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Staff Report to Introduce for First Reading an Ordinance Adding Municipal Code Chapter 4-33 Relating to a Prohibition Against the Establishment and Operation of Medical Marijuana Cooperatives, Collectives, Dispensaries and Cultivation Facilities in the City of San Leandro

RECOMMENDATIONS

Staff recommends that the City Council introduce for first reading an ordinance to add Municipal Code Chapter 4-33 prohibiting the establishment and operation of Medical Marijuana Cooperatives, Collectives, Dispensaries and Cultivation Facilities in the City of San Leandro. Staff further recommends that the City Council schedule second reading of the ordinance at its September 4, 2012 regular meeting agenda, including a staff report on any developments that occurred since the ordinance's introduction for first reading.

BACKGROUND

- In 1996 California voters approved Proposition 215, codified as Health and Safety Code Section 11362.5 et. seq., entitled "The Compassionate Use Act of 1996." The intent of Proposition 215 was to enable persons in need of medical marijuana for specified medical purposes to obtain medical marijuana, and use it under limited, specified circumstances.
- The Legislature enacted SB 420 to clarify the scope of the Compassionate Use Act of 1996, effective January 1, 2004.

- The San Leandro Municipal Code and Zoning Code are silent regarding the regulation of medical marijuana dispensaries and cultivation facilities.
- The City of San Leandro received inquiries regarding the permitting and establishment of medical marijuana dispensaries and marijuana cultivation facilities within the City due, in part, to other Alameda County cities' laws and restrictions as well as the anticipation of voter approval of Proposition 19 or another state ballot proposition legalizing marijuana.
- Cities throughout California either prohibit medical marijuana dispensaries, marijuana cultivation facilities and other related activities, have a moratorium banning them, or allow them under certain conditions or through certain processes.
- On October 4, 2010, the City Council adopted a 45-day interim urgency ordinance prohibiting consideration and approval of use permits, variances, building permits, start of new construction, or other entitlements for any establishment or operation of medical marijuana dispensaries, marijuana cultivation facilities, or other land uses that could have been proposed if Proposition 19 was approved.
- On November 8, 2010, the City Council held a work session to review legal issues related to medical marijuana dispensaries and cultivation facilities, including the *Qualified Patients Association v. City of Anaheim* (2010) case (Case No. G040077).
- On November 15, 2010, the Moratorium was extended by 10 months and 15 days to September 30, 2011.
- The City Council, at the February 28, 2011 City Council work session, directed staff to prepare an ordinance prohibiting Medical Marijuana Dispensaries and Cultivation Facilities.
- The City Council, at its May 16, 2011 meeting, indicated a desire to postpone a vote on an ordinance prohibiting Medical Marijuana Dispensaries and Cultivation Facilities, pending additional information from other municipalities regarding their Medical Marijuana ordinances relative to cultivation facilities.
- On September 6, 2011, the Moratorium was extended by 1 year to September 30, 2012.
- On June 18, 2012, the City Council directed staff to prepare an ordinance prohibiting Medical Marijuana cooperatives, collectives, dispensaries and cultivation facilities in the City of San Leandro with a sunset date of June 30, 2013.

Discussion and Analysis

Legal Analysis

This analysis is in addition to earlier analyses by the City Attorney's Office related to land use regulations concerning medical marijuana dispensaries, collectives, cooperatives, and grow facilities. Special recognition is attributed to the League of California Cities City Attorney's Department for its continuing coverage of the legal impacts to cities caused by medical marijuana issues, including some of the research and text for this continuing analysis.

In November 2011, in *City of Riverside v. Inland Empire Patient's Health and Wellness Center* (200 Cal.App.4th 885), Division 2 of the Fourth District Court of Appeal upheld a local ordinance that banned medical marijuana dispensaries in the City of Riverside. The California Supreme Court granted review of the *Riverside* case, as well as *Pack v. Superior Court (City of Long Beach as the Real Party in Interest)*, which holds that Federal law pre-empts State law in certain aspects of medical marijuana dispensary regulation) in January 2012. Those cases have not yet been set for hearing.

In February 2012, however, Division 3 of the Fourth District struck down a city's ban on medical marijuana dispensaries in *City of Lake Forest v. Evergreen Holistic Collective* (203 Cal.App.4th 1413). In both *Riverside* and *Lake Forest*, the cities brought abatement actions against local dispensaries, arguing that their operations violated zoning codes and were consequently per se public nuisances. Riverside's zoning code expressly prohibits medical marijuana dispensaries within the city, while Lake Forest's zoning code prohibits "uses that were not enumerated" within it. The Supreme Court granted certiorari in the *Lake Forest* decision on May 16, 2012.

The appeals court in *City of Riverside* found that Riverside's zoning ordinance banning dispensaries did not contradict the two California medical marijuana statutes that permit them, the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA). It held that although the MMPA expressly declared that dispensaries are not subject to nuisance prosecution under state nuisance laws, this prohibition on prosecution did not extend to local nuisance laws. Accordingly, Riverside could ban dispensaries under its own law. The court followed precedent for a narrow reading of Civil Code section 3482, which provides that "nothing which is done . . . under the express authority of a statute can be deemed a nuisance," noting that the state marijuana statutes do not prohibit zoning bans on marijuana dispensaries. The court further held that State law did not expressly or implicitly occupy the field of marijuana regulation to the exclusion of local controls.

The court in *City of Lake Forest* reached the opposite conclusion, holding that that city's ban on dispensaries directly conflicted with State law. The court held that the CUA and MMPA precluded all nuisance prosecutions, not only state nuisance prosecutions. It further ruled that Civil Code section 3482, even when narrowly read, barred Lake Forest's nuisance suit because dispensary activity is exactly the activity legislatively authorized by the CUA and MMPA. The ruling in *City of Lake Forest* is narrow. The court construed the MMPA and CUA only to authorize dispensaries that also contain grow-sites. Thus, dispensaries operating in isolation from grow-sites are not protected from public nuisance suits. The court also cautioned that state law only preempts complete bans on medical marijuana dispensaries within a city; it does not prevent cities from restricting the locations of dispensaries or otherwise regulating them.

On July 2, 2012, the Court of Appeal for the Second Appellate District, Division One, issued its ruling in *County of Los Angeles v. Alternative Medicinal Cannabis Collective et al.* (2012 Cal.App.LEXIS 772). This case held that Los Angeles County's complete ban on the establishment of medical marijuana collectives and cooperatives within the County was pre-empted by the State's Compassionate Use Act and Medical Marijuana Program Act. Because the California Supreme Court granted certiorari to the *City of Riverside*, *City of Lake Forest* and *Pack v. City of Long Beach* appellate decisions, which thereby rendered them not citable because they had been superceded by the California Supreme Court's grant of review, this case (*County of Los Angeles*) is the current law as it relates to cities and counties being able to regulate or prohibit the establishment of medical marijuana collectives, cooperatives, and dispensaries as legitimate land uses.

DISCUSSION

Of the two opinions up for California Supreme Court review (*Riverside and Lake Forest*), the League of California Cities believes that *City of Lake Forest* appears to be the better-reasoned and supported. That court analyzed the text and the intent of the CUA and MMPA to find that state law preempted Lake Forest's zoning prohibition on medical marijuana dispensaries. In addition to relying on the state statutory exemptions from nuisance prosecutions, the court cited the statutory purposes of the CUA and MMPA-to provide distribution of medical marijuana to all patients who need it and promote uniform application of the Acts across California counties. Local zoning bans would defeat these statutory goals.

The narrow preemption finding in *City of Lake Forest* would preserve significant regulatory latitude for cities and counties. It limits state preemption to dispensaries that are also grow-sites. All dispensaries operating independently of grow-sites may be banned. Additionally, the opinion preserves the ability of cities to regulate medical marijuana dispensaries by limiting them to certain zoning districts, requiring business licenses for operation, and other similar measures. However, the ruling also leaves some practical questions unanswered, e.g., what if zoning regulations do not bar medical marijuana dispensaries on their face, but, as a practical matter, preclude the development of medical marijuana dispensaries anywhere in the jurisdiction? The court's analysis in *City of Riverside* was more cursory. The court failed to explain why Civil Code section 3482 does not preempt nuisance prosecutions against statutorily authorized and otherwise lawful medical marijuana dispensaries. Instead, it merely concluded that state law did not expressly prohibit local bans on dispensaries..

City of Riverside and *City of Lake Forest* have been de-published pursuant to the California Supreme Court's grant of certiorari. On July 2nd, *County of Los Angeles* became the current law, which is that a local jurisdiction's ordinance prohibiting the establishment of dispensaries, or other facilities to cultivate or distribute medical marijuana by collectives or cooperatives as defined under the MMPA is unlawful; State law prohibits local jurisdictions from enacting bans on medical marijuana dispensaries, grow facilities, collectives, or cooperatives.

Since the appellate court's July 2nd decision in *County of Los Angeles*, the City Attorney's Office learned of the following:

- ❖ City attorneys throughout the State think that the California Supreme Court will grant review of the *County of Los Angeles* decision, or de-publish the opinion. The timing for the Supreme Court's grant of review, or a decision on de-publishing could be quicker than when *City of Lake Forest* was ultimately granted certiorari, which was three months after the opinion was filed in February of this year.
- ❖ The California Supreme Court will ultimately decide the state law pre-emption issue. How soon is unclear, but other city attorneys think by the end of this year, or early 2013 at the latest. In the meantime, several jurisdictions with existing bans in place are awaiting the outcome of the issue before making any decisions on their existing ordinances.

Because of the imminent expiration of the City's moratorium, staff recommends that the City Council introduce the proposed ordinance for first reading, and direct staff to schedule second reading and an update on the status of medical marijuana dispensary regulations for its next regular meeting on September 4, 2012. This will allow staff and the City Council time to evaluate what, if anything, the

California Supreme Court and other local jurisdictions do in the next seven weeks to address the legal uncertainty created by the decisions pending California Supreme Court hearing and the *County of Los Angeles* decision.

If the City Council took no action on the proposed ordinance and allowed the moratorium to expire, then the City would find itself in the legal position it was in before it enacted the current moratorium i.e. staff relied upon the authority granted to the Finance Director by the Municipal Code to reject a business license application if the proposed business would not or could not comply with applicable laws or regulations. San Leandro Municipal Code section 2-2-420. In this case, because marijuana is a schedule I controlled substance under the Federal Controlled Substances Act (FCSA), manufacture, possession, and distribution of marijuana by a dispensary, collective or cooperative would be considered an illegal business, and a business license could not be issued; this is essentially the holding that was appealed in *Pack v. City of Long Beach*. However, because that case has been de-published pending California Supreme Court review, *Qualified Patients v. City of Anaheim* (2010) 187 Cal.App.4th 734 is the current law, which holds that in certain circumstances, Federal law may not pre-empt State medical marijuana laws. Thus, the law is unsettled as to whether the City's legal inability to issue a business license to a medical marijuana collective, cooperative or dispensary because to do so would violate the FCSA is a proper application of Federal laws' pre-emption over State laws.

Law Enforcement Analysis

In 2011, the Department of Justice issued a memorandum to federal prosecutors stating that marijuana dispensaries and licensed growers in states with medical marijuana laws could face prosecution for violating federal drug and money-laundering laws. Under Federal law, a dispensary's operations involving the sales and distribution of marijuana are illegal and subject to criminal prosecution. Under the law, real and personal property involved in such operations are subject to seizure by and forfeiture to the United States.

Attorney General Kamala Harris recently issued a memorandum to California Law Enforcement officials stating that the current medical marijuana laws are being "exploited by gangs, criminal enterprises, and others." After conducting research with state, federal, patient and civil rights communities it was concluded that the California medical marijuana laws need to be reformed, simplified, and improved to explain how, when, and where individuals may cultivate and obtain physician recommended marijuana. A critical element of this reform is also to educate law enforcement with guidelines for enforcement. In her memorandum Attorney General Harris urges the California legislature to amend the law to establish clear rules governing medical marijuana. Attorney General Harris states "We cannot protect the will of the voters, or the ability of seriously ill patients to access their medicine, until statutory changes are made that define the scope of the group cultivation right, whether dispensaries and edible marijuana products are permissible and how marijuana grown for medical use may lawfully be transported."

The City of San Leandro has seen firsthand how medical marijuana laws are being exploited and the dangers that have impacted the San Leandro community. Since 2011, the San Leandro Police Department (SLPD) seized over 17,627 marijuana plants and 108,193 grams (238 pounds) of marijuana. With the estimate that one plant of marijuana yields approximately one-half pound per cycle, the plants seized by the Narcotics Unit have an approximate street value of \$24,235,750.00. The approximate street value of the finished marijuana is \$654,500. These totals are based upon a conservative estimate of \$2,750 per pound of marijuana at street level prices. Therefore since 2011,

the estimated value of marijuana seized is approximately 25 million dollars. Approximately eighty five percent of those seizures were from marijuana grows in San Leandro residential neighborhoods.

The San Leandro Narcotics Unit has noticed that during their cultivation investigations individuals are using fraudulent medical paperwork in various homes to make it look like they are complying with the Acts. Oftentimes these residential grow houses are bypassing or stealing electrical power, which causes serious risk for residential fires. Recently an indoor marijuana grow was the cause of a fire on Warwick Ave. While putting out the fire, an Alameda County Firefighter was injured and had to be taken to a local hospital for treatment. According to PG&E, electrical rates are going up 6 to 7 percent each year. A factor for this increase is the power being stolen to illegally cultivate marijuana. Indoor marijuana grows also destroy properties in our communities. Marijuana grows cause hazardous mold to spread in rooms used for cultivating, destroy interior carpet, and cause major electrical problems to homes. These homes are often eyesores in our community due to the neglect by illicit marijuana cultivators. Homes are not painted, lawns are not mowed, and trash often accumulates on these properties. It should be noted that the San Leandro Police Department complies with Proposition 215 and has investigated 10 marijuana grows where no enforcement action was taken because the subjects were in compliance.

The City of San Leandro has seen significant acts of violence surrounding the cultivation and sale of marijuana. In 2011, a shooting occurred in the Walmart parking lot on Hesperian Blvd, where a victim was shot in the neck. At the scene, marijuana was recovered in the parking lot packaged for sale. It was later determined that the victim attempted to steal marijuana from the suspect (seller) who shot the victim after he tried to flee the area. This shooting occurred in a notoriously busy parking lot with many innocent people walking or driving in the lot to shop.

On January 18, 2012, at approximately 9:22 pm, the San Leandro Police Department's Narcotics Unit conducted surveillance in the area of Aloha Drive looking for suspects involved in the illegal cultivation of marijuana. It should be noted that a week earlier the Unit conducted a search warrant on Carrillo Drive and discovered an illegal marijuana grow. The subjects arrested at the house were believed to be involved in a gang and had several assault rifles in their possession. Detectives felt the same group may be involved in the Aloha investigation. During the surveillance on Aloha Drive, a San Leandro Narcotics Detective Sergeant observed a suspicious vehicle driving in the neighborhood. The Sergeant followed the vehicle from a distance in his undercover vehicle and lost sight of the suspect vehicle as it went around a bend in the road. As the Sergeant continued to follow, he noticed the suspect vehicle was now driving towards him. When the vehicle was approximately six feet away from the Sergeant's vehicle, the driver shot multiple rounds from a .45 caliber handgun at the Sergeant. As the Sergeant drove away, the suspect continued to fire multiple rounds which struck several parked cars in the neighborhood. Fortunately, the Sergeant was not hurt and no innocent citizens were struck by stray bullets. From the investigation, it is believed that the suspect knew that the Sergeant was a Police Officer before he attempted to murder him. It was determined that the suspect (who was later arrested) was involved in a gang which uses profits from the illegal cultivation of marijuana to help facilitate the gang's criminal activities.

The illegal cultivation of marijuana has a severe impact on departmental resources and finances. On August 18, 2011, at approximately 3:17 pm, the San Leandro Police Communications Center received a 911 call stating that a male subject was being chased by two males with guns. The reporting party stated that all three subjects ran into a residence in the 2000 block of Fairbanks Street. As officers arrived on the scene, a perimeter was established around the residence. Multiple announcements were made by using a Public Address system to have the occupants exit the house.

SLPD personnel also made numerous phone calls to the residence and received no response. The SLPD Special Weapons and Tactics (SWAT) and Hostage Negotiations Team (HNT) were called to the scene based on the fact that this was a possible hostage situation involving armed suspects. SWAT and HNT attempted to contact the occupants and met with negative results. SWAT officers entered the residence and did not locate anyone inside. Officers did locate a marijuana grow of approximately 240 plants and also located a pit-bull puppy that had to be taken to an emergency pet clinic because it was malnourished and appeared to be in distress.

According to a study done by the University of Michigan, marijuana use continued to rise among 10th and 12th graders in 2011 for all prevalence periods which include lifetime, past year, past 30 days and daily use in the past 30 days. An alarming trend is that the annual prevalence for 8th graders over the past two years has been higher than any time since 2003. Of greater importance is the rise in daily or near daily marijuana use amongst 8th, 10th and 12th graders. This is defined as use on 20 or more occasions in the prior 30 days. The study found that daily use was up 1.3 percent (8th grade), 3.6 percent (10th grade) and 6.6 percent (12th grade). According to the National Center on Addiction and Substance Abuse, 36 percent of high school students have used marijuana, and more shocking is that 21 percent of parents declared marijuana harmless.

Marijuana is a mind altering drug. Research has shown that you are more likely to make a bad decision while under the influence of marijuana that could include driving a vehicle, making unsafe sexual choices and trying other dangerous drugs. The short term effects from using marijuana include problems concentrating, anxiety, paranoid thoughts, increased heart rate and memory impairment. The long term effects include respiratory problems, mental problems and several studies have shown that if a person uses an addictive substance such as marijuana before the age of 18, that person is six times more likely to develop a substance use disorder.

Exploitation of law, violence, safety of our children and quality of life issues are factors that impact the San Leandro community regarding marijuana cultivation. The San Leandro Police Department is dedicated and committed to serving the community and enhancing the quality of life for every citizen. The San Leandro Police Department supports all efforts to ban medical marijuana dispensaries, cooperatives, collectives, cultivation, and grow facilities.

Planning Analysis

During the fall of 2010 and winter of 2011, the City Council met four times to discuss issues related to Medical Marijuana regulations. The material presented was a collaboration by various staff in the City Manager's and City Attorney's Offices, the Police Department and the Community Development Department.

During the moratorium, staff surveyed various communities, including all cities in Alameda County and Alameda County itself. At that time, six cities had ordinances that prohibit dispensaries and cultivation: Alameda, Dublin, Emeryville, Fremont, Livermore and Pleasanton. The cities of Berkeley, Oakland and Albany, as well as Alameda County, had ordinances that allow for dispensaries. Since that time, Union City has enacted a moratorium and Newark has an ordinance prohibiting dispensaries and cultivation. The City of Hayward continues to have a de facto prohibition. (See attached Table)

The medical marijuana facilities in the City of Oakland have come under considerable scrutiny, with various federal raids of facilities. Also, in March of 2012, the City of Oakland increased the total

number of Medical Cannabis Dispensary Permits from four to eight permits citywide. Only one of the four received conditional permit approval at an approved site. The other three applicants were required to find sites within a specified period and must be in compliance with various safety requirements. City of Oakland staff now report that none of these four applicants have been able to execute a lease. Many property owners are now leery of renting to medical marijuana facilities because of recent federal raids.

The City of Berkeley allows four dispensaries. One of these dispensaries, Berkeley Patients Group, closed its San Pablo Avenue location on May 1, 2012 after 12 ½ years of operation. Although they will be looking for a new location, according to BerkeleySide.com, Berkeley Patients Group is closing the San Pablo dispensary because of federal government threats to seize the landlord's assets if cannabis operations continue. Berkeley Patients Group, with 13,000 members, is the largest and oldest dispensary to be impacted by U.S. Attorney's pursuit of cannabis operations throughout California.

Conclusion

A moratorium was established in the City of San Leandro in late 2010 for Medical Marijuana dispensaries and cultivation facilities; it was extended to September 30, 2012. Although there is still uncertainty with regard to direction from the California Supreme Court regarding the *City of Riverside* and *City of Lake Forest* cases coupled with the holding in *County of Los Angeles*, it appears that the most prudent course of action is to at least introduce for first reading an ordinance prohibiting dispensaries until the two California Supreme Court cases are decided. This approach prepares the City for a ban while addressing the imminent expiration of the moratorium, keeps open opportunities for future local legislation relative to medical marijuana, and does not commit the City for the next seven weeks while staff monitors and gathers information related to medical marijuana laws. Staff recommends the City Council introduce the proposed ordinance, schedule second reading for September 4, 2012, and also receive an update on the status of medical marijuana regulation by local jurisdictions.

ATTACHMENTS

Attachments were provided electronically and are available for review in the Community Development Department during normal business hours.

- Alameda County and Alameda County Cities' Approach to Medical Marijuana Dispensaries and Cultivation Facilities
- Exhibit A: "White Paper on Marijuana Dispensaries" issued by California Police Chiefs Association's Task Force on Marijuana Dispensaries
- Exhibit B: "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, September to December 2007;
- "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, July to September 2008;
- "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, January to March 2009
- "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, April to June 2009;
- "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, July to September 2009;
- "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police

Chiefs Association, October to December 2009;

- “Medical Marijuana Dispensaries and Associated Issues” presented to the California Police Chiefs Association, January to March 2010;
- “Medical Marijuana Dispensaries and Associated Issues” presented to the California Police Chiefs Association, April to June 2010;
- “California Police Chiefs Association Position Paper on the Decriminalization of Marijuana” September, 2009;
- “Medical Marijuana Dispensaries and Associated Issues” presented to the California Police Chiefs Association, [undated]

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