



Legislation Text

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PASS TO PRINT: An Ordinance Adding Municipal Code Chapter 4-33 Relating to the Prohibition Against the Establishment and Operation of Medical Marijuana Dispensaries in the City (establishes a ban on medical marijuana cooperatives, collectives, dispensaries and cultivation facilities, to sunset on June 30, 2013)

The City Council of the City of San Leandro does ORDAIN as follows:

Section 1. Findings.

(A) On November 5, 1996, the voters of the State of California approved Proposition 215, codified at California Health and Safety Code § 11362.5 et seq. and entitled “The Compassionate Use Act of 1996” (“the Act” or “the CUA”). The intent of Proposition 215 was to enable persons who are in need of medical marijuana for specified medical purposes to obtain and use it under limited, specified circumstances.

(B) Despite voter approval of the Compassionate Use Act, various problems and uncertainties in the Act impeded law enforcement’s ability to interpret and enforce the law, and the uncertainties also hindered persons eligible to use marijuana for medical purposes from accessing marijuana, while many persons took advantage of the Act to use marijuana for recreational and not medicinal purposes.

(C) The California Legislature adopted Senate Bill 420, effective January 1, 2004, adding Article 2.5, “Medical Marijuana Program” to Division 10 of the California Health and Safety Code § 11362.7, et seq. (“the Medical Marijuana Program Act”, “the MMPA” or “Program”). The MMPA created a state-approved voluntary medical marijuana identification card program and provided for certain additional immunities from state marijuana laws. Health and Safety Code § 11362.83 also authorized cities and other local governing bodies to adopt and enforce rules and regulations consistent with the Program.

(D) While the MMPA intended to clarify the scope of the Act, neither the Federal nor the State government has implemented a specific plan “to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana,” leaving numerous questions unanswered as to how the CUA and the MMPA should be implemented, particularly in regard to the distribution of medical marijuana through facilities commonly referred to as medical marijuana dispensaries.

(E) The chief purposes of the Compassionate Use Act are: (a) to give Californians the opportunity to obtain and use marijuana in the medical treatment of illnesses for which it provides appropriate relief, as recommended by a physician, and (b) to ensure that patients and their primary caregivers who obtain and use marijuana for medicinal purposes upon recommendation of a physician are not subject to criminal prosecution or sanction. As such, the primary intention of the Compassionate Use Act was to provide seriously ill Californians with the right to use marijuana for

medicinal purposes, without facing criminal penalties otherwise imposed under State law, and not to legalize marijuana for recreational use, legitimize illegal drug use or fuel the market for illegal drug sales.

(F) The Compassionate Use Act is limited in scope, in that it only provides a defense from criminal prosecution for possession and cultivation of marijuana to qualified patients and their primary caregivers. The scope of the Medical Marijuana Program is also limited in that it establishes a statewide identification program and affords qualified patients, persons with identification cards, and their primary caregivers an affirmative defense to certain enumerated criminal sanctions that would otherwise apply to transporting, processing, administering or distributing marijuana.

(G) The Compassionate Use Act and Medical Marijuana Program Act do not appear to have facilitated the stated goals of providing access to marijuana for patients in medical need of marijuana, but instead the predominant use of marijuana has been for recreational and not-medicinal purposes as provided in a report issued by the California Police Chiefs Association in September 2009, entitled “California Police Chiefs Association Position Paper on the Decriminalization of Marijuana”: “[I]t has become clear, despite the claims of use by critically ill people that only about 2% of those using crude Marijuana for medicine are critically ill. The vast majority of those using crude Marijuana as medicine are young and are using the substance to be under the influence of THC [tetrahydrocannabinol] and have no critical medical condition.” (“White Paper on Marijuana Dispensaries” issued by California Police Chiefs Association’s Task Force on Marijuana Dispensaries, available at the City’s Community Development Department, noted as Exhibit A).

(H) Facilities purportedly dispensing marijuana for medicinal purposes are commonly referred to as medical marijuana dispensaries, medical marijuana cooperatives, or medical marijuana collectives; however, these terms are not defined anywhere in the Compassionate Use Act nor Medical Marijuana Program Act. Significantly, nothing in the CUA or the MMPA specifically authorizes the operation and the establishment of medical marijuana dispensing facilities.

(I) Further, neither the CUA nor the MMPA require or impose an affirmative duty or mandate upon local governments, such as the City of San Leandro (“San Leandro” or “City”), to allow, authorize, or sanction the establishment, or operation of facilities dispensing medical marijuana within its jurisdiction. Moreover, the Compassionate Use Act did not create a constitutional right to obtain medical marijuana.

(J) Health and Safety Code § 11362.765 specifically prohibits the cultivation or distribution of medical marijuana for profit.

(K) It is critical to note that the Act does not abrogate the City’s powers to regulate for public health, safety and welfare. Health and Safety Code § 11362.5(b)(2) provides that the Act does not supersede any legislation intended to prohibit conduct that endangers others. And, Health and Safety Code § 11352.83 authorizes cities and counties to adopt and enforce rules and regulations consistent with the Medical Marijuana Program Act.

(L) On August 25, 2008, Edmund G. Brown, the California Attorney General, issued “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (“the Attorney General Guidelines”), which sets regulations intended to ensure the security and non-diversion of marijuana grown for medical use by qualified patients. Health and Safety Code §11362.81(d)

authorizes the Attorney General to “develop and adopt appropriate guidelines to ensure the security and non-diversion of marijuana grown for medical use by patients qualified under” the Compassionate Use Act. Nothing in the Guidelines imposes an affirmative mandate or duty upon local governments, such as San Leandro, to allow, sanction or permit the establishment or the operation of facilities dispensing or cultivating medical marijuana within their jurisdictional limits.

(M) In adopting this Ordinance, the City Council takes legislative notice of the following cases that it finds relevant to its actions:

- (1) *People v. Mentch* (2008), 45 Cal.4th 274 [California Supreme Court holding that a “primary caregiver” status requires a specified showing of consistently providing care, independent of any assistance in taking medical marijuana, at or before the time of assuming the responsibility of assisting with medical marijuana];
- (2) *People ex rel. Lungren v. Peron* (1997), 59 Cal.App.4th 1383 [California Court of Appeal recognizing the limited scope of the CUA and the MMPA, and holding that filling out a form that designates a commercial enterprise as the qualified patient’s “primary caregiver” is insufficient to establish a caregiver status];
- (3) *Ross v. Raging Wire Telecommunications, Inc.* (2008), 42 Cal.4th 920 [California Supreme Court holding that an employee may be terminated for the use of medical marijuana];
- (4) *Claremont v. Kruse* (2009), 177 Cal.App.4th 1153 [California Court of Appeal holding that neither the CUA nor the MMPA expressly or impliedly preempt local exercise of land use and zoning police powers, therefore, cities retain their police power to regulate and, if necessary, restrict the operation of medical marijuana collectives and cooperatives];
- (5) *People v. Mower* (2002), 28 Cal.4th 457 [California Supreme Court holding that the defenses accorded by the CUA are limited to “patients and primary caregivers” for the possession and cultivation of marijuana];
- (6) *People v. Urziceanu* (2005), 132 Cal.App.4th 747 [California Court of Appeal noting that courts consistently have rejected attempts to broaden the scope of the CUA and the MMPA and recognizing that the CUA did not create a constitutional right to obtain marijuana];
- (7) *People v. Hochanadel* (2009) 176 Cal.App.4th 1997 [California Court of Appeal holding that the operators of a storefront dispensary which sold marijuana to individuals did not operate within the CUA and the MMPA, and did not constitute a primary caregiver such that it was entitled to protections under the CUA and MMPA];
- (8) *City of Lake Forest v. Moen et al.* (Case No. 30-2009-0029887-CU-MC-CJC) [trial court granting Lake Forest’s preliminary injunction and finding that (a) a city’s power to enact land use or zoning laws, and a city’s enforcement of existing local laws is not preempted by the Compassionate Use Act and Medical Marijuana Program Act; and (b) under Government Code Section 37100, Lake Forest could not have promulgated local regulations allowing the use, sale or distribution of marijuana because marijuana remains an illegal drug under the Federal Controlled Substances Act];

(9) *People v. Kelly* (2010), 47 Cal.4th 1008 [California Supreme Court ruling that Health & Safety Code Section 11362.77 which limits the quantity of medical marijuana a qualified patient or primary caregiver may possess without a physician's recommendation, unconstitutionally amended the voter-approved Compassionate Use Act, by burdening a qualified patient's defense to criminal charges, as individuals may possess and cultivate any amount of marijuana reasonably necessary for his or her medical condition for purposes of a defense in a criminal case].

(10) *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* (2011) 200 Cal.App.4th 892 [California Court of Appeal upheld a local ordinance that banned medical marijuana dispensaries in the City of Riverside. This case has since been granted certiorari by the California Supreme Court, and is thus depublished].

(11) *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 [California Court of Appeal struck down a local ban on medical marijuana dispensaries in the City of Lake Forest. This case has since been granted certiorari by the California Supreme Court, and is thus depublished].

(12) *Pack v. Superior Court (City of Long Beach as the Real Party in Interest)* (2011) 199 Cal.App.4th 1070 [California Court of Appeal held that Federal law pre-empts State law related to permitting of dispensaries. This case has since been granted certiorari by the California Supreme Court, and is thus depublished].

(13) *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (2012) Cal.App.LEXIS 772 [Court of Appeal decision struck down a County's ban on dispensaries, in line with the *City of Lake Forest* and in opposition to the *City of Riverside* decisions]. At this time, *County of Los Angeles* is the current law related to a local jurisdiction's ability to regulate medical marijuana dispensaries, collectives, and cooperatives.

(N) Marijuana remains an illegal substance under the Federal Controlled Substances Act, 21 U.S.C. § 801, *et seq.* and is classified as a "Schedule I Drug," which is defined as a drug or other substance that has a high potential for abuse, that has no currently accepted medical use in treatment in the United States, and that has not been accepted as safe for its use under medical supervision. Furthermore, the Federal Controlled Substances Act makes it unlawful for any person to cultivate, manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense marijuana. The Controlled Substances Act contains no statutory exemption for the possession of marijuana for medical purposes.

(O) The City Council, in adopting this Ordinance, takes legislative notice of the following federal cases:

(1) *United States v. Oakland Cannabis Buyers' Cooperative* (2001), 532 U.S. 483 [finding that there is no medical necessity defense or exemption for the possession of medical marijuana under the federal Controlled Substances Act];

(2) *Gonzalez v. Raich* (2005), 545 U.S. 1 [holding that under the Commerce Clause of the U.S. Constitution, Congress can prohibit the manufacture, cultivation, distribution and

possession of marijuana pursuant to the Federal Controlled Substances Act, even as such prohibitions apply to marijuana manufactured, cultivated, distributed or possessed under the auspices of the Act]; and

(3) *James v. City of Costa Mesa et al.* (Case No. SACV 10-402 AG (MLGx)) [District Court ruling denying plaintiffs' preliminary injunction and finding that medical marijuana users are not qualified individuals under the Americans with Disabilities Act because marijuana remains an illegal drug under the Federal Controlled Substances Act].

(P) The City Council, in adopting this Ordinance, takes further legislative notice of the existence and content of the following reports concerning the negative secondary effects and adverse impacts of facilities dispensing medical marijuana: September 2009, "California Police Chiefs Association Position Paper on Decriminalizing Marijuana"; "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association, April to June 2010; "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, July to September 2008; "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, January to March 2009; "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, October to December 2009 "Medical Marijuana Dispensaries and Associated Issues" presented to the California Police Chiefs Association [undated]. These reports are available at the City's Community Development Department, noted as Exhibit B).

(Q) In adopting this Ordinance, the City Council also takes notice of the existence and contents of various newspaper articles concerning negative secondary effects and adverse impacts of facilities dispensing and/or cultivating medical marijuana. The City Council finds that these reports are relevant to the problems addressed by the City of San Leandro in enacting this Ordinance to preserve and safeguard public health, safety and welfare by protecting against the negative secondary effects and adverse impacts of facilities dispensing and/or cultivating medical marijuana, and more specifically finds that these reports provide convincing evidence that:

(1) There is substantial evidence that other California cities that have permitted the establishment and operation of facilities for the purpose of dispensing or cultivating medical marijuana have experienced negative secondary effects and adverse impacts, including an increase in crimes of marijuana and narcotics distribution and use; an increase in other criminal activities in the vicinity of these facilities, such as robbery of patients as they go in or leave the dispensaries; increased instances of DUIs and street dealings of illegal drugs; burglary of facilities dispensing medical marijuana; increases in violent crimes, such as armed robberies and murders; loss of trade for other commercial businesses located near these facilities; organized crime involvement in the ownership and operation of marijuana dispensaries; money laundering and firearms violations; physicians making recommendations for questionable or potentially questionable cases of qualified use of medical marijuana; unjustified and fictitious physician recommendations; street dealers in the vicinity of dispensaries offering marijuana at a lower price to arriving patrons; smoking of marijuana in the public; and increased noise and pedestrian traffic.

(2) In light of the negative secondary effects and adverse impacts described above, the City Council finds that operation of facilities dispensing or cultivating medical marijuana will burden and strain the City's law enforcement resources, in that law enforcement assistance would often be required to address and respond to increased criminal activities.

(3) California communities have also experienced that the operation of facilities dispensing medical marijuana negatively impact minors. For example, medical marijuana dispensaries advertise to high school students by leaving fliers on cars in the students' parking lot and offering discounts on marijuana products; medical marijuana shops target healthy minors as young as 14 years of age through street contacts, suggesting that students obtain medical marijuana cards; high school students are reportedly obtaining physician recommendations to use marijuana for such conditions as sleeplessness and stress; and minors are obtaining medical marijuana cards or physical recommendation for recreational and non-medicinal purposes. The City Council recognizes the possible harmful effects on minors exposed to the negative secondary effects and adverse impacts of facilities dispensing medical marijuana and recognizes the need to adopt this Ordinance, which will minimize and/or eliminate such exposure within San Leandro.

(4) California communities have reported that the vast majority of facilities dispensing medical marijuana, purportedly as "cooperatives" or "collectives", are operating in violation and contrary to the CUA and the MMPA, in that these marijuana dispensing facilities are large money making enterprises and are generally operating illegally for profit and are engaging in the "sale" of marijuana, instead of distributing or making marijuana available to qualified patients.

(5) In addition to the illegal operations of these money-making entities that sell marijuana, California communities have reported concerns over the quality of marijuana, in that certain chemicals including pesticides and insecticides, have been discovered in the marijuana. In 2010, testing of certain "medical marijuana" distributed through a dispensary in Los Angeles County revealed high levels of Bifenthrin, a known form of pesticide or insecticide. Most marijuana dispensaries do not test the marijuana for dangerous and poisonous substances, nor are warning labels generally attached. The unmonitored, untested and unlabeled distribution of marijuana poses serious health and safety concerns.

(6) These reports and experiences from other California cities and counties establish by convincing evidence that facilities dispensing and distributing medical marijuana negatively impact the health, safety and welfare of the community because of the secondary negative effects and adverse impacts described in Subparagraphs (1)-(5), above.

(7) Relying on the above, the City Council also finds that facilities dispensing and distributing medical marijuana, may lead to the detrimental secondary effects and adverse impacts, as specifically described in Subparagraphs (1)-(6), above. The City bases this conclusion on the experiences of California communities that the City has a reasonable basis to believe reflect the experiences of its own community.

(R) Moreover, persons in the City of San Leandro that may be in need of medical marijuana have access to facilities dispensing marijuana in neighboring cities within a short car ride away,

including but not limited to the cities of Oakland and Berkeley and unincorporated Alameda County. In addition, the City of San Leandro Police Department acts in compliance with the Act in the enforcement of medical marijuana cultivation, possession and use such that qualified patients and their primary caregivers may safely access their medicine as long as they use the medicine in compliance with the law.

(S) Pursuant to the City's police powers authorized in Article XI, Section 7 of the California Constitution, as well as under the City of San Leandro's Charter, and Municipal Code the City has the power to regulate permissible land uses throughout the City and to enact regulations for the preservation of public health, safety and welfare of its residents and community. And, pursuant to Government Code § 38771 the City also has the power through its City Council to declare actions and activities that constitute a public nuisance.

(T) The City Council finds that neither the CUA nor the MMPA preempt the City's exercise of its traditional police powers in enacting regulations, as well as legislation for preservation of public health, safety and welfare, such as this Ordinance prohibiting the establishment and operation of medical marijuana cooperatives, collectives, dispensaries, and cultivation facilities within the City.

(U) In 2010, the Legislature amended the MMPA to add Health and Safety Code § 11362.768 which became effective January 1, 2011, and prohibits any "medical marijuana cooperative, collective, dispensary, operator, establishment, or provider from locating within 600 feet of a school", which reaffirms the City's ability to regulate the location of medical marijuana dispensaries; and

(V) The City Council finds that the public health, safety and general welfare of the City and its residents necessitates and requires the adoption of this Ordinance, prohibiting the establishment and operation of medical marijuana cooperatives, collectives, dispensaries, and cultivation facilities in order to: (a) protect and safeguard against the detrimental secondary negative effects and adverse impacts of facilities dispensing medical marijuana, as more specifically described in Paragraph Q, above; (b) preserve and safeguard the minors, children and students in the community from the deleterious impacts of medical marijuana facilities; and (c) preserve the City's law enforcement services, in that monitoring and addressing the negative secondary effects and adverse impacts will likely burden the City's law enforcement resources. The City Council further finds that due to the negative secondary effects and adverse impacts of facilities dispensing and/or cultivating medical marijuana, the establishment and the operation of these facilities will negatively impact residential uses and neighborhoods in the City.

(W) The City Council finds that *County of Los Angeles v. Alternative Medicinal Cannabis Collective* may be granted certiorari by the California Supreme Court, or it may be de-published in the coming weeks, such that it would no longer be the law that a city may not prohibit the establishment of dispensaries, collectives, or cooperatives within its jurisdiction. Additionally, the various other court cases granted certiorari by the California Supreme Court interpreting the Act related to whether a city may prohibit the establishment and operation of medical marijuana cooperatives, collectives, dispensaries, and cultivation facilities, and legislation passed by the California Legislature may dramatically change a city's ability to regulate dispensaries such that the City Council finds that due to the continuing, unpredictable, and pervasively unsettled nature of the law related to the establishment and regulation of medical marijuana dispensaries, collectives, and cooperatives, it is in the public health, safety, and general welfare to establish this ordinance until the law related to

whether and how local jurisdictions may ban or regulate medical marijuana dispensaries, collectives, and cooperatives is settled, and that this ordinance shall sunset on June 30, 2013, and the prohibition shall be lifted. Furthermore, the City Council finds that this Ordinance has a severability clause such that if the Ordinance is adopted then any part of the adopted Ordinance later found to be unlawful by operation of law shall be automatically stricken and of no effect.

(X) This Ordinance is consistent with the City of San Leandro General Plan in that the General Plan, its objectives, policies, and goals do not permit or contemplate the establishment or operation of medical marijuana cooperatives, collectives or similar facilities that engage in dispensing of or cultivating marijuana for medicinal purposes.

SECTION 2. AMENDMENT TO TITLE 4 “PUBLIC WELFARE” OF THE CITY OF SAN LEANDRO MUNICIPAL CODE.

Title 4 “Public Welfare” of the City of San Leandro Municipal Code is hereby amended to add Chapter 4-33 entitled “Prohibition on Medical Marijuana Cooperatives or Collectives” to read in its entirety as follows:

Chapter 4-33 PROHIBITION OF MEDICAL MARIJUANA COOPERATIVES OR COLLECTIVES.

Section 4-33-100 Purpose.

It is the purpose and intent of this Chapter to preclude the opening, establishment and operation of Medical Marijuana Cooperatives and Collectives, in the City.

Section 4-33-105 Definitions.

The words and phrases included in this Section shall have the following meanings, unless it is clearly apparent from the context that another meaning is intended:

“Marijuana” means all or parts of the plant *Cannabis sativa* L., pursuant to Health and Safety Code § 11018, as amended from time to time.

“Medical marijuana” means marijuana authorized in strict compliance with Health and Safety Code §§ 11362.5, 11362.7 *et seq.*, or as such sections may be amended from time to time.

“Medical marijuana cooperative” or “collective” means a collective, cooperative, dispensary, operator, establishment, provider, association or similar entity, whether fixed or mobile, that cultivates, distributes, dispenses, stores, exchanges, processes, delivers, makes available, transmits and/or gives away marijuana in the City of San Leandro for medicinal purposes to two (2) or more of the following: qualified patients, persons with an identification card or primary caregivers, in strict accordance with California Health and Safety Code §§ 11362.5, 11362.7 *et seq.* and/or the Attorney General Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use, or as these laws and guidelines may be amended from time to time. The terms “primary caregiver,” “qualified patient” and “person with an identification card” shall be as defined in California Health and Safety Code § 11352.5 *et seq.*

Section 4-33-110 Medical Marijuana Cooperatives and Collectives Prohibited.

(a) Medical Marijuana Cooperative or Collective is not a permitted use and is prohibited in all zones throughout the City. No permit or any other applicable license or entitlement for use, nor any business license, shall be approved or issued for the establishment, maintenance or operation of a Medical Marijuana Cooperative or Collective within the City.

(b) The establishment, maintenance or operation of a Medical Marijuana Cooperative or Collective within the City is declared to be a public nuisance and may be abated by the City either pursuant to the San Leandro Municipal Code or any other available legal remedies, including but not limited to declaratory relief and civil injunctions.

Section 4-33-115 Violation and Enforcement.

The establishment, maintenance or operation of a Medical Marijuana Cooperative or Collective in violation of or in non-compliance with any of the requirements of this Chapter or applicable provisions of the Zoning Code or San Leandro Zoning Code shall be subject to any enforcement remedies available under the law and/or the City's Municipal Code. In addition, the City may enforce the violation of this Chapter by means of civil enforcement through a restraining order, a preliminary or permanent injunction or by any other means authorized by the law.

Section 4-33-120 Sunset

This ordinance shall automatically sunset on June 30, 2013, such that all of its provisions shall terminate without further action. The City Clerk shall publish notice of the impending sunset sixty (60) days before June 30, 2013 in a newspaper of general circulation, and on the City's website.

SECTION 3. CALIFORNIA ENVIRONMENTAL QUALITY ACT FINDINGS.

Upon independent review and consideration of the information contained in the Staff Report and the Notice of Exemption for this Ordinance, the City Council hereby finds and determines that this Ordinance does not have the potential for causing a significant effect on the environment. Accordingly, the City Council finds and determines that this Ordinance is exempt from the California Environmental Quality Act ("CEQA", Public Resources Code § 21000 *et seq.*) pursuant to the general rule in Section 15061(b)(3) of the CEQA Guidelines (Chapter 3, of Title 14, of the California Code of Regulations) that CEQA applies only to projects which have the potential for causing a significant effect on the environment and thereby the City Council approves and adopts the Notice of Exemption. The City Council further directs Staff to file the Notice of Exemption, as authorized by law.

SECTION 4. SEVERABILITY.

If any provision, section, paragraph, sentence or word of this Ordinance, or any part thereof, is for any reason found to be unconstitutional, invalid or beyond the authority of the City of San Leandro by a court of competent jurisdiction, such decisions shall not affect the validity or effectiveness of the remaining portions of this Ordinance.

SECTION 5. This ordinance shall take effect upon the expiration of the moratorium. The City Clerk is

directed to publish the title once and post a complete copy thereof on the City Council Chamber bulletin board prior to its adoption.