

ORDINANCE NO. 26-2009

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ELK GROVE ADOPTING A MORATORIUM ON MEDICAL MARIJUANA DISPENSARIES

The City Council of the City of Elk Grove does ordain as follows:

Section 1: Purpose and Authority

The purpose of this urgency ordinance is to create an immediate moratorium on land use approvals and building permits in all zoning districts for medical marijuana dispensaries.

The City of Elk Grove has the authority to adopt this ordinance pursuant to California Constitution Article XI, section 7 and California Government Code section 65858.

Section 2: Findings.

A. California Environmental Quality Act

The City Council hereby finds and determines that the adoption of this ordinance would not be a "project" under the California Environmental Quality Act because it will not result in a direct or reasonably foreseeable indirect physical change in the environment. Therefore, this project is exempt under 14 California Code Regulations sections 15060(c)(2) and (3), 15061(b)(3), 15262 and 15378.

B. Moratorium

In 1996, the voters of the State of California approved Proposition 215, the Compassionate Use Act of 1996 ("CUA" or the "Act"). The Act was subsequently codified as California Health and Safety Code section 11362.5. The Act was designed to provide a defense to persons charged with possessing or cultivating marijuana for the personal medical use of patients who have received a recommendation from a physician that the use of marijuana may be beneficial in the treatment of that patient. CUA further prevented criminal prosecution of doctors who recommend the use of marijuana by patients for medical purposes.

The state legislature subsequently enacted the "Medical Marijuana Program", also codified as Health and Safety Code section 11362.7 (the "Program"). The Medical Marijuana Program provides guidance for the use and cultivation of medical marijuana. The hallmark of the Program is that it prohibits the arrest of any qualified patient (or that patient's primary caregiver) for the possession, transportation, delivery or cultivation of medical marijuana. In order to qualify for this immunity, the person must possess an identification card issued by the State Department of Health Services through a voluntary program. However, at this time, the State of California has yet to implement a statewide identification card program for qualified patients and their primary caregivers.

Despite CUA and the Program, the possession, sale and distribution of marijuana are

still criminal offenses under both California state and Federal law. Moreover, no provision of California law authorizes the sale or distribution of cannabis by medical marijuana dispensaries to any primary care giver, a qualified patient, or a person with a valid identification card obtained under the auspices of the Program.

Neither CUA nor the Program expressly authorize or address the role of dispensaries in the scheme of providing medical marijuana to qualified patients and/or their primary caregivers. Despite this, local agencies throughout California have seen medical marijuana dispensaries established in their communities. Once established, these locations have created a number of secondary effects associated with them, including:

- Illegal drug activity and drug sales in the vicinity of dispensaries
- Robbery of persons leaving dispensaries;
- Driving under the influence of controlled substances obtained from dispensaries;
- Persons acquiring marijuana from a dispensary and then selling it to non-qualified persons;
- Burglaries and robberies; and
- Increased vacancies in the commercial areas near such dispensaries.

These impacts have been compiled in an extensive report prepared by the California Police Chiefs Association. A copy of that report is attached to this Ordinance as Exhibit "A" and is incorporated herein by this reference. The City Council of the City of Elk Grove hereby finds that the report contains persuasive anecdotal and documented evidence that medical marijuana dispensaries pose a threat to the public health, safety and welfare.

At present, the City of Elk Grove Zoning Code does not contain any explicit provisions contemplating the approval of medical marijuana dispensary facilities within the City of Elk Grove. Moreover, the City has experienced a recent increase in the number of contacts received by the City about opening medical marijuana dispensaries. The City Council hereby finds that it is in the best interest for the health, safety and welfare of the residents of the City of Elk Grove to prevent potentially harmful secondary effects of medical marijuana dispensaries to adopt this urgency ordinance to allow City staff time to study the impacts of permitting medical marijuana dispensaries, as well as to determine which zoning districts may be appropriate for such use, and what level of discretionary review may be required for approval of such use.

Section 3: Moratorium.

There shall be an interim moratorium on land use approvals and building permits in all zoning districts for medical marijuana dispensaries. As used in this ordinance, "medical marijuana dispensary" includes, but is not limited to any site, facility, location, use, cooperative business that distributes, sells, exchanges, processes, delivers, gives away or cultivates marijuana for medical purposes to qualified patients, health care providers, patients' primary caregivers or physicians, pursuant to 1) CUA and the Program or 2) any state regulations adopted in furtherance thereof. As used in this ordinance, "marijuana" shall mean cannabis and all parts of that plant. Based on the findings contained in this ordinance, no permit, license, or other applicable entitlement for use,

which has as its result the final approval or allowance of a medical marijuana dispensary within the City of Elk Grove, shall be granted or approved by any employee, department, or commission of the City for a period of forty-five days (45) days immediately following the effective date of this ordinance unless appealed or extended by a later enacted ordinance.

Section 4: No Mandatory Duty of Care.

This ordinance is not intended to and shall not be construed or given effect in a manner that imposes upon the City or any officer or employee thereof a mandatory duty of care towards persons and property within or without the City, so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 5: Severability.

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable. This City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof and intends that the invalid portions should be severed and the balance of the ordinance be enforced.

Section 6: Effective Date

This Ordinance is declared to be an urgency ordinance for preserving the public health, safety and welfare and shall take effect and be enforced immediately upon adoption.


ORDINANCE: **26-2009**
ADOPTED: December 9, 2009
EFFECTIVE: December 9, 2009



PATRICK HUME, MAYOR of the
CITY OF ELK GROVE

ATTEST:


SUSAN J. BLACKSTON, CITY CLERK

APPROVED AS TO FORM:


SUSAN COCHRAN, CITY ATTORNEY

Date signed: December 17, 2009

EXHIBIT A

WHITE PAPER ON MARIJUANA DISPENSARIES

by

**CALIFORNIA POLICE CHIEFS ASSOCIATION'S
TASK FORCE ON MARIJUANA DISPENSARIES**

ACKNOWLEDGMENTS

Beyond any question, this White Paper is the product of a major cooperative effort among representatives of numerous law enforcement agencies and allies who share in common the goal of bringing to light the criminal nexus and attendant societal problems posed by marijuana dispensaries that until now have been too often hidden in the shadows. The critical need for this project was first recognized by the California Police Chiefs Association, which put its implementation in the very capable hands of CPCA's Executive Director Leslie McGill, City of Modesto Chief of Police Roy Wasden, and City of El Cerrito Chief of Police Scott Kirkland to spearhead. More than 30 people contributed to this project as members of CPCA's Medical Marijuana Dispensary Crime/Impact Issues Task Force, which has been enjoying the hospitality of Sheriff John McGinnis at regular meetings held at the Sacramento County Sheriff's Department's Headquarters Office over the past three years about every three months. The ideas for the White Paper's components came from this group, and the text is the collaborative effort of numerous persons both on and off the task force. Special mention goes to Riverside County District Attorney Rod Pacheco and Riverside County Deputy District Attorney Jacqueline Jackson, who allowed their Office's fine White Paper on Medical Marijuana: History and Current Complications to be utilized as a partial guide, and granted permission to include material from that document. Also, Attorneys Martin Mayer and Richard Jones of the law firm of Jones & Mayer are thanked for preparing the pending legal questions and answers on relevant legal issues that appear at the end of this White Paper. And, I thank recently retired San Bernardino County Sheriff Gary Penrod for initially assigning me to contribute to this important work.

Identifying and thanking everyone who contributed in some way to this project would be well nigh impossible, since the cast of characters changed somewhat over the years, and some unknown individuals also helped meaningfully behind the scenes. Ultimately, developing a *White Paper on Marijuana Dispensaries* became a rite of passage for its creators as much as a writing project. At times this daunting, and sometimes unwieldy, multi-year project had many task force members, including the White Paper's editor, wondering if a polished final product would ever really reach fruition. But at last it has! If any reader is enlightened and spurred to action to any degree by the White Paper's important and timely subject matter, all of the work that went into this collaborative project will have been well worth the effort and time expended by the many individuals who worked harmoniously to make it possible.

Some of the other persons and agencies who contributed in a meaningful way to this group venture over the past three years, and deserve acknowledgment for their helpful input and support, are:

George Anderson, California Department of Justice
Jacob Appelsmith, Office of the California Attorney General
John Avila, California Narcotics Officers Association
Phebe Chu, Office of San Bernardino County Counsel
Scott Collins, Los Angeles County District Attorney's Office
Cathy Coyne, California State Sheriffs' Association
Lorrac Craig, Trinity County Sheriff's Department
Jim Denney, California State Sheriffs' Association
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Thomas Toller, California District Attorneys Association
Martin Vranicar, Jr., California District Attorneys Association

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Dennis Tilton, Editor

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WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION'S TASK FORCE ON MARIJUANA DISPENSARIES

EXECUTIVE SUMMARY

INTRODUCTION

Proposition 215, an initiative authorizing the limited possession, cultivation, and use of marijuana by patients and their care providers for certain medicinal purposes recommended by a physician without subjecting such persons to criminal punishment, was passed by California voters in 1996. This was supplemented by the California State Legislature's enactment in 2003 of the Medical Marijuana Program Act (SB 420) that became effective in 2004. The language of Proposition 215 was codified in California as the Compassionate Use Act, which added section 11362.5 to the California Health & Safety Code. Much later, the language of Senate Bill 420 became the Medical Marijuana Program Act (MMPA), and was added to the California Health & Safety Code as section 11362.7 *et seq.* Among other requirements, it purports to direct all California counties to set up and administer a voluntary identification card system for medical marijuana users and their caregivers. Some counties have already complied with the mandatory provisions of the MMPA, and others have challenged provisions of the Act or are awaiting outcomes of other counties' legal challenges to it before taking affirmative steps to follow all of its dictates. And, with respect to marijuana dispensaries, the reaction of counties and municipalities to these nascent businesses has been decidedly mixed. Some have issued permits for such enterprises. Others have refused to do so within their jurisdictions. Still others have conditioned permitting such operations on the condition that they not violate any state or federal law, or have reversed course after initially allowing such activities within their geographical borders by either limiting or refusing to allow any further dispensaries to open in their community. This White Paper explores these matters, the apparent conflicts between federal and California law, and the scope of both direct and indirect adverse impacts of marijuana dispensaries in local communities. It also recounts several examples that could be emulated of what some governmental officials and law enforcement agencies have already instituted in their jurisdictions to limit the proliferation of marijuana dispensaries and to mitigate their negative consequences.

FEDERAL LAW

Except for very limited and authorized research purposes, federal law through the Controlled Substances Act absolutely prohibits the use of marijuana for any legal purpose, and classifies it as a banned Schedule I drug. It cannot be legally prescribed as medicine by a physician. And, the federal regulation supersedes any state regulation, so that under federal law California medical marijuana statutes do not provide a legal defense for cultivating or possessing marijuana—even with a physician's recommendation for medical use.

CALIFORNIA LAW

Although California law generally prohibits the cultivation, possession, transportation, sale, or other transfer of marijuana from one person to another, since late 1996 after passage of an initiative (Proposition 215) later codified as the Compassionate Use Act, it has provided a limited affirmative defense to criminal prosecution for those who cultivate, possess, or use limited amounts of marijuana for medicinal purposes as qualified patients with a physician's recommendation or their designated primary caregiver or cooperative. Notwithstanding these limited exceptions to criminal culpability, California law is notably silent on any such available defense for a storefront marijuana dispensary, and California Attorney General Edmund G. Brown, Jr. has recently issued guidelines that generally find marijuana dispensaries to be unprotected and illegal drug-trafficking enterprises except in the rare instance that one can qualify as a true cooperative under California law. A primary caregiver must consistently and regularly assume responsibility for the housing, health, or safety of an authorized medical marijuana user, and nowhere does California law authorize cultivating or providing marijuana—medical or non-medical—for profit.

California's Medical Marijuana Program Act (Senate Bill 420) provides further guidelines for mandated county programs for the issuance of identification cards to authorized medical marijuana users on a voluntary basis, for the chief purpose of giving them a means of certification to show law enforcement officers if such persons are investigated for an offense involving marijuana. This system is currently under challenge by the Counties of San Bernardino and San Diego and Sheriff Gary Penrod, pending a decision on review by the U.S. Supreme Court, as is California's right to permit any legal use of marijuana in light of federal law that totally prohibits any personal cultivation, possession, sale, transportation, or use of this substance whatsoever, whether for medical or non-medical purposes.

PROBLEMS POSED BY MARIJUANA DISPENSARIES

Marijuana dispensaries are commonly large money-making enterprises that will sell marijuana to most anyone who produces a physician's written recommendation for its medical use. These recommendations can be had by paying unscrupulous physicians a fee and claiming to have most any malady, even headaches. While the dispensaries will claim to receive only donations, no marijuana will change hands without an exchange of money. These operations have been tied to organized criminal gangs, foster large grow operations, and are often multi-million-dollar profit centers.

Because they are repositories of valuable marijuana crops and large amounts of cash, several operators of dispensaries have been attacked and murdered by armed robbers both at their storefronts and homes, and such places have been regularly burglarized. Drug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts of their operations. To repel store invasions, firearms are often kept on hand inside dispensaries, and firearms are used to hold up their proprietors. These dispensaries are either linked to large marijuana grow operations or encourage home grows by buying marijuana to dispense. And, just as destructive fires and unhealthy mold in residential neighborhoods are often the result of large indoor home grows designed to supply dispensaries, money laundering also naturally results from dispensaries' likely unlawful operations.

LOCAL GOVERNMENTAL RESPONSES

Local governmental bodies can impose a moratorium on the licensing of marijuana dispensaries while investigating this issue; can ban this type of activity because it violates federal law; can use zoning to control the dispersion of dispensaries and the attendant problems that accompany them in unwanted areas; and can condition their operation on not violating any federal or state law, which is akin to banning them, since their primary activities will always violate federal law as it now exists—and almost surely California law as well.

LIABILITY

While highly unlikely, local public officials, including county supervisors and city council members, could potentially be charged and prosecuted for aiding and abetting criminal acts by authorizing and licensing marijuana dispensaries if they do not qualify as “cooperatives” under California law, which would be a rare occurrence. Civil liability could also result.

ENFORCEMENT OF MARIJUANA LAWS

While the Drug Enforcement Administration has been very active in raiding large-scale marijuana dispensaries in California in the recent past, and arresting and prosecuting their principals under federal law in selective cases, the new U.S. Attorney General, Eric Holder, Jr., has very recently announced a major change of federal position in the enforcement of federal drug laws with respect to marijuana dispensaries. It is to target for prosecution only marijuana dispensaries that are exposed as fronts for drug trafficking. It remains to be seen what standards and definitions will be used to determine what indicia will constitute a drug trafficking operation suitable to trigger investigation and enforcement under the new federal administration.

Some counties, like law enforcement agencies in the County of San Diego and County of Riverside, have been aggressive in confronting and prosecuting the operators of marijuana dispensaries under state law. Likewise, certain cities and counties have resisted granting marijuana dispensaries business licenses, have denied applications, or have imposed moratoria on such enterprises. Here, too, the future is uncertain, and permissible legal action with respect to marijuana dispensaries may depend on future court decisions not yet handed down.

Largely because the majority of their citizens have been sympathetic and projected a favorable attitude toward medical marijuana patients, and have been tolerant of the cultivation and use of marijuana, other local public officials in California cities and counties, especially in Northern California, have taken a “hands off” attitude with respect to prosecuting marijuana dispensary operators or attempting to close down such operations. But, because of the life safety hazards caused by ensuing fires that have often erupted in resultant home grow operations, and the violent acts that have often shadowed dispensaries, some attitudes have changed and a few political entities have reversed course after having previously licensed dispensaries and authorized liberal permissible amounts of marijuana for possession by medical marijuana patients in their jurisdictions. These “patients” have most often turned out to be young adults who are not sick at all, but have secured a physician’s written recommendation for marijuana use by simply paying the required fee demanded for this document without even first undergoing a physical examination. Too often “medical marijuana” has been used as a smokescreen for those who want to legalize it and profit off it, and storefront dispensaries established as cover for selling an illegal substance for a lucrative return.