



**DATE: OCTOBER 5, 2012**

**SUBJECT: REPORT OF THE URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EUREKA IMPOSING A MORATORIUM ON MEDICAL CANNABIS DISPENSARIES.**

**Background:**

On November 1, 2011 the City Council approved Bill No. 837-CS, Ordinance No. 770-C.S., an urgency ordinance adopting a 45-day moratorium on the establishment of Medical Cannabis Dispensaries in the City of Eureka. The moratorium ordinance directed the City Manager or his designee to suspend the processing of applications pending, or received, for "Medical Cannabis Dispensaries" in the City of Eureka.

On December 20, 2011, the Council approved Bill No. 843-C.S., Ordinance No. 776-C.S. an urgency ordinance extending the moratorium for an additional ten months and 15 days.

This report is prepared in conformance with Government Code Section 65858 (d), which requires the City to "issue a written report describing the measures taken to alleviate the condition(s) which led to the adoption of the ordinance" ten days prior to the expiration of an interim urgency ordinance. On October 16, 2012, staff will present the City Council with an interim urgency ordinance to extend the moratorium for an additional one year, together with a staff report recommending that the City Council adopt the extension.

**Discussion:**

Currently, the sale, possession, cultivation and distribution of cannabis is prohibited by federal law, specifically 21 U.S.C. sections 812 and 841, part of the Controlled Substances Act. Cannabis continues to be a prohibited Schedule 1 drug for which there is no legally accepted medical use. The U.S. Drug Enforcement Administration's Office of Chief Counsel issued an Opinion Letter on March 31, 2006 which stated that "the knowing or intentional manufacture, possession, or distribution of cannabis, or aiding and abetting or participating in conspiracy to engage in such conduct, violates federal law regardless of any state law authorizing such conduct."

The State of California also generally prohibits the sale, possession, cultivation and use of marijuana but, has an exception for the use of marijuana for medical purposes. In 1996, California voters approved by initiative "The Compassionate Use Act of 1996," also known as Proposition 215. The purpose of Proposition 215 was to allow seriously ill persons to obtain and use medical cannabis under certain specified circumstances. The Act also protects qualified patients' primary caregivers from prosecution for the possession or cultivation of marijuana which is being used to treat serious illnesses pursuant to a doctor's recommendation.

In 2003, the Legislature approved SB420, The Medical Marijuana Program Act, which provided additional statutory guidance for those involved with medical cannabis use. The MMPA permits qualified patients and their caregivers to obtain identifications cards and gives them immunity from arrest and prosecution for possession of medical marijuana.

Despite the passage of Proposition 215, the United States Supreme Court in *United States v. Oakland Marijuana Buyers' Cooperative* (2001) 532 U.S. 483, held that the Federal Controlled Substances Act continues to prohibit cannabis use, distribution and possession, and that no medical necessity exceptions exist to those prohibitions. In 2005, the United States Supreme Court further held that federal laws which ban the use of cannabis for medical purposes are constitutional in the case of *Gonzales v. Raich* (2005) 545 U.S. 1.

In 2008, the California Attorney General issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* (Guidelines). Under the Guidelines (which are not necessarily the law of the State) qualified patients and their primary caregivers may associate with one another in order to collectively or cooperatively cultivate marijuana for medical purposes. Cooperatives and collectives are prohibited from purchasing marijuana from, or selling to, non-members, instead they may only provide a means for facilitation or coordinating medical marijuana transactions between members. Only marijuana cultivated by the members of the collective or cooperative may be utilized by the members. The Guidelines also provide that neither the collective nor the cooperative are permitted to operate "for profit."

In 2009, in the first California appellate case regarding a medical cannabis dispensary, the California Court of Appeal for the Second Appellate District issued its opinion in *City of Claremont v. Kruse*. Kruse had opened up a medical cannabis dispensary with the City limit of Claremont without obtaining the necessary land use permits. Upon learning of the dispensary, the City Council adopted an Urgency Ordinance barring medical cannabis dispensaries from the City. Kruse challenged the adoption and the trial court upheld the City's Ordinance. ON appeal, the court upheld the City's Ordinance stating the neither California Medical Marijuana Program or the Compassionate Use Act (Proposition 215) requires a city to establish local regulations to accommodate medical cannabis dispensaries.

Subsequent cases, in the California Court of Appeal for the Fourth Appellate District, *Qualified Patients Association v. City of Anaheim* and *County of San Diego v. San Diego NORML*, held that a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical cannabis dispensaries that meet state law requirements would not violate conflicting federal law. The County of San Diego case further concluded that the state's identification card program was not preempted as an obstacle to the federal Controlled Substances Act because that Act combats recreational drug use, and does not regulate a state's medical practices.

In 2011, the four California U.S. Attorneys raised concerns that local government regulations that provide for a permitting process for medical cannabis are in direct

violation of the Federal laws regulating controlled substances. The U.S. Attorney's Office for the Central District of California has issued letters addressed to property owners who lease out property for medical marijuana dispensaries. The letters notify the property owner that medical marijuana dispensaries are illegal under Federal Law, and the property involved in such operations is subject to seizure and forfeiture by the Federal Government. The letter emphasizes that "it is not a defense to either the referenced crime or to the forfeiture of the property that the dispensary is providing 'medical marijuana.'" In 2011, federal law enforcement agencies also seized 3.9 million marijuana plants and plan to collect more this year. Federal authorities have also shut down many dispensaries.

Over the past year there have been numerous court decisions at the state and federal level addressing medical marijuana use in California. None of these decisions have clarified the issue for any length of time. Here is where the cases stand right now:

On October 4, 2011 the California Second District Court of Appeal issued its decision in the *Pack v. Superior Court of Los Angeles County (City of Long Beach)* holding that the Long Beach permitting process for medical cannabis collectives in that city were preempted by federal law. The *Pack* decision appeared to be inconsistent with the previous holdings made by the California Fourth District Court of Appeal in that the operation of medical cannabis dispensaries were held to not conflict with federal law. However, the California Supreme Court has dismissed this case as moot, since the City of Long Beach has now repealed its permissive regulations in favor of a total ban.

On November 9, 2011, the California Court of Appeal, Fourth Appellate District, issued a ruling holding that state law does not preempt the City of Riverside's ordinance banning medical cannabis dispensaries. *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* The Court found that the City's Ordinance could be reconciled with state law. The Court based its decision on the fact that the Compassionate Use Act is narrow in scope and only provides limited criminal immunity for the use, cultivation and possession of medical cannabis. The Court also found that neither the Compassionate Use Act nor the Medical Marijuana Program Act created a statutory or constitutional right to use cannabis or allow for the sale or distribution of cannabis by a medical cannabis dispensary. Thus, neither Act mandates that cities and counties permit medical cannabis dispensaries and nothing precludes cities and counties from banning medical cannabis dispensaries. The California Supreme Court has granted review and thus, the holding cannot be relied upon as legal precedent.

On November 9, 2011 *People et. al. (Upland) v. G3 Holistic* the Fourth District Court of Appeal held that Upland's zoning and business license ordinance banning dispensaries was not preempted by the CUA or the MMPA. This case is on review before the California Supreme Court and cannot be cited as legal precedent.

On November 23, 2011, the Fourth District Court of Appeal held in *City of Dana Point v. Holistic Health* that that an individual dispensary patron does not have standing to challenge Dana Point's zoning ordinance prohibiting cooperative or collective entities engaged in the production and distribution of marijuana to their members for medicinal purposes. This case is also pending before the California Supreme Court.

On February 29, 2012, the Fourth District Court of Appeal in *City of Lake Forest v. Evergreen Holistic Collective*, held that “local governments may not prohibit medical marijuana dispensaries altogether, with the caveat that the Legislature authorized dispensaries only at sites where medical marijuana is ‘collectively or cooperatively...cultivate[d]’”. Relying on a stated purpose of the Compassionate Use Act (CUA) “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,” and one of the express legislative purposes of the Medical Marijuana Program Act (MMPA) to “enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects,” the court determined that California law provides for dispensaries as a matter of statewide concern. This case has also been granted review by the California Supreme Court which, means that it cannot be relied upon as legal precedent.

On August 20, 2012 the California Supreme Court denied a Petition for Review filed by the medical marijuana dispensary in the matter of *The City of Palm Springs v. The Holistic Collective*. The petition sought review of an unpublished decision by the Fourth District Court of Appeal, Division 2, which affirmed the trial court’s grant of a permanent injunction against the dispensary. The City of Palm Springs had enacted an ordinance which called for regulatory permits to be issued to a limited number of medical marijuana dispensaries (which must meet various qualification requirements), and which allowed the permitted dispensaries to operate within specified zoning districts in Palm Springs. In the trial court, the dispensary argued that the City’s ordinance was preempted by state law and violated the dispensary’s right to equal protection. Additionally, the dispensary argued that the City’s ordinance was tantamount to an outright ban on dispensaries. The trial court denied the dispensary’s motion and subsequently granted the City’s unopposed motion for summary judgment. The Court of Appeal affirmed the trial court’s ruling and rejected the dispensary’s preemption and equal protection arguments. Additionally, the Court confirmed that the City’s regulations did not constitute a complete ban on medical marijuana dispensaries.

In September 2012, the California Supreme Court granted petitions for review in two more cases, *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (July 2, 2012) 207 Cal.App.4th 601 (ruling County’s complete ban on dispensaries preempted by the MMPA) and *420 Caregivers LLC v. City of Los Angeles* (July 3, 2012) 207 Cal.App.4th 703 (rejecting preemption, equal protection due process and privacy challenges to City’s dispensary regulations). Both cases are a “grant and hold” pending the Court’s decisions in *City of Riverside v. Inland Empire Patients’ Health and Wellness Center, Inc.*, and *People et al. (Upland) v. G3 Holistic, Inc.*

More recently, the City of Los Angeles sent out letters to approximately 900 dispensaries ordering them to shut down. This has been dubbed a “Gentle Ban” since the City will permit collectives of three or few people. Litigation is sure to follow.....

The lack of consistency between these California Court of Appeal decisions and State and Federal laws and regulations, regarding the distribution of medical cannabis, may result in the City violating the state and federal law if dispensaries and the like are conditionally permitted. Thus, it was recommended by City staff that an Urgency Ordinance imposing a moratorium on the City’s Ordinance providing for the permitting

process for medical cannabis cooperatives and collectives for 45 days, initially, and then for an additional 10 months and 15 days pending City staff's further analysis.

After the adoption of the urgency ordinance, the City Manager along with the Police Chief, Community Development Director, and City Attorney continued to: research and analyze the operations of medical cannabis dispensaries in other California cities; monitor the legal concerns raised by the US Attorneys in California and related Court of Appeal decisions; and considered revised development regulations that could minimize potential impacts to the public welfare. Due to the complexity of the issue including the continued legal uncertainty of local government regulations that provide for a permitting process for medical cannabis cultivation, processing, and distribution, and the current legal inconsistencies staff cannot make a definitive determination that the City's current ordinance will or will not survive judicial scrutiny.

The use of a moratorium has been held permissible in *City of Claremont v. Kruse* (2009) 177 Cal.app. 4<sup>th</sup> 1153. "The CUA, by its terms, accordingly did not supersede the **City's** moratorium on medical **marijuana** dispensaries, enacted as an urgency measure 'for the immediate preservation of the public health, safety, and welfare.'" This case is still good law which means that cities are free to impose a temporary moratorium on processing or permitting dispensaries to buy some time to figure out what to do.

### **Recommendation:**

Based on our analysis, staff will recommend that the City Council extend the urgency ordinance as allowed by Government Code Section 65858 for an additional period of one year.

The City staff continues the process of evaluating relevant legal issues and developing guidance for legally appropriate regulation. There is currently considerable uncertainty regarding the legality of dispensaries and the scope of federal and state preemption with respect to local regulation of medical cannabis.