

CITY OF ALAMEDA

Memorandum

To: Honorable Mayor and
Members of the City Council

From: Ann Marie Gallant
Interim City Manager

Date: March 16, 2010

Re: Adopt an Ordinance Adding Subsection 30-5.15 to the Alameda Municipal
Code to Prohibit the Operation of Medical Marijuana Dispensaries in the
City of Alameda

BACKGROUND

In November 2008, the City Council adopted a moratorium on the establishment of medical marijuana dispensaries in the City of Alameda. The moratorium was extended on December 2, 2008 and is set to expire in June 2010. The purpose of establishing the moratorium was to give the City of Alameda time to establish appropriate amendments for the Alameda Municipal Code for the regulation of the use. Currently, the Alameda Municipal Code does not include or address this type of use.

In December 2009, staff publicly noticed and made available for public consideration a recommendation to amend the municipal code to prohibit medical marijuana dispensaries in Alameda. The proposed amendment was published and distributed for public review in the Planning Board packet for December 14, 2009, but due to a long agenda, the Planning Board continued its consideration of the item to the regular meeting of January 11, 2010.

On January 11th, the Planning Board unanimously recommended that the City Council not adopt the draft ordinance. The Planning Board recommended that the City Council refer the matter back to the staff and the Planning Board for further deliberation and hearings to allow time for preparation of a draft ordinance that might allow a limited number of dispensaries in carefully controlled locations and under certain limited conditions. Given the complete lack of policy direction on this issue in any existing City of Alameda documents (e.g. City Charter, General Plan, or Municipal Code), limited staff, Board resources, and time, the Planning Board felt that it would be inappropriate to continue the discussion and expend city and community resources and time to craft a revised ordinance, if in fact, the City Council felt that such an effort would be contrary to the best interests of the community. Therefore, the Planning Board recommended denial of the draft ordinance rather than continuing the item, which gives the City Council the ability to adopt the ordinance tonight, if the City Council so chooses.

City Council
Report Re:
Agenda Item #6-B
03-16-10

DISCUSSION

Medical marijuana raises a number of difficult legal, social, safety, and medical issues for the California cities.

In 1970, Congress enacted the Controlled Substances Act (CSA), which makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States. In 1996, California voters approved Proposition 215, or the Compassionate Use Act of 1996 (CUA), which allows a qualified person to use and cultivate marijuana for medical purposes. California voters approved this initiative in order to exempt certain patients and their primary caregivers from criminal liability for possession and cultivation of marijuana. In 2003, the state legislature enacted further regulations by passing Senate Bill 420, or the Medical Marijuana Program Act (MMP) to establish and maintain a program for voluntary registration of qualified patients and their primary caregivers through a statewide identification card.

Since the passage of the CUA, “storefront” marijuana dispensaries began to open in jurisdictions around the state. These facilities operate as if they are pharmacies and often dispense different types of marijuana and some offer-baked goods that contain marijuana. Monetary donations are collected from patients or primary caregivers in exchange; since it would be a criminal violation to sell these items.

Under federal law, the mere existence of these storefront dispensaries is illegal and some have been subject to raids. The use, possession, distribution and sale of marijuana remains illegal under federal law and the U.S. Supreme court has held that the federal government may enforce the CSA despite California law. *Gonzales v. Raich*, 125 S.Ct. 2195. Under California law, patients and their primary caregivers may grow and cultivate marijuana.

Furthermore, the California Attorney General has adopted certain guidelines for interpretation and implementation of the State’s medical marijuana laws and has stated that “[a]lthough medical marijuana “dispensaries” have been operating in California for years, dispensaries as such, are not recognized under the law.

One purpose of the Compassionate Use Act and the Medical Marijuana Program is 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. However, neither the federal nor the state government has implemented a plan to provide medical marijuana under these guidelines. The Medical Marijuana Program provides additional statutory guidance for medical marijuana use and cultivation, but does not explicitly address the role of dispensaries, nor does it require cities provide for or allow the establishment and/or operation of medical marijuana dispensaries.

Cities throughout California are struggling with this difficult and evolving legal and medical issue. This issue forces cities to balance the needs of qualified patients in need of relief with the needs of the community to protect the public health and safety of

the community from some of the unwanted potential impacts of such dispensaries. The California Police Chiefs Association has compiled an extensive report detailing negative secondary effects associated with medical marijuana dispensaries (Exhibit 1 on file in the City Clerk's Office). The report contains anecdotal and documented evidence that medical marijuana dispensaries pose a threat to public health, safety, and welfare. The proposed ordinance does not prohibit nor eliminate the availability and use of medical marijuana. The ordinance guards against abuses of the law and responsibly protects the health, safety, and welfare of Alameda's residents and businesses.

The staff recommendation to adopt a citywide ban on medical marijuana dispensaries is based upon the following considerations:

1. The legal and regulatory context is evolving. Cities around the state are experimenting with different approaches to this new land use, some with modest success, and others with less success. This is not a land use issue that Alameda needs to or should be at the forefront.
2. The proposed prohibition is a simple ordinance that can be easily amended at a future date if the community wishes to do so. It establishes a definition of "medical marijuana dispensary" in the Municipal Code and then establishes a citywide prohibition on that use. At a future date, the citywide prohibition portion of the ordinance may be amended to allow dispensaries within certain locations under certain conditions if it is the will of the City Council and community.
3. At this time, staff is unable to identify any locations in Alameda that staff believes the community would deem to be acceptable for medical marijuana dispensaries. In reviewing potential locations in Alameda, staff immediately ruled out residential neighborhoods and the Webster Street or Park Street commercial areas based upon comments made by those business associations and the proximity of those business areas to residential areas. Once Alameda residential areas and the two main commercial areas are removed from consideration, the remaining possible locations include: the Northern Waterfront, Marina Village commercial areas, the Harbor Bay Business Park, and Alameda Point. Staff does not believe that there would be support for medical marijuana dispensaries at any of these locations at this time.
4. Although staff could draft an ordinance within a month allowing medical marijuana dispensaries in certain locations under certain conditions for public review and discussion, any such draft ordinance will likely be the subject of intense public debate. The community will need time to educate themselves and several hearings to discuss and debate this issue before the Planning Board and City Council. Given all of the other City of Alameda priorities in 2010, staff believes that such an effort will take time and may not be completed by November 2010. The moratorium expires in June 2010. By state law, the City Council cannot extend the moratorium beyond November 2010.
5. The City of Alameda must get some type of regulation adopted before the moratorium expires. Although many cities around the state are struggling with this

issue, the cities that have allowed a number of unregulated dispensaries to open prior to the adoption of coordinated well thought out regulations are adopted now have two problems to address: 1) what should their regulations be, and 2) how do they deal with the existing non-conforming dispensaries. Provided that Alameda amends its code prior to the expiration of the moratorium, Alameda can avoid having to address the difficult problem of existing non-conforming dispensaries, because no such dispensaries currently exist in Alameda to our knowledge.

Alternatives and Options:

At this time, the City Council has at least three options:

- The City Council may adopt the attached ordinance establishing a definition and citywide prohibition of Medical Marijuana Dispensaries.
- The City Council may reject the attached ordinance as recommended by the Planning Board and direct staff to: 1) work with the Planning Board and community to develop a draft ordinance to allow medical marijuana dispensaries under certain limited conditions, and 2) return with the necessary ordinances if and when necessary to extend the moratorium until November 2010. Under this option, the Planning Board would need to have a recommended ordinance to the City Council by late September or early October 2010 for City Council public hearings.
- The City Council may adopt the attached ordinance prohibiting medical marijuana and direct staff to work with the Planning Board and community to develop a draft ordinance amendment to allow medical marijuana dispensaries under certain limited conditions. Under this third option, the Planning Board and community would not be constrained by the time limits of the moratorium, which might allow for a more thoughtful and less time sensitive public process.

FINANCIAL IMPACT

If the City Council adopts the staff recommendation, there would be no financial impact from the proposed action.

If the City Council directs staff to work on a revised ordinance, the Community Development Department has a small remaining fund balance in the Community Planning Fund that may be used to fund staff time for this effort. The Community Planning Fund funds staff time for maintenance and update of the General Plan and Municipal Code.

MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

The proposed ordinance would amend the Alameda Municipal Code by establishing new section 30-5.15 Medical Marijuana Dispensaries. The proposed section does not conflict with any existing Municipal Code, General Plan or other city regulations or

plans.

ENVIRONMENTAL REVIEW

This ordinance is not subject to the California Environmental Quality Act ("CEQA") pursuant to §§ 15060 (c)(2) (the activity will not result in a direct or reasonable foreseeable indirect physical change in the environment) and 15060 (c)(3) the activity is not a project as defined in § 15378 of the CEQA Guidelines (Title 14, Chapter 3 of the California Code of Regulations) because it has no potential for resulting in physical change to the environment, directly or indirectly; it prevents changes in the environment pending the completion of the contemplated studies. This ordinance also is exempt from CEQA pursuant to the "common sense" exemption under § 15061(b)(3) of the CEQA Guidelines, because the City Council hereby determines and finds that there is no possibility that the ordinance may have a significant effect on the environment.

RECOMMENDATION

Adopt an Ordinance Adding Subsection 30-5.15 to the Alameda Municipal Code to Prohibit the Operation of Medical Marijuana Dispensaries in the City of Alameda.

Respectfully submitted,



Andrew Thomas,
Planning Services Manager

Approved as to funds and account,



Evelyn Leung
Interim Supervising Accountant

AT:nm

Exhibit:

1. The California Police Chiefs Association Report-On file in the City Clerk's Office

CC: Planning Board

CITY OF ALAMEDA ORDINANCE No. _____

New Series

ADDING A NEW SECTION 30-5.15 TO THE ALAMEDA MUNICIPAL
CODE TO PROHIBIT THE OPERATION OF MEDICAL MARIJUANA
DISPENSARIES IN THE CITY OF ALAMEDA

BE IT ORDAINED by the City Council of the City of Alameda:

Section 1. Section 30-5.15 is hereby added to the Alameda Municipal Code to read as follows:

Section 30-5.15. Medical Marijuana Dispensaries

a. Findings.

In enacting this Section, the City Council finds as follows:

1. In 1970, Congress enacted the Controlled Substances Act (CSA) which, among other things, makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States.
2. In 1996, the voters of the State of California approved Proposition 215, also known as the Compassionate Use Act of 1996 (the Act), codified at Cal. Health & Safety Code (H&S) Sec. 11362.5 et seq.
3. The Act creates a limited exception from criminal liability for seriously ill persons who are in need of medical marijuana for specified medical purposes and who obtain and use medical marijuana under limited, specified circumstances.
4. On January 1, 2004, S.B. 420 went into effect. S.B. 420, known as the "Medical Marijuana Program" (MMP) (codified at Cal. H&S Code Secs. 11362.7-11362.83) was enacted by the state Legislature to clarify the scope of the Act and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with S.B. 420.
5. The Act expressly anticipates the enactment of additional local legislation. It provides: "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 non-medical purposes." Cal. H&S Code Sec. 11362.5.

Approved as to Form
Dorcas P. Hysmith
City Attorney

6. The City Council takes legislative notice of the fact that several California cities and counties which have permitted the establishment of medical marijuana dispensaries have experienced serious adverse impacts associated with and resulting from such dispensaries. According to these communities, and according to news stories widely reported, medical marijuana dispensaries have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana dispensaries. The City of Alameda reasonably could anticipate experiencing similar adverse impacts and effects.
7. The City Council further takes legislative notice of a California Police Chiefs Association compilation of police reports, news stories and statistical research setting forth the adverse secondary impacts associated with medical marijuana dispensaries. http://www.californiapolicechiefs.org/nav_files/marijuana_files/Research.html.
8. The City Council further takes legislative notice that as of July 2009, at least 29 cities and two counties in California have adopted moratoria or interim ordinances prohibiting medical marijuana dispensaries. The City Council further takes legislative notice that as of July 2009, at least 111 cities and seven counties in California have adopted permanent prohibitions against medical marijuana dispensaries.
9. The City Council further takes legislative notice that the use, possession, distribution and sale of marijuana remain illegal under the CSA; that the federal courts have recognized that despite California's Act and MMP, marijuana is deemed to have no accepted medical use (*Gonzales v. Raich*, (2005) 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Cooperative*, (2001) 532 U.S. 483); that medical necessity has been ruled not to be a defense to prosecution under the CSA (*United States v. Oakland Cannabis Buyers' Cooperative*, (2001) 532 U.S. 483); and that the federal government properly may enforce the CSA despite the Act and MMP. (*Gonzales v. Raich*, (2005) 545 U.S. 1).
10. While the City Council in no manner intends or undertakes by the adoption of this ordinance to enforce federal law, the City Council is concerned about interfering with federal law enforcement efforts.

11. The City Council further takes legislative notice that concerns about non-medical marijuana use arising in connection with the Act and the MMP also have been recognized by state and federal courts. See, e.g., *Bearman v. California Medical Bd.*, (2009) 176 Cal.App.4th 1588; *People ex rel. Lungren v. Peron*, (1997) 59 Cal.App.4th 1383, 1386-1387; *Gonzales v. Raich*, (2005) 545 U.S. 1, 32 n. 43.
12. Allowing medical marijuana dispensaries, and issuing permits, business licenses or other applicable licenses or entitlements providing for the establishment and/or operation of medical marijuana dispensaries poses a threat to the public health, safety and welfare.
13. An ordinance prohibiting medical marijuana dispensaries, and prohibiting the issuance of any permits, licenses and entitlements for medical marijuana dispensaries, is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of Alameda.
14. The City Council further takes legislative notice that the California Attorney General has adopted guidelines for the interpretation and implementation of the State's medical marijuana laws, entitled "*GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE* (August 2008)." (http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuana_guidelines.pdf.) The Attorney General has stated in the guidelines that "[a]lthough medical marijuana 'dispensaries' have been operating in California for years, dispensaries, as such, are not recognized under the law."
15. The City Council further takes legislative notice that in *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, the Court held that neither the Act nor the MMP preempts cities from adopting land use regulations for medical marijuana dispensaries.
16. The City Council further takes legislative notice that the Act anticipates local regulations at Cal. H&S Code Sec. 11362.5(b)(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."

b. Definitions.

As used in this ordinance, the following terms shall be ascribed the following meanings:

1. "Medical Marijuana" means "marijuana" as that term is defined and used in the Act and the MMP, to wit, Cal. H&S Code Secs. 11362.5-11362.83.
2. "Medical marijuana dispensary" means any facility or location, whether fixed or mobile, where medical marijuana is provided, sold, made available, or otherwise distributed to one or more of the following: a primary caregiver, a qualified patient or a person with an identification card.
3. A Medical Marijuana Dispensary shall not include the following uses, so long as such uses comply with this code, Cal. H&S Code Secs. 11362.5, 11362.7 et seq., as amended, and other applicable laws:
 - a) A clinic licensed pursuant to Chapter 1 (commencing with Sec. 1200) of Division 2 of the Cal. H&S Code, as amended.
 - b) A health care facility licensed pursuant to Chapter 2 (commencing with Sec. 1250) of Division 2 of the Cal. H&S Code, as amended.
 - c) A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Sec. 1568.01) of Division 2 of the Cal. H&S Code, as amended.
 - d) A residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Sec. 1569) of Division 2 of the Cal. H&S Code, as amended.
 - e) A hospice or a home health agency, licensed pursuant to Chapter 8 (commencing with Sec. 1725) of Division 2 of the Cal. H&S Code, as amended.
4. "Person with an Identification Card" shall have the meaning given that term by Cal. H&S Code Sec. 11362.7, as amended.
5. "Primary Caregiver" shall have the meaning given that term by Cal. H&S Code Sec. 11362.7, as amended.
6. "Qualified Patient" shall have the meaning given that term by Cal. H&S Code Sec. 11362.7, as amended.

c. Operation of Medical Marijuana Dispensaries Prohibited.

Medical marijuana dispensaries are prohibited in the City of Alameda. No person or entity shall operate or permit to be operated a Medical Marijuana Dispensary in or upon any premises in the city. The City shall not issue, approve or grant any permit, license or other entitlement for the establishment or operation of a medical marijuana dispensary

Section 2. Severability Clause. It is the declared intent of the City Council of Alameda that if any section, subsection, sentence, clause, phrase, or provision of this ordinance is held invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not be so construed as to render invalid or unconstitutional the remaining provision of this ordinance.

Section 3. This ordinance and the rules, regulations, provisions, requirements, orders, and matters established and adopted hereby shall take effect and be in full force and effect from and after the expiration of thirty (30) days from the date of its final passage.

Section 4. CEQA. This ordinance is not subject to the California Environmental Quality Act ("CEQA") pursuant to Secs.15060 (c)(2) (the activity will not result in a direct or reasonable foreseeable indirect physical change in the environment) and 15060 (c)(3) the activity is not a project as defined in Sec.15378 of the CEQA Guidelines (Title 14, Chapter 3 of the California Code of Regulations) because it has no potential for resulting in physical change to the environment, directly or indirectly; it prevents changes in the environment pending the completion of the contemplated studies. This ordinance also is exempt from CEQA pursuant to the "common sense" exemption under Sec.15061(b)(3) of the CEQA Guidelines, because the City Council hereby determines and finds that there is no possibility that the ordinance may have a significant effect on the environment.

Presiding Officer of the City Council

Attest:

Lara Weisiger, City Clerk
City of Alameda

* * * * *

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by Council of the City of Alameda in regular meeting assembled on the _____ day of _____, 2010, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the official seal of said City this _____ day of _____, 2010.

Lara Weisiger, City Clerk
City of Alameda