qualified patients and their primary caregivers to collectively or cooperatively cultivate marijuana for medical purposes, but neither the CUA nor SB 420 addresses the legality of MMDs.

3. The City's prohibition of MMDs is consistent with federal law because federal law expressly prohibits dispensing marijuana.

4. The City’s prohibition of MMDs is also consistent with state law because state law does not specifically permit MMDs, and the Ordinance will not impact a qualified patient or primary caregiver’s right to cultivate and possess medical marijuana pursuant to state law.

5. The secondary impacts associated with MMDs, such as increased crime in and around the dispensaries, loitering, excessive noise, noxious odors and increased traffic, adversely impact the health, safety and welfare of the community and will require increased police patrols that will place a heavy burden on the City’s limited law enforcement resources.

6. Other facilities exist that can serve the needs of Placerville’s medical marijuana patients, so there currently exists no need for MMDs in the City.

Section 2: Title 5, Chapter 25, Sections 1-6, “Medical Cannabis Dispensaries” of the City of Placerville Municipal Code are amended in their entirety to read and provide as follows:

“CHAPTER 25

MEDICAL CANNABIS DISPENSARIES

SECTION:

- 5-25-1: Purpose
- 5-25-2: Relationship to Other Laws
- 5-25-3: Definitions
- 5-25-4: Medical Marijuana Dispensaries Prohibited
- 5-25-5: Establishment or Maintenance of Medical Marijuana Dispensaries Declared a Public Nuisance
- 5-25-6: Penalties for Violation

5-25-1: **PURPOSE:** The purpose of Chapter 25 is to prohibit medical marijuana dispensaries from locating in the City of Placerville. The City Council may adopt by resolution any regulations or policies that will further the purpose of this chapter, and that do not conflict with the provisions herein.

5-25-2: **RELATIONSHIP TO OTHER LAWS:** This chapter is not intended to, nor shall it be, construed or given effect in a manner that causes it to apply to any activity that is regulated by federal or state law to the extent that application of this chapter would conflict with such law or would unduly interfere with the achievement of federal or state regulatory purposes. It is the intention of the City Council that this chapter shall be interpreted to be compatible with federal, county and state enactments, and in the furtherance of the public purposes which those enactments express. Nothing in this chapter is intended to supersede any other provisions of this code.

5-25-3: **DEFINITIONS:** For the purpose of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section:

CITY: The City of Placerville.

COMPASSIONATE USE

ACT OF 1996: California Health and Safety Code Sections 11362.5 and 11362.7, et seq., as those sections are amended from time to time, including, without limitation, those amendments contained in SB 420.

MEDICAL MARIJUANA

DISPENSARY: Any facility or location where medical marijuana is made available to and/or distributed by or to two or more of the following: a qualified patient, a person with an identification card, and/or a primary caregiver. A “medical marijuana dispensary” shall not include qualified patients, persons with an identification card and/or primary caregivers who associate within the state of California in order to collectively or cooperatively cultivate marijuana for medical purposes. A primary caregiver of a qualified patient or person with an identification card may deliver, administer or provide medical marijuana at the primary residence of the qualified patient or person with an identification card without violating this chapter.

PERSON WITH AN

IDENTIFICATION CARD: Shall have the same meaning as defined in the Compassionate Use Act of 1996, California Health and Safety Code Sections 11362.5 and 11362.7, et seq., as those sections are amended from time to time.

PRIMARY CAREGIVER:

Shall have the same meaning as defined in the Compassionate Use Act of 1996, California Health and Safety Code Sections 11362.5 and 11362.7, et seq., as those sections are amended from time to time.

QUALIFIED PATIENT:

A person who is entitled to use medical marijuana pursuant to the California Compassionate Use Act of 1996, California Health and Safety Code Sections 11362.5 and 11362.7, et seq., as those sections are amended from time to time.

5-25-4: **MEDICAL MARIJUANA DISPENSARIES PROHIBITED:** The establishment and/or operation of medical marijuana dispensaries shall be prohibited in all areas of the City of Placerville. No permit or any other applicable license or entitlement for use, including, but not limited to the issuance of a business license, shall be approved or issued for

the establishment or operation of a medical marijuana dispensary within the city limits of the City of Placerville.

5-25-5: **ESTABLISHMENT OR MAINTENANCE OF MEDICAL MARIJUANA DISPENSARIES DECLARED A PUBLIC NUISANCE:** The establishment, maintenance, or operation of a medical marijuana dispensary as defined in this chapter within the city limits of the City of Placerville is declared to be a public nuisance.

5-25- 6: **PENALTIES FOR VIOLATION:**

- (A) Any person violating any of the provisions of this article shall be guilty of a misdemeanor and shall be punishable therefore by a fine of not more than one thousand dollars \$1,000) or by imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment. In the event any civil suit or action is brought by the City to enforce the provisions of this chapter, the person responsible for such violation shall be liable to the City for the City's costs of the suit, including, but not limited to attorneys' fees, expert fees, and other costs of the suit.

- (B) In addition to any other enforcement remedies available to the City under any applicable state or federal statute or pursuant to any other lawful power the City may possess, any violation of this chapter may be prosecuted or enforced as a nuisance pursuant to Placerville Municipal Code Section 7-8-1 through 7-8-5, as those sections may be amended from time to time. The City may also prosecute or enforce violations of this chapter as a criminal offense or by a civil court action, prosecuted by the City Attorney or District Attorney in the name of the City or in the name of the People of the State of California, by seeking the appointment of a receiver, or in any other manner provided by law.”

Section 3: Compliance with California Environmental Quality Act.

The City Council finds that this Ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Sections 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines because it has no potential for resulting in physical change to the environment, directly or indirectly, and it prevents changes in the environment pending the completion of the contemplated study.

Section 4: Severability.

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the Ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Ordinance are severable. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof irrespective of the fact that any one or more section, subsection,

subdivision, paragraph, sentence, clause or phrase be held unconstitutional, invalid or unenforceable.

Section 5: Effective Date and Publication.

This Ordinance of the City of Placerville shall be effective thirty (30) days after the date of its passage. Before expiration of fifteen (15) days after its passage, this Ordinance or a summary thereof as provided in Government Code Section 36933, shall be published at least once in a newspaper of general circulation published and circulated in the City of Placerville, along with the names of the City Council voting for and against its passage.

Section 6: Title 5, Chapter 25, Sections 7-25 of the City of Placerville Municipal Code are repealed in their entirety

Section 7: Title 10, Chapter 10 of the City of Placerville Municipal Code is repealed in its entirety.

The above Ordinance was introduced at a regular meeting of the City Council of the City of Placerville held on November 8, 2011, by Councilmember Hagen, and it was read for the first time. The Ordinance was read for the second time on _____ and Councilmember _____ moved its adoption. The motion was seconded by Councilmember _____. A poll vote was taken, which stood as follows:

AYES:

NOES:

ABSENT:

ABSTAIN:

Mark A. Acuna, Mayor Pro Tem

ATTEST:

Susan Zito, MMC, City Clerk