"Placerville, a Unique Historical Past Forging into a Golden Future "

City Manager's Report
May 26, 2015, City Council Meeting
Prepared By: John Driscoll, City Attorney
Item#: 15.1

Subject: Receive and file this background report on medical marijuana dispensaries and related ordinances within the City of Placerville

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Discussion:

History of the Medical Marijuana Dispensary Ordinance

In 1996, the People of the State of California passed Proposition 215, the Compassionate Use Act (CUA), with the stated intent of ensuring that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. This voter initiative exempts patients and their primary caregivers from prosecution under state laws that otherwise prohibit the cultivation or possession of marijuana.

In 2003, the state legislature passed SB 420, which established the Medical Marijuana Program. This legislation created a voluntary system for qualified patients and their caregivers to obtain identification cards which would insulate them from arrest for violations of state law relating to marijuana.

In June 2004, the City of Placerville adopted an ordinance allowing the operation of medical marijuana dispensaries (MMDs) in certain zones and under certain specified conditions. The Ordinance was adopted in response to several requests the City had received from potential operators of MMDs and, as the City had no ordinance in place to regulate MMDs, the Ordinance was adopted as an urgency measure. All applications for the operation of a MMD were processed through the Police Department.

Even though California passed the CUA in 1996, possession of marijuana remained illegal under the Federal Controlled Substances Act (CSA). In 2006, the U.S Supreme Court rendered its decision in *Gonzales v. Raich,* (2005) 125 S. Ct. 2201, wherein the conflict between the CSA and California's CUA was the focal point. In *Raich,* the Court held that despite the CUA, the federal government could continue to prohibit the possession of medical marijuana for medical purposes under the CSA.

As a result of the Supreme Court's decision, staff brought the MMD issue back to the Council at its January 10, 2006 meeting. Staff's recommendation at that time was to repeal the City's existing

ordinances allowing medical marijuana dispensaries and adopt an ordinance prohibiting such dispensaries within the City of Placerville. At that meeting, the Council heard testimony from many medical marijuana advocates, including a lengthy discussion regarding the conflict between federal law and California state law allowing and providing for medical marijuana dispensaries.

In response to the concern expressed over the prohibition of medical marijuana dispensaries in Placerville, Council tabled the matter and directed that staff and representative members of the audience meet and discuss options that would address both the City's and the medical marijuana dispensary proponents' concerns. Staff brought back to the Council amendments to the City's then existing ordinance regulating medical marijuana dispensaries, as well as the option of repealing the ordinance and banning the dispensaries. The Council adopted the amendments to the Ordinance, which had the effect of providing additional safeguards and controls for the operation of dispensaries, including limiting the number of dispensaries within the City to two.

The 2006 amendments to the MMD Ordinance, however, did not resolve the problems and uncertainties in regulating MMDs. Because of ongoing problems associated with the operation of an MMD (Mountain Meds), e.g., a total lack of financial records, failure to disclose employees and using employees not cleared by the Police Department, as well as additional case decisions, staff revisited the MMD Ordinance in February 2010, and recommended a temporary moratorium on MMDs. City Council agreed and a temporary moratorium was adopted on February 9, 2010. The moratorium was the product of difficulties and uncertainties in enforcing regulations and laws relating to the possession of marijuana, and in particular medical marijuana and MMDs. Ultimately, the moratorium culminated with the Council's action in 2011 repealing the MMD Ordinance and banning MMDs within the City. This action will be discussed further below.

Since the MMD Ordinance was adopted in 2004, two MMDs have operated in the City. Both operated at the same location, one after the other. The last MMD (Mountain Meds) ceased operations in April 2009, at which time it was denied renewal of its operating permit for numerous violations of the MMD Ordinance. That denial was upheld on appeal to the City Council. Since that MMD ceased operation, the Police Department received several applications for permits to operate MMDs. Three were processed, with two denied and one withdrawn. Because of limited staff resources and the extensive review required to process an MMD application, only one application could be processed at a time.

When the City Council adopted the Urgency Ordinance establishing a temporary moratorium on MMDs, the Police Department was processing an application and another application was pending review. The following discussion is intended to give an overview of some of the legal issues leading up to the temporary moratorium.

Legislation and Case Decisions Affecting Medical Marijuana Dispensaries

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. However, 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. As previously mentioned, the U.S. Supreme Court has 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 did not give 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. The MMP, among other things, did the following: (1) redefined the definition of "primary caregiver"; and (2) set out a maximum amount of marijuana a patient or caregiver could possess and cultivate. California Supreme Court decisions, as well as State of California Attorney General Guidelines (Guidelines) have further clarified the definition of "primary caregiver," however, a subsequent California Supreme Court decision 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,* (2010) 47 Cal 4th 108 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 caregiver" 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 difficulties with the *Kelly* case is how, from a practical perspective, law enforcement can be expected to know the 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.

Kelly does, however, 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; rather, 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.

Another area of the law that 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*, (2008) 45 Cal 4th 274, explained that definition in more 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? Unfortunately, MMDs tend to take the form of "storefront operations" that generally require that patients merely complete a form summarily designating the business owner as their primary caregiver and offering marijuana in exchange for cash. It is the author's opinion that this type of operation is not what the Court envisioned in the *Mentch* case. However, it should be noted this type of operation is commonplace in the significant number of jurisdictions that allow MMDs.

At the time the moratorium was adopted, the case of *Qualified Patients Association v. City of Anaheim*, was pending in the California Court of Appeals, 4th District. It was hoped that this case would rule on the issue of whether or not local governments could ban MMDs. On August 18, 2010, the Fourth District Court of Appeals rendered its position in *Qualified Patients Association v.*

City of Anaheim. Unfortunately, the Court did not decide the pivotal question as to whether a City could outright ban 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 right of cities and counties to ban MMDs was confirmed by the *California Supreme Court in City of Riverside v. Inland Empire Patients Health & Wellness Center,* (2013) 56 Cal 4th 729. In that case the Court held that local governments were not preempted by the CUA from declaring MMDs to be a prohibited use and a public nuisance.

The City Council's Action in November 2011

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.

As indicated above, the City Council, in November 2011, had 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; 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 and the Attorney General's Guidelines.

The Council chose Option 2 and banned MMDs within the City. The Ordinance banning dispensaries does not prevent qualified patients from obtaining medical marijuana from a primary caregiver in circumstances other than a storefront dispensary operation. Nor does the Ordinance conflict with the CUA or SB 420 because it does not impact a qualified patient's or primary caregiver's right to cultivate or possess medical marijuana under state law. The ban simply prevents the storefront dispensing of medical marijuana.

Potential Future Legislation

Presently, AB 266 is pending in the California legislature. The bill's author is Ken Cooley of Rancho Cordova, and the bill is sponsored by both the League of California Cities and the California Police Chiefs Association. The bill will provide a more comprehensive framework for the implementation of the CUA that provides local governments the authority to create and enforce

locally driven policies and ensure public safety. While the state would issue conditional licenses, the actual license to operate would be issued by local governments and local governments would retain control of suspension and revocation of licenses.

A similar bill was introduced in 2014 in the California Senate, SB 1262. There are, however, some distinct differences between the two bills. The primary difference is in the area of local control. Specifically, SB 1262 places control over licensing with the state, not local government. At this point, it is unclear as to what will happen with either of these two bills. It also should be noted that it is anticipated that an initiative for the legalization of marijuana will appear on the November 2016 ballot. Suffice to say that the future is unclear at this time.

Since this report is for informational purposes, there are no alternatives, budget impacts or recommendations presented. Although somewhat related to budget matters, it should be pointed out that cities that have adopted ordinances allowing MMDs have also adopted a form of business operations tax on MMDs. As an example, the City of Sacramento imposes a business operations tax on MMDs equal to four percent (4%) of each dollar of gross receipts from the sale of medicinal marijuana and related products.

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