City of Placerville
MEMORANDUM

DATE: February 9, 2010

TO: City Council

FROM: John Driscoll
City Manager/City Attorney

SUBJECT: **AN URGENCY ORDINANCE ESTABLISHING A TEMPORARY MORATORIUM ON MEDICAL MARIJUANA DISPENSARIES**

RECOMMENDATION

That the City Council adopts an Urgency Ordinance to establish a temporary moratorium on the establishment and operation of Medical Marijuana (Cannabis) Dispensaries, to become effective immediately.

BACKGROUND

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 Three such applications have been processed, with two denied and one withdrawn. Currently, the Police Department is processing an application, with another application pending review. 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.

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 to the California Chiefs of Police Association, staff has revisited the City's MMD

Ordinances and is recommending that the Council adopt an Urgency Ordinance placing a moratorium on MMDs in the City of Placerville.

DISCUSSION

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 medical marijuana dispensaries. 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 medical marijuana dispensaries 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 a medical marijuana dispensary 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?

The City's current Medical Cannabis Dispensary Ordinances are directed at storefront operations. While the terms "collective and cooperative" are mentioned in the Ordinance, when viewed in its entirety, including the land use provisions, it is clearly designed to regulate a storefront medical marijuana operation. The California Attorney General Guidelines published

in August 2008 distinguish between cooperatives, collectives and dispensaries. Collectives and cooperatives are recognized under California law, while dispensaries are not.

Collectives and cooperatives conduct their business for the mutual benefit of their members. These organizations facilitate the collaborative efforts of patients and caregiver members. According to the Guidelines, cooperatives and collectives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members who would still have to be qualified patients and primary caregivers.

On the other hand, 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.

The determination of whether or not it is possible for a collective or cooperative to operate legally as a "storefront" would require significant study and, if possible, a redrafting of the City's applicable Ordinances. 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 medical marijuana dispensaries; 29 cities with moratoria; and 31 cities with ordinances allowing but regulating medical marijuana dispensaries. Presently, there is pending a case before the court of appeal dealing with the City of Anaheim's prohibition of medical marijuana dispensaries. Staff is hopeful that the outcome of the *Anaheim* case will provide some guidance as to the legality of prohibiting and/or regulating dispensaries.

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 medical marijuana dispensaries, 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 medical marijuana dispensaries 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.

As previously indicated, there are two applications presently pending with the Police Department, and staff has had numerous other inquiries regarding establishing dispensaries. Staff is concerned that if new medical marijuana dispensaries 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 therefore recommending that the Council tonight adopt an Urgency Ordinance establishing a moratorium on medical marijuana dispensaries. If enacted tonight, the moratorium will run for 45 days. State law allows the moratorium to be extended for up to an additional 22 months and 15 days after a noticed public hearing. Staff will also prepare a report as to the status of this matter ten days prior to the expiration of the 45-day initial moratorium period. The moratorium, if adopted, goes into effect immediately. A four-fifths vote is required to adopt the Urgency Ordinance.

It also needs to be mentioned that the requested moratorium will not prevent qualified patients from obtaining medical marijuana from a primary caregiver in circumstances other than a storefront dispensary operation. The proposed moratorium simply prevents the storefront dispensing of medical marijuana.

Hopefully, during the moratorium, the pending appellate court case involving the Anaheim ordinance will be decided and will provide more guidance to cities in regulating the dispensing of medical marijuana. The moratorium will also allow staff time to determine whether an ordinance can be crafted to regulate legally operating collectives and cooperatives dispensing medical marijuana, or if all storefront operations dispensing marijuana should be prohibited.

FISCAL IMPACT

There is no direct fiscal impact associated with the requested moratorium; however, there could be a loss of some sales tax proceeds since the sale of medical marijuana is subject to sales tax.

Respectfully submitted,

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John Driscoll
City Manager/City Attorney