

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

MARY T. NUESCA
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

March 15, 2011

REPORT TO THE HONORABLE MAYOR AND CITY COUNCIL

RECOMMENDATIONS FROM THE PUBLIC SAFETY AND NEIGHBORHOOD SERVICES
COMMITTEE, RELATING TO REGULATIONS FOR MEDICAL MARIJUANA OUTSIDE
OF LAND USE AND ZONING

INTRODUCTION

The Medical Marijuana Task Force (MMTF) was formed on October 6, 2009, and directed by the City Council to provide guidelines for (1) patients and caregivers, (2) the structure and operation of collectives and cooperatives, and (3) police enforcement. The MMTF produced two reports: a November 12, 2009 Report to Council addressing land use and zoning issues—heard and modified by the Land Use and Housing Committee (LUH) on March 24, 2010;¹ and an April 21, 2010, Report to Council regarding regulations that fall outside of land use and zoning—heard at the Public Safety and Neighborhood Services Committee (PSNS) on April 28, 2010, Attachment A. As requested by PSNS at the April 28 meeting, this Office provided a report addressing the recommendations contained in the April 21 Report. *See* City Att’y Report 10-19 (May 21, 2010) (CA Report 10-19), Attachment B. At its May 26, 2010, meeting, PSNS directed the City Attorney’s Office to develop an ordinance for the regulation of medical marijuana cooperatives using the recommendations of the MMTF, with two additional requirements. Specifically, PSNS added a requirement that all cooperatives organize as statutory entities pursuant to the Attorney General’s Guidelines, and that labels on medications include the patient’s name, name of the cooperative, address, and if an edible product, the source of that food production. This Report further discusses implementation details not previously discussed in CA Report 10-19. A proposed ordinance is attached, Attachment C.

BACKGROUND

In 1996, Proposition 215, the California Compassionate Use Act (CUA), was passed by the electorate. Proposition 215, codified at California Health and Safety Code section 11362.5, allows the use of marijuana for medical purposes when recommended by a physician and excludes from criminal prosecution the patient and the primary caregiver, as defined. In 2003, the State of California enacted Senate Bill 420, the Medical Marijuana Program Act (MMP), setting forth requirements for the issuance of voluntary identification (ID) cards; exempting cardholders, qualified patients, and designated primary caregivers who associate to collectively

¹ On September 13, 2010, the City Council initiated the amendments to the Land Development Code and the City’s Local Coastal Program. The amendments incorporated the MMTF recommendations, as modified by LUH and by the City Council. The City Council directed that staff bring back the land use and non-land use regulations together to the City Council upon completion of the initiation and public process for the land use amendments.

or cooperatively cultivate marijuana for medical purposes from certain crimes; requiring the Attorney General to issue guidelines for the security and nondiversion of medical marijuana; and allowing cities to adopt and enforce laws consistent with the MMP. The MMP is codified at California Health and Safety Code sections 11362.7-11362.83.² The Attorney General issued “Guidelines for the Security and Non-Diversion for Marijuana Grown for Medical Use” in August of 2008 (AG Guidelines).

DISCUSSION

I. AUTHORITY TO REGULATE MEDICAL MARIJUANA COOPERATIVES

Pursuant to article XI, section 7 of the California Constitution, a “county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” This police power is broad.

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the ‘police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself.’ (quoting *Birkenfield v. City of Berkeley*, 17 Cal. 3d 129, 140 (1990)).

Candid Enterprises, Inc. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 885 (1985).

While municipal business regulations must be reasonable and nondiscriminatory, whether regulation is required is determined by the legislative body and generally not questioned by the courts. *See People v. Glaze*, 27 Cal. 3d 841, 845 (1980); *Harriman v. City of Beverly Hills*, 275 Cal. App. 2d 918, 923 (1969). “Judicial review of police power is limited to determining whether a regulation is reasonably related to promoting public health, safety, comfort and welfare and whether the means adopted are reasonably appropriate to the purpose.” *Graf v. San Diego Unified Port Dist.*, 7 Cal. App. 4th 1224, 1232 (1992) (citing *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30 (1964)).

The CUA allows the possession and cultivation of marijuana for medical use by certain qualified persons. According to the AG Guidelines, the MMP recognizes a qualified right to collective and cooperative cultivation of medical marijuana. AG Guidelines, p.2. However, case law has upheld the right of local government to regulate such entities, and the CUA and MMP do not create “a broad right to use marijuana without hindrance.” *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1175 (2009) (quoting *RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008)).

² The distribution of, or possession with intent to distribute, marijuana remains a federal crime. 21 U.S.C. § 841 (2010). This Office has been asked on several occasions to reconcile the State of California’s medical marijuana laws with the federal prohibitions. *See* 1999 City Att’y Report 8 (99-8; Aug. 31, 1999); 2002 City Att’y MOL 5 (02-5; Sept. 19, 2002); 2007 Op. City Att’y 3 (07-3; June 21, 2007); 2009 City Att’y Report 18 (09-18; July 24, 2009). The two cannot be reconciled.

Neither statute precludes local action, except in the areas of punishing physicians for recommending marijuana to their patients, and according qualified persons affirmative defenses to enumerated penal sanctions. (§ 11362.5, subds. (c), (d); 11362.765; 11362.775.) The CUA expressly provides that it does not ‘supersede legislation prohibiting persons from engaging in conduct that endangers others’ (§ 11362.5, subd. (b)(2)), and the MMP expressly states that it does not ‘prevent a city or other local governing body from adopting and enforcing laws consistent with this article’ (§ 11362.83).

Kruse, 117 Cal. App. 4th at 1176.

Further, the CUA and MMP likely do not require the City to establish local regulations for medical marijuana dispensaries.³ *Id.* In *Kruse*, the court held that the areas of land use, zoning and business licensing were not preempted by CUA or MMP and therefore it was permissible for the city to adopt a moratorium on issuing permits and licenses to dispensaries as well as enforce licensing and zoning regulations prohibiting operation of such dispensaries. *Id.* at 1175-76. *See also City of Westminster v. Saif Madhat*, Case No. 30-2010-00338140 (Orange Co. Super.) and *City of Lake Forest v. Mark G. Moen*, Case No. 30-2009-00298887 (Orange Co. Super.) (both upholding zoning regulations prohibiting all dispensaries from the jurisdictions). The MMP specifically contemplates local regulation. Cal. Health & Safety Code §§ 11362.83, 11362.768. Los Angeles County ordinances regulating the location of dispensaries and requiring a business license were recently upheld against a challenge that they were preempted by state law, inconsistent with state law, and treated dispensaries differently from pharmacies. *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (2011). Therefore, the City may regulate such entities, but this Office expects the contours of local government regulations to continue to be the subject of litigation.

II. STATUTORY COOPERATIVES

A. Introduction

Pursuant to California Health and Safety Code section 11362.775, medical marijuana patients, their designated primary caregivers, and persons with identification cards are not subject to criminal sanctions when they associate to collectively or cooperatively cultivate marijuana for medical purposes. As discussed in the AG Guidelines, a collective as an organizational form has no legal definition in California. AG Guidelines, p.8. Additionally, only entities organized under the relevant sections of the California Corporations Code and the California Food and Agricultural Code may legally be designated as “cooperatives.” Cal. Corp. Code § 12679 and Cal. Food & Agric. Code § 54036. As discussed below, this Office

³ The term “dispensary” is often used to describe a variety of operations relating to the collective cultivation and distribution of medical marijuana. The term did not appear in the CUA or MMP when enacted, however, the California Legislature recently used the term in adding California Health and Safety Code section 11362.768 to the MMP. That section prohibits a cooperative, collective, dispensary, operator, establishment, or provider from locating within 600 feet of a school, but does not separately define “dispensary.”

recommends the “consumer cooperative” structure for compliance with MMTF recommendations and includes this structure in the proposed ordinance.

B. Agriculture Cooperatives

A cooperative agricultural association features some characteristics that conform to the MMTF’s recommendations. It cannot be organized to make a profit for itself or for its members as members. Cal. Food & Agric. Code § 54033. Its activities are limited to handling the product produced by its members or providing certain services or supplies to its members. Cal. Food & Agric. Code § 54171. And, unless expressly dispensed with in the bylaws, it is required to provide members an annual financial report, including a balance sheet, to be prepared “in a form which is sanctioned by sound accounting practice for the association or approved by a duly certified public accountant or a public accountant.” Cal. Food & Agric. Code § 54204.

However, there are characteristics of an agricultural cooperative that make it unsuitable for inclusion in the proposed ordinance, given the MMTF’s recommendations for medical marijuana dispensaries. First, while it is a non-profit, cooperative agricultural associations generally seek to generate profits for their members as producers. Cal. Food & Agric. Code § 54033. This corporate form was created to facilitate the marketing and distribution of agricultural products more directly from producer to consumer. Cal. Food & Agric. Code § 54031. Agricultural cooperatives may engage in any activity associated with the production of the agricultural product by its members, including marketing, selling, or processing of the product and providing members with supplies and equipment. Cal. Food & Agric. Code §§ 54061, 54171. Consequently, such cooperatives can only be formed by three or more natural persons engaged in the production of an agricultural product. Cal. Food & Agric. Code § 54061. Membership is limited to:

such persons as are engaged in the production of any product which is to be handled by or through the association, or that use or employ any service or facility offered by the association on, or in connection with, land which is used for the production of any product

Cal. Food & Agric. Code § 54231.

Medical marijuana cooperatives are envisioned to “be a closed circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members.” AG Guidelines, p.10. Under the MMTF proposed model, it is expected that some members will contribute to the organization by providing medical marijuana from their personal grows for use by other members. Therefore, it is this Office’s opinion that a cooperative agricultural association formed under the Food and Agriculture Code is not the most appropriate organizational form for medical marijuana cooperatives.

C. Consumer Cooperatives

While having features similar to agricultural cooperatives, consumer cooperatives are generally better suited to ensure compliance with the MMTF recommendations.

A corporation formed under the Consumer Cooperative Corporation Law must include the word “cooperative” in its name. Cal. Corp. Code § 12311(a). It is organized and operated primarily for the benefit of members as patrons of the corporation. Cal. Corp. Code § 12201. It is not organized to make a profit for itself or for its members as members. *Id.* It is democratically controlled by members, with members having equal voting rights, unless the articles of incorporation provide otherwise.⁴ Cal. Corp. Code §§ 12201, 12314, 12404. Requirements for membership are defined in the corporation's articles or bylaws and any person may be a member (except for a subsidiary of the corporation). Cal. Corp. Code §§ 12238, 12403. The cooperative may require consideration for membership as well as levy dues, assessments, or fees, as provided in its bylaws or articles. Cal. Corp. Code §§ 12400, 12441.

Annually, the cooperative must file with the Secretary of State a statement providing the names and complete business or residence addresses of its chief executive officer or general manager, secretary, and chief financial officer, as well as the street address of its principal office in California.⁵ Cal. Corp. Code § 12570. It must maintain “adequate and correct books and records of account,” and minutes of member and board proceedings. Cal. Corp. Code § 12590. It must also maintain a record of all members, consisting of their names, addresses, the class of membership, and number of membership units held. *Id.* Such accounting books and records and minutes of proceedings are open for inspection by members. Cal. Corp. Code § 12603.

Cooperatives with more than twenty-five members must prepare an annual report containing, “in appropriate detail,” a balance sheet, income statement, and statement of cashflows for the preceding fiscal year. Cal. Corp. Code § 12591. Financial statements must be prepared according to “generally accepted accounting principles or some other basis of accounting which reasonably sets forth the assets and liabilities and the income and expenses of the corporation.” Cal. Corp. Code § 12217. Any director or officer who knowingly concurs in communicating to members any materially false statement regarding the financial condition of the corporation is subject to criminal prosecution. Cal. Corp. Code § 12673. Additionally, every director, officer, agent or member of a cooperative who, with intent to defraud, destroys, alters, or falsifies the records of the corporation or is complicit in an omission of a material entry in any record is subject to criminal prosecution. Cal. Corp. Code § 12674.

The annual report must include a report of independent accountants, “or, if there is no report, the certificate of an authorized officer of the corporation that the statements were prepared without audit from the books and records of the corporation.” Cal. Corp. Code § 12591. It must also state the location where a record of the names and addresses of members is maintained. *Id.*

However, there are certain sections of the California Corporations Code that will not apply to medical marijuana collectives under the proposed ordinance. For example, collectives cannot generate gains or profits for distribution, which are normally permitted pursuant to California Corporations Code sections 12450-12454. In addition, there may be issues which arise

⁴ Pursuant to the Consumer Cooperative Corporation Law, the terms “shareholder” and “member” are equivalent. Cal. Corp. Code § 12247.

⁵ The cooperative must have a minimum of three directors and the exact number must be provided in the articles or bylaws. Cal. Corp. Code § 12331.

upon dissolution of the cooperative. Pursuant to California Corporations Code section 12656, remaining assets are distributed among the members unless the articles or bylaws provide otherwise. In this case, such distribution may run afoul of state law.

The requirements of statutory consumer cooperatives are generally consistent with the features recommended by the MMTF. Therefore, the proposed ordinance contains the requirement that cooperatives form as statutory consumer cooperatives, at San Diego Municipal Code (SDMC) sections 42.1503-42.1504.

III. IMPLEMENT ACTION OF THE MEDICAL MARIJUANA TASK FORCE RECOMMENDATIONS

The MMTF recommendations listed in the April 21, 2010, Report to Council are listed below. The report discusses each recommendation as it relates to the consumer cooperative requirements as appropriate, and adds comments to supplement CA Report 10-19.

A. Establishment Of A Cost-Recovery Fee

A cost-recovery fee may not exceed the reasonable regulatory costs to the City pursuant to Proposition 26. Proposition 26, passed by the voters in November 2010, recategorized certain state and local fees as taxes, with some exceptions, by amending article XIII A and C of the California Constitution. A cost recovery fee as proposed by the MMTF may be defensible as fitting within two of the seven exceptions contained in Proposition 26: (1) as “[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege” and (2) “[a] charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.” So long as the fee established is based on the reasonable regulatory cost to the City, such fee should be outside the definition of a “tax” and thus not need voter approval. The proposed ordinance incorporates this recommendation at SDMC section 42.1506.

B. Definition of Non-Profit Operation

The MMTF recommended a standard to determine whether a medical marijuana cooperative is operating as a non-profit in compliance with state law. The proposed ordinance incorporates this recommendation at SDMC section 42.1509. *See* CA Report 10-19.

C. Verification of Non-Profit Operation on an Annual Basis

The MMTF recommended that each collective annually file an audit of its operations with the City Comptroller. Under state law, annual reports containing a balance sheet, income statement, and statement of cashflows for the preceding fiscal year are only required of cooperatives with more than twenty-five members. Cal. Corp. Code § 12591. Additionally, financial statements need not be audited nor prepared according to generally accepted auditing and accounting principles. Cal. Corp. Code §§ 12217, 12591. Financial statements may be

prepared according to any “basis of accounting which reasonably sets forth the assets and liabilities and the income and expenses of the corporation.” Cal. Corp. Code § 12217.

Pursuant to California Health and Safety Code section 11362.83, *Kruse*, and consistent with the AG Guidelines, the City may require a cooperative, upon request, to submit to the City an audited financial statement prepared in accordance with generally accepted auditing and accounting principles. A cooperative could satisfy this requirement by submitting an appropriately prepared annual report.

The MMTF recommended that the Comptroller review this documentation. However, reviewing documentation of this nature does not fit within the City Comptroller’s duties under the San Diego Charter. The Comptroller currently works for the Chief Financial Officer (CFO). Pursuant to Charter section 39, the CFO is responsible for the fiscal affairs of the City, not the fiscal affairs of a private entity. Therefore, the proposed ordinance does not identify a particular city department to fulfill this function.

The proposed ordinance incorporates this recommendation at SDMC section 42.1508.

D. Documentation and Definition of Closed-System Operation

The MMTF recommended that a medical marijuana collective document closed system operations pursuant to the AG Guidelines. Additional documentation requirements are likely permissible pursuant to California Health and Safety Code section 11362.83 and *Kruse*. As discussed above, statutory cooperatives are required to maintain “adequate and correct books and records of account” and make them available for inspection by their members. Cal. Corp. Code §§ 12590 and 12603. Also, since “adequate and correct books and records of account” is not defined in the California Corporations Code, it is likely that the City can be more explicit in the type and form of records it requires from medical marijuana cooperatives. The issue of how long such records should be maintained was not addressed by the MMTF, thus the proposed ordinance does not contain a minimum requirement.⁶

As stated in CA Report 10-19, the MMTF proposal for “reasonable compensation” is not found in the California Health and Safety Code or in the AG Guidelines.⁷

⁶ A minimum two-year record retention is required by the San Diego County Code regulations relating to medical marijuana collective facilities. San Diego County Code of Regulatory Ordinances § 21.2505.

⁷ However, a provision of the Internal Revenue Code may provide guidance on the implementation of this recommendation. Section 4958 of the Internal Revenue Code provides for an excise tax for “excess benefits transactions” by tax-exempt organizations. Excess benefits transactions are transactions in which the organization provides a benefit, directly or indirectly, to a disqualified person in excess of consideration received. I.R.C. § 4958(c)(1). A disqualified person is any person (or their family member) who, at any time in the five years prior to the transaction, was “in a position to exercise substantial influence over the affairs of the organization.” I.R.C. § 4958(f)(1). Where the excise tax has been imposed on a disqualified person, an additional tax (computed as a percentage of the excess benefit) is imposed on the organization’s managers who participate in the transaction knowing it to be an excess benefit transaction. I.R.C. § 4958(a)(2).

In the case of compensation, relevant information includes “compensation levels paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions; the availability of similar services in the geographic area of the applicable tax-exempt organization; current compensation surveys compiled by independent firms; and actual written offers from similar institutions competing for the services of the

The proposed ordinance incorporates this recommendation at SDMC sections 42.1508 and 42.1509.

E. Background Checks for Dispensary Directors, Managers, and Other Employees

The MMTF recommended that background checks be performed on all potential directors, managers, and staff of medical marijuana dispensaries. The proposed ordinance incorporates this recommendation at SDMC section 42.1507. *See* CA Report 10-19.

F. Prohibition of Employing Minors

The MMTF recommended a prohibition on the employment of individuals under 18 years of age. The proposed ordinance incorporates this recommendation at SDMC section 42.1510. *See* CA Report 10-19.

G. Restrictions on dispensing medical marijuana to qualified patients under 18

The MMTF recommended that medical marijuana be obtained only by qualified patients 18 years of age or older or the parents or legal guardians of patients under 18 years of age. The proposed ordinance incorporates this recommendation at SDMC section 42.1510. *See* CA Report 10-19.

H. Prohibition Against Physicians' Consultations at Dispensaries

The MMTF recommended that physician's consultations at dispensaries be prohibited. This recommendation was incorporated into the proposed ordinance addressing land use regulations. *See* proposed San Diego Ordinance O-2011-24, section 141.0614(b).

I. Restrictions on Medical Marijuana Transportation

The MMTF recommended that medical marijuana transportation be restricted to patients, caregivers, or collective members. The proposed ordinance incorporates this recommendation at SDMC section 42.1511. *See* CA Report 10-19.

J. Packaging and Labeling

The MMTF recommended that medical marijuana be packaged and labeled with specified information. Existing state and federal regulations regarding labeling of food and drugs require a product label to state the name of the product as well as its ingredients. *See* Cal. Health & Safety Code §§ 110720, 110370, Sherman Food, Drug, and Cosmetic Law (Cal.

disqualified person." 26 C.F.R. § 53.4958-6(c)(2)(i). For smaller organizations (with annual gross receipts (including contributions) of less than \$1 million), "the authorized body will be considered to have appropriate data as to comparability if it has data on compensation paid by three comparable organizations in the same or similar communities for similar services." 26 C.F.R. § 53.4958-6(c)(2)(ii).

Health & Safety Code §§ 109875-111900), Fair Packaging and Labeling Act (15 U.S.C. §§ 1451 – 1461), FDA Regulations of Food Labeling (21 C.F.R. § 101.1-101.108), FTC Regulations Under the Fair Packaging and Labeling Act (16 C.F.R. §§ 500.1-503.6). Therefore, such requirements by the City could be found to be duplicative and thus preempted by such regulations. However, there are no cases addressing the relationship between those regulations and medical marijuana, and there are no cases addressing the additional packaging and labeling requirements recommended by the MMTF and PSNS. Pursuant to California Health and Safety Code section 11362.83 and *Kruse*, the proposed ordinance incorporates this recommendation at SDMC section 42.1512.

K. Patient Advisory For Edible Products And Concentrates

The MMTF recommended that there be a warning on the use of edible products and concentrates. The proposed ordinance incorporates this recommendation at SDMC section 42.1513. Due to the current lack of verification of the accuracy of the warning sign, this Office recommends omitting this requirement from the ordinance. *See* CA Report 10-19.

L. Applicability of Patients' Bill of Rights to Medical Marijuana Patients

The MMTF recommended that the City acknowledge a Patients' Bill of Rights for medical marijuana patients. This recommendation was not incorporated into the proposed ordinance. As discussed in CA Report 10-19, if a bill of rights is identified, City Council can express its support through a resolution. *See* CA Report 10-19.

M. Revisions to Existing San Diego Municipal Code Provisions Relating to Medical Marijuana

The MMTF recommended revisions to the current SDMC language which sets forth guidelines for protection from arrest based on quantitative amounts for both identification card holders and persons with a physician's recommendation.

As discussed more fully in CA Report 10-19, the California Supreme Court decision in *People v. Kelly*, 47 Cal. 4th 1008 (2010), invalidated possession limits insofar as those limits conflict with the CUA. The CUA does not require a physician to specify a quantity in a recommendation. Possession limits are permitted to the extent that they are used to provide protection from arrest for medical marijuana ID card holders. Setting those possession limits in amounts greater than provided in the MMP is permitted pursuant to California Health and Safety Code section 11362.77(c). As such, the MMTF recommendation was modified to only apply to state identification card holders, rather than all patients and caregivers.

The proposed ordinance incorporates this recommendation by amending SDMC section 42.1303. Due to that modification, there is no separate provision in the proposed ordinance addressing outdoor cultivation for patients and caregivers who are not identification card holders.


IV. OTHER PROPOSED CHANGES TO THE SAN DIEGO MUNICIPAL CODE

The proposed ordinance eliminates language in SDMC Chapter 4, Article 2, Division 13, related to a City-run voluntary identification card program as the program was never implemented, and is now preempted by state law because San Diego County is currently issuing identification cards. 88 Op. Cal. Att'y Gen. 113 (2005). Definitions were added and amended in Division 13 to be consistent with the CUA, MMP, and case law.

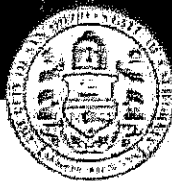
SDMC Chapter 4, Article 2, Division 15, entitled "Medical Marijuana Consumer Cooperatives," incorporates the MMTF recommendations as modified by PSNS, and adds a purpose and intent section, definitions, and a permit requirement so that there is an enforcement and cost recovery tool. The Mayor and City Council have not identified a particular regulatory body within city government to enforce these regulations. Additional changes to the regulations may be necessary once that body is identified.

CONCLUSION

As discussed in CA Report 10-19, there is little judicial guidance for the City in creating regulations that fall outside of the land use arena. We will keep the City Council apprised as the law continues to develop in this area.

By 
Mary T. Nuesca
Chief Deputy City Attorney

MTN:aml:amt
Attachments
RC-2011-14



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: April 21, 2010

REPORT NO: 10-060

ATTENTION: City Council

SUBJECT: Recommendations from the Medical Marijuana Task Force

REQUESTED ACTION: Approve the recommendations

BACKGROUND:

On October 6, 2009, the San Diego City Council voted to establish a Medical Marijuana Task Force [hereinafter "Task Force"] to advise the City Council on: (1) guidelines for medical marijuana patients and primary caregivers; (2) guidelines for the structure and operation of medical marijuana cooperatives and/or collectives; and (3) guidelines for police department enforcement regarding medical marijuana. The Council appointed eleven members, with a broad range of perspectives and backgrounds, to serve on the Task Force.

In October and November of 2009, the Task Force formed its recommendations regarding land use and zoning regulations for collectives and cooperatives that dispense medical marijuana to qualified patients. The Task Force presented its land use and zoning recommendations to City Council in December of 2009.

This report provides a summary of the Task Force's recommendations regarding regulations that fall outside of land use and zoning.

OVERVIEW:

The Task Force met seven times over the course of January, February and March 2010 to discuss the recommendations summarized in this report. The meetings were conducted pursuant to the Brown Act and open to the public. The Task Force was fortunate to receive helpful input from the public at these meetings and relied on a wide range of documents and reports to inform our work, including ordinances from over three dozen other cities and counties in California regulating medical marijuana collectives and cooperatives. Representatives from the City Attorney and the Independent Budget Analyst offices attended each meeting to advise the Task Force on pertinent issues.

The Task Force's recommendations appear in full below. In general, however, the recommendations reflect a shared belief by the Task Force that the best way for the City Council to address the issue of medical marijuana collectives and cooperatives is to adopt an ordinance that closely regulates such entities. We believe that by closely regulating collectives and

cooperatives, the City of San Diego can ensure that qualified patients have safe access to their lawfully recommended medicine and prevent against the dangers attendant to unregulated or otherwise illegitimate operators. Though some members of the Task Force differed on specific recommendations, we all were in agreement on this central principle.

RECOMMENDATIONS:

The Task Force voted on recommendations for a number of specific issues. We considered and voted on each issue one at a time. By the nature of the project, the Task Force could not consider and vote on every possible consideration. Accordingly, these recommendations are meant to provide general advice to the City Council about the items that we believe would be especially important to include in any ordinance that regulates medical marijuana patients and primary caregivers; the structure and operation of medical marijuana cooperatives and/or collectives; and police department enforcement regarding medical marijuana. The following is a list of each recommendation of the Task Force, along with a voting breakdown and, where helpful, brief explanatory text.

- **Establishment of a Fee:** The Task Force recommends that the City adopt cost-recovery fees for medical marijuana cooperatives and collectives pursuant to the City of San Diego's process for determining and establishing cost-recovery fees.

- Vote: This recommendation was adopted by a vote of 7-1

- **Definition of Non-Profit Operation:** The Task Force recommends that the City adopt the following standard to determine whether medical marijuana cooperatives and collectives are operating in a non-profit manner in compliance with State law:

No collective shall operate for profit. Cash and in-kind contributions, reimbursements and reasonable compensation provided by members towards the collective's actual expenses for the growth, cultivation and provision of medical marijuana shall be allowed in accordance with State Law. All such cash and in-kind amounts and items shall be fully documented. "Reasonable compensation" shall mean compensation for directors, managers and/or other employees commensurate with reasonable wages and benefits paid to employees of IRS-qualified non-profit organizations who have similar descriptions and duties. The payment of a bonus shall not be considered "reasonable compensation."

- Vote: This recommendation was adopted by a vote of 8-0

- **Verification of Non-Profit Operation:** The Task Force recommends that on an annual basis each collective be given the opportunity to provide evidence of its operation in a non-profit manner to the City during the previous year. Upon request by the City, each collective shall file with the City Controller an audit of its operations of the previous calendar year, completed and certified by an independent certified public accountant in accordance with generally accepted auditing and accounting principles.

- Vote: This recommendation was adopted by a vote of 6-2

• **Documentation and Definition of Closed-System Operation:** The Task Force recommends that medical marijuana cooperative and collective applicants shall document closed system operations pursuant to the Attorney General's guidelines. As such, it is expected that all collective members are potentially growers and can grow for themselves as they are able or as they choose. Collective members are expected to bring the excess medical marijuana from their own personal grows to the collective where they may be compensated by cash or trade in-kind. Certain collective members choose that their sole support to the cooperative effort will be to contribute their time and expertise in growing medical marijuana for the collective. Growers are compensated for their time and expenses in growing for the collective when the harvest is brought to the dispensary. Other members may participate in the cooperative cultivation of the medical marijuana, however the growers are responsible and compensated by the transaction amount to be paid by other members of the collective as their contribution to the cultivation of the medicine. Members may offer labor at any point in the cultivation cycle as their skills and choices allow and as opportunity permits.

• Vote: 7-0-1

• **Background Checks For Dispensary Directors, Managers, and Other Employees:** The Task Force recommends that LiveScan fingerprinting be required of all potential directors/managers/staff of dispensaries. Those who have been convicted of violent felonies or convicted of crimes of moral turpitude within the past seven (7) years shall be excluded from being directors, managers or staff of dispensaries.

• Vote: 7-0

• **Prohibition of Employing Minors:** The Task Force recommends that dispensing collectives and cooperatives be prohibited from employing individuals under 18 years of age.

• Vote: 6-0

• **Restrictions on Dispensing Medical Marijuana to Qualified Patients Under 18 Years of Age:** The Task Force recommends that qualified patients 18 or older or parents/legal guardians of a minor who is a qualified patient may obtain medical cannabis for the patient. It is acknowledged that medical marijuana may be dangerous in the hands of juveniles and the use must be appropriately supervised by a parent or legal guardian.

• Vote and background: 5-0

• **Prohibition Against Physicians' Consultations at Dispensaries:** The Task Force recommends that dispensing medical marijuana collectives and cooperatives be prohibited from offering physician's consultations and recommendations on dispensary premises.

• Vote: 7-0

• **Restrictions on Medical Marijuana Transportation:** The Task Force recommends that medical marijuana may be transported only by patients, caregivers or a member of a collective.

• Vote: 5-0

• **Packaging and Labeling:** The Task Force recommends that (a) all packaging of medical marijuana be sealed in an airtight manner and (b) a label be affixed to the package containing the following information: Patient's name; Dispensing date; Name of product; Product ingredients; It must be used as recommended; It must be kept out of reach of children; Patients must not operate heavy machinery while under the influence of medical marijuana; It is prohibited to sell or transfer medical marijuana to non-patients; The product is intended for medical use only as stated under the California Health and Safety Code Section 11362.5; Any use instructions and warning.

• Vote: Recommendation (a) was approved by a vote of 5 – 0; Recommendation (b) was approved by a vote of 9 – 0

• **Patient Advisory for Edible Products and Concentrates:** The Task Force recommends that the warning on the use of edible products and concentrates contained in Attachment A be posted on a wall in the dispensary and that edible products and concentrates must be labeled with an appropriate warning label.

• Vote: 9 – 0

• **Applicability of Patients' Bill of Rights to Medical Marijuana Patients:** The Task Force recommends that the City acknowledge that the Patients' Bill of Rights applies to medical marijuana patients.

• Vote: 9 – 1

• **Revisions to Existing San Diego Municipal Code Provisions Relating to Medical Marijuana:** The Task Force recommends that the City of San Diego revise existing municipal code provisions relating to medical marijuana in accordance with Attachment B.

• Vote: 5 – 2


CONCLUSION:

The Task Force recommends that the City of San Diego closely regulate medical marijuana collectives and cooperatives in order to ensure that qualified patients have safe access to their lawfully recommended medicine and to prevent against the dangers attendant to unregulated or otherwise illegitimate operators.

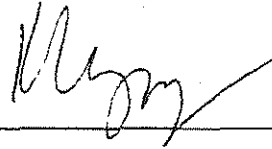
PREVIOUS COUNCIL and/or COMMITTEE ACTION: NONE

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: NONE

KEY STAKEHOLDERS AND PROJECTED IMPACTS: NONE



Task Force Chair



City Council Staff to the Task Force

CANNABIS PATIENT ADVISORY

THIS IS A WARNING REGARDING EDIBLE CANNABIS/MARIJUANA PRODUCTS

CAUTION – Edible products containing cannabis extracts (THC – Tetra Hydro Cannabinol) have serious risks associated with the consumption. **KEEP OUT OF THE REACH OF CHILDREN**

Common Names: Cannabis Sativa, Cannabis Indica

Uses: Edible cannabis products must always be consumed with caution! The fact that most edible are produced in kitchens which have not been certified by the health Department creates a risk of serious illness and/or an agonizing painful death. THE CITY OF SAN DIEGO CANNOT REGULATE THIS POTENTIALLY DANGEROUS PRODUCT! Edible cannabis products provide thirty seven additional variations of the THC – (Tetra Hydro Cannabinol) molecule over the benefits received from the inhalation of medical cannabis. Patients with terminal cancer, and those suffering from respiratory problems will benefit from orally consuming cannabis since inhalation is impossible for them; however, there are associated risks. DO NOT OPERATE A MOTOR VEHICLE OR MACHINERY WITHIN EIGHT HOURS OF CONSUMING EDIBLE CANNABIS PRODUCTS.

Side Effects: Severe Extreme Anxiety attacks lasting for up to four (4) hours may occur without proper use of this product. Unless you have experience with this substance, do not drive within seven (7) hours of consumption.

Non Health Department Certified Kitchens: Food products and other ingestible items containing cannabis are usually not produced in Health Department Certified Kitchens. Consuming these products is a risk.

Dosages: It is difficult to regulate the doses of THC in edible products. It is advised that each new lot be tested by consuming only small portions over a period of several hours.

Anxiety Sufferers: Patients suffering from anxiety should consult a physician before considering the use of edible products containing THC. The increased risk of anxiety attacks may be associated with their consumption.

ATTACHMENT B

**Suggested amendments in bold*

§42.1308 Permissible Amounts of Marijuana

A person in possession of a current and valid State Medical Marijuana Identification Card and/or a **valid physician's recommendation**, who is within the jurisdictional limits of the City, is not subject to arrest by the SDPD for possession of marijuana, or detention by the SDPD longer than necessary to verify his or her status, or seizure by the SDPD of marijuana in his or her possession, if the amount of medicinal cannabis possessed is within the following limits:

- a) *Processed Marijuana - Medical Cannabis Patients.* An individual who is a *medical cannabis patient* may possess the total amount of *processed marijuana*, regardless of growing method, recommended by his or her physician for the length of time recommended by the physician, not to exceed one pound, or an amount consistent with the physician's recommendation.
- b) *Processed Marijuana - Primary Caregivers.* An individual who is a *primary caregiver* may possess no more than the amount specified above for each *medical cannabis patient* for whom the individual serves as a verified *primary caregiver* as defined in section 42.1302(a) not to exceed two pounds, or an amount consistent with the physician's recommendation.
- c) *Indoor Plants - Medical Cannabis Patients.* A *medical cannabis patient* may possess a maximum of twenty-four unharvested plants or an amount consistent with the physician's recommendation.
- d) *Indoor Plants - Primary Caregivers.* A *primary caregiver* may possess no more than the amount of medical cannabis specified above and growing in the space specified above in subsection c, for each *medical cannabis patient* for whom the individual serves as a verified *primary caregiver* as defined above in section 42.1302(a), not to exceed a total of **ninety-nine** plants or an amount consistent with the recommendation of the physician or physicians.
- e) *Outdoor/Greenhouse Plants* No **unsupervised** outdoor marijuana cultivation shall be permitted. Growing marijuana shall only be permitted in a fully enclosed yard with a **six foot fence perimeter** or a greenhouse or structure that must be locked and contained. The amount of marijuana grown in the enclosed **yard with a six foot fence perimeter** or a greenhouses or structures that are locked and contained shall not exceed the permissible amounts for indoor plants according to sections 42.1311(c) and 42.1311(d) above.
- f) Possession of cannabis in amounts which exceed those set forth in this section by individuals asserting medical necessity or *primary caregiver* status will be evaluated by SDPD on a case by case basis according to the totality of the circumstances, taking into account facts such as whether the person is in possession of a current valid verification card, and whether the amount possessed is consistent with a physician's recommendation.

("Permissible Amounts of Marijuana" added; "Expiration" renumbered to Sec. 42.1310 and amended 9-29-2003 by O-19218 N.S.)

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY
MARY T. NUESCA
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

May 21, 2010

REPORT TO THE PUBLIC SAFETY AND
NEIGHBORHOOD SERVICES COMMITTEE

RECOMMENDATIONS FROM THE MEDICAL MARIJUANA TASK FORCE, REPORT
NO. 10-060, REGULATIONS OUTSIDE LAND USE AND ZONING

INTRODUCTION

On October 6, 2009, the City Council formed the Medical Marijuana Task Force (MMTF). The MMTF was directed to provide guidelines for (1) patients and caregivers, (2) the structure and operation of collectives and cooperatives, and (3) police enforcement. The MMTF produced two reports: a November 12, 2009 Report to Council addressing land use and zoning issues—heard and modified by the Land Use and Housing Committee (LUH) on March 24, 2010; and an April 21, 2010 Report to Council regarding regulations that fall outside of land use and zoning—heard at the Public Safety and Neighborhood Services Committee (PSNS) on April 28, 2010. PSNS asked this Office to provide a report addressing the recommendations contained in the April 21 Report. We have provided general information below. When more precise direction from City Council is given with respect to what kind of regulations the City Council desires and what conduct will be addressed, this Office can provide any necessary advice.

BACKGROUND

In 1996, Proposition 215, the California Compassionate Use Act (CUA), was passed by the electorate. Proposition 215, codified at California Health and Safety Code section 11362.5, allows the use of marijuana for medical purposes when recommended by a physician and excludes from criminal prosecution the patient and the primary caregiver, as defined. In 2003, the State of California enacted Senate Bill 420, the Medical Marijuana Program Act (MMP), setting forth requirements for the issuance of voluntary identification (ID) cards; allowing the cultivation, possession, sale, or storage of marijuana; prohibiting the distribution of marijuana for profit; exempting from prosecution qualified patients and designated primary caregivers who associate to collectively or cooperatively cultivate marijuana for medical purposes; requiring the Attorney General to issue guidelines for the security and nondiversion of medical marijuana; and allowing cities to adopt and enforce laws consistent with the MMP. The MMP is codified at California Health and Safety Code sections 11362.7- 11362.83.¹ The Attorney General issued

¹ The distribution of, or possession with intent to distribute, marijuana remains a federal crime. 21 U.S.C. § 841. This Office has been asked on several occasions to reconcile the State of California's medical marijuana laws with

“Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (AG Guidelines) in August 2008.

DISCUSSION

I. GENERAL PRINCIPLES

Generally, the City has broad discretion pursuant to its police powers to enact ordinances to protect the public health, safety, and welfare, so long as the ordinance does not conflict with state or federal law². Cal. Const. art. 11, § 7, Cal. Gov’t. Code § 37100. A conflict exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th, 893, 897 (1993). The California Uniform Controlled Substances Act (CSA), found at California Health and Safety Code section 11000, et. seq., occupies the field of defining drug crimes and specifying penalties for those crimes. *O’Connell v. City of Stockton*, 42 Cal. 4th 1061, 1071-72 (2007). The CUA and MMP are contained within the CSA. The MMP expressly allows local regulation consistent with the MMP. Cal. Health & Safety Code § 11362.83.

The AG Guidelines state that neither the CUA nor the MMP conflict with federal law because the state did not legalize marijuana.³ Additionally, the voluntary identification card program contained in the MMP does not conflict with federal law, *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008), nor does a court order ordering law enforcement to return marijuana upon the dismissal of criminal charges against a qualified patient. *City of Garden Grove v. Superior Court of Orange County (Kha)*, 157 Cal. App. 4th 355 (2007). However, there is ongoing litigation related to the relationship between local, state, and federal law.⁴ See *Qualified Patients Ass’n, et. al. v. City of Anaheim*, Case No. G040077, currently pending before the Fourth District Court of Appeal, Division Three, wherein issues related to

the federal prohibitions. 1999 City Att’y Report 8; 2002 City Att’y MOL 5; 2007 Op. City Att’y 5; 2009 City Att’y Report 18. As has been stated, the two cannot be reconciled.

² See fn. 1 for previous City Attorney reports discussing the conflict between the federal and state law.

³ The courts have consistently described the CUA as a narrowly drafted statute – a narrow measure with narrow ends. *People v. Menich*, 45 Cal. 4th 274, 286, n. 7 (2008); *People v. Urziceanu*, 132 Cal. App. 4th 747, 772-73 (2005).

⁴ For example, in *City of Lake Forest v. Moes, et al.*, Case. No. 30-2009-00298887, May 11, 2010, the trial court ruled that *Lake Forest* could not promulgate code or zoning regulations due to the conflict with federal law, and citing Cal. Gov’t Code § 37100. See also Associated Press report “OC Judge says pot shops in Lake Forrest must close,” Silicon Valley Mercury News, May 12, 2010, available at http://www.mercurynews.com/breaking-news/cj_150708889?no_lick_check=1. A trial court ruling is binding only on the parties involved in the litigation. Eisenberg, Horvitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS Vol. 1.1 § 1:14.1 (The Rutter Group 2009).

prohibiting dispensaries, preemption, discrimination, and nuisance law, *inter alia*, are expected to be ruled on by the court in July of this year.

There is little case law addressing the specifics of how a city can regulate non land use matters related to medical marijuana.⁵ Two recent cases held that medical marijuana dispensaries not in compliance with local zoning ordinances were public nuisances. *City of Corona v. Naulls*, 166 Cal. App. 4th 618 (2008), and *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1157 (2009). In *Claremont*, the court specifically said that neither the CUA nor the MMP do not preempt a city's enactment or enforcement of land use, zoning or business license as they apply to medical marijuana dispensaries. *Id.* at 1176. The Court examined the history and case law surrounding the CUA and the MMP, noting that the nature of the right to use marijuana is in the form of a limited defense to criminal prosecution, not a constitutional right to obtain marijuana. *Id.* at 1171.

Both *Claremont* and *Corona* involved situations where the regulations at issue were land use regulations and where the local government was seeking closure of the dispensary. They did not involve a challenge to a non land use regulatory scheme. It is possible that a local government could be challenged for imposing regulations that conflict with the CUA and MMP. Conversely, local government could be challenged for enacting code or zoning regulations allowing the use, sale, or distribution of marijuana.⁶ Cal. Gov't Code § 37100.

The City, by enacting regulations, cannot guarantee that those regulations will provide a "safe harbor" from criminal liability for violations of the CSA because the imposition of criminal liability and the affirmative defenses to those charges are matters of statewide concern. Arguably, the City can act for the general health, safety, and welfare of its citizens so long as it does not conflict with the CSA, CUA or MMP. Cal. Health & Safety Code §11362.83.

II. RECOMMENDATIONS

The MMTF generally recommends an ordinance that closely regulates collectives and cooperatives, however, there has been no specific structure proposed that will "closely regulate," collectives and cooperatives. Additionally, there has not been any determination made as to whether the regulations will apply to all collectives and cooperatives, or only to those that operate as a "storefront." Thus, this Report addresses several legal concepts. Once the Committee or City Council identifies specific actions it would like to take, this Office can refine and address those actions.

⁵ Land use regulations are being separately addressed by our Office pursuant to direction given to our Office by LUH at its March 24, 2010 meeting.

⁶ See fn. 4.

1. Establishment of a Fee.

The MMTF recommends that the City adopt cost-recovery fees for medical marijuana cooperatives and collectives pursuant to the City of San Diego's process for determining and establishing cost-recovery fees.⁷

To the extent the City enacts some type of regulatory or administrative scheme enforced by the City, such costs are probably recoverable. *Collier v. City and County of San Francisco*, 151 Cal. App. 4th 1326 (2007). (Regulatory fees spent for the purpose of legitimate regulation are valid so long as they do not exceed the reasonably necessary expense of the regulatory effort). See also Independent Budget Analyst Report 10-15, dated February 16, 2010, discussing fees and describing specific concerns and noting modifications that may be needed in the San Diego Municipal Code (SDMC) should the City Council adopt cost recovery fees related to the regulation of medical marijuana dispensing facilities.

2. Definition of Non-Profit Operation.

The MMTF recommends that the City adopt the following standard to determine whether medical marijuana cooperatives and collectives are operating in a non-profit manner in compliance with State law:

No collective shall operate for profit. Cash and in-kind contributions, reimbursements and reasonable compensation provided by members towards the collective's actual expenses for the growth, cultivation and provision of medical marijuana shall be allowed in accordance with State Law. All such cash and in-kind amounts and items shall be fully documented. "Reasonable compensation" shall mean compensation for directors, managers and/or other employees commensurate with reasonable wages and benefits paid to employees of IRS-qualified non-profit organizations who have similar descriptions and duties. The payment of a bonus shall not be considered "reasonable compensation."

The MMP allows patients and caregivers to associate collectively and cooperatively to cultivate marijuana for medical purposes. Cal. Health & Safety Code § 11362.775, but no individual or group may cultivate or distribute marijuana for profit. Cal. Health & Safety Code § 11362.765(a). Primary caregivers may receive compensation for actual expenses, including reasonable compensation for services provided: enabling a patient to use marijuana, out-of-pocket expenses incurred in providing those services, or both. Cal. Health & Safety

⁷ The MMTF recommendations are represented by italics throughout this Report.

Code § 11362.765(c). "Cooperatives" must be formed as statutory entities pursuant to the Corporations or Food and Agriculture Code. The AG Guidelines state that a "collective" is not a statutory entity. The Guidelines further state that as a practical matter may have to organize as some form of business to carry out their activities. The Guidelines provide further suggested guidelines and practices.

The statements that a collective not operate for profit, and that there be documentation describing the operation, are consistent with the AG Guidelines. To the extent there are cash or in-kind contributions, reimbursements and reasonable compensation, and those activities are in accordance with state law, then that is also consistent with the AG Guidelines. To the extent such compensation merely is another way of describing a permissible reimbursement consistent with state law, it is likely allowable. To the extent that compensation can be judged by comparison to other non-profits and be in compliance with state law is simply unknown. The definition of "reasonable compensation" proposed is not found in state law or the AG Guidelines.⁸

3. Verification of Non-Profit Operation.

The MMTF recommends that on an annual basis each collective be given the opportunity to provide evidence of its operation in a non-profit manner to the City during the previous year. Upon request by the City, each collective shall file with the City Controller an audit of its operations of the previous calendar year, completed and certified by an independent certified public accountant in accordance with generally accepted auditing and accounting principles.

The MMTF made the following recommendation in its Report To Council December 2009 (Zoning and Land Use): *The Task Force recommends that the City require dispensing collectives and cooperatives to submit, as part of their application for a conditional use permit, evidence that they are incorporated as statutory cooperatives or bona fide nonprofit corporations, or documentation outlining their plans for operating in a not-for-profit manner, as contemplated by the Attorney General's guidelines.*

At its March 24, 2010 meeting, the LUH Committee also recommended that proof of non-profit status be required for a Conditional Use Permit (CUP).

The submission of "non-profit" operational plans, subsequent reviews and audits are not appropriate for a CUP,⁹ and, if desired by the Council, could be part of a separate regulatory scheme. Although this specific recommendation is not described in the AG Guidelines, it appears to be consistent with the goals of creating operations with sufficient structure to ensure

⁸ With respect to "reasonable compensation," state law specifically allows primary caregivers to receive reasonable compensation for certain services.

⁹ Conditional use permits create a right that attach to the land, not to any individual permittee. *Anza Parking Corporation v. City of Burlingame*, 195 Cal. App. 3d 855 (1987); *Malibu Mountains Recreation, Inc. v. County of Los Angeles*, 67 Cal. App. 4th 359 (1999).

compliance with state law, and documenting the activities of the operation, as suggested in the AG Guidelines. However, the placement of such a function with the City Comptroller will require further review.

4. Documentation and Definition of Closed-System Operation.

The MMTF recommends that medical marijuana cooperative and collective applicants shall document closed system operations pursuant to the Attorney General's guidelines. As such, it is expected that all collective members are potentially growers and can grow for themselves as they are able or as they choose. Collective members are expected to bring the excess medical marijuana from their own personal grows to the collective where they may be compensated by cash or trade in-kind. Certain collective members choose that their sole support to the cooperative effort will be to contribute their time and expertise in growing medical marijuana for the collective. Growers are compensated for their time and expenses in growing for the collective when the harvest is brought to the dispensary. Other members may participate in the cooperative cultivation of the medical marijuana, however the growers are responsible and compensated by the transaction amount to be paid by other members of the collective as their contribution to the cultivation of the medicine. Members may offer labor at any point in the cultivation cycle as their skills and choices allow and as opportunity permits.

The AG Guidelines state that collectives and cooperatives should document each member's contribution of labor, resources or money. To the extent the MMTF proposal describes a system not specifically described in the AG Guidelines, it is unknown whether a court will find that this is a "collective" within the meaning of state law.

5. Background Checks for Dispensary Directors, Managers, and Other Employees.

The MMTF recommends that LiveScan fingerprinting be required of all potential directors/managers/staff of dispensaries. Those who have been convicted of violent felonies or convicted of crimes of moral turpitude within the past seven years shall be excluded from being directors, managers or staff of dispensaries.

Under California law, crimes of moral turpitude are defined as those that "necessarily involve an intent to defraud or intentional dishonesty for the purpose of personal gain." *In re Fahey*, 8 Cal. 3d 842, 849 (1973). Crimes of moral turpitude are also described as acts of baseness, vileness or depravity in the private and social duties owed by one person to another. *Henry H. v. Board of Pension Comrs.* 149 Cal. App. 3d 965, 975-76 (1983). Specific crimes that have been found to be crimes of moral turpitude include fraud (*People v. Cadogan*, 173 Cal. App. 4th 1502, (2009)), perjury (*People v. Chavez*, 84 Cal. App. 4th 25 (2000)), forgery (*In re Johnson*, 1 Cal. 4th 689 (1992)), grand theft, and embezzlement (*Chadwick v. State Bar*, 49 Cal. 3d 103 (1989)).

Background checks are currently authorized for police-regulated business permittees. See San Diego Municipal Code section 33.0305. Background checks are also done for state licensure for various occupations. The AG Guidelines do not address this issue; however, it is likely that this type of regulation would be upheld.

6. Prohibition of Employing Minors.

The MMTF recommends that dispensing collectives and cooperatives be prohibited from employing individuals under 18 years of age.

Neither the CUA nor the MMP set forth different regulations for those under 18 years of age as compared to those over 18 years of age. Arguably, those under the age of 18 have the same ability to collectively and cooperatively associate to cultivate marijuana as those over the age of 18. Cal. Health & Safety Code § 11362.775. The AG Guidelines do not address or suggest any distinction between those under 18 and those over the age of 18.

However, courts have repeatedly upheld laws that distinguish between minors and adults for the minor's health or safety under the doctrine of *parens patriae*. See, e.g., *In re Walter P.*, 170 Cal. App. 4th 95, 101 (2009); Cal. Educ. Code §48200 (subjecting minors to compulsory education between ages six and eighteen); *In re Nancy C.*, 28 Cal. App. 3d 747, 758 (1972) (upholding curfew ordinance). "Without question, the city has a substantial interest in public safety, and in the safety and well being of minors specifically." *Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 441 (2004). Because minors are vulnerable, immature, and subject to adult care and control, cities may pass laws that discriminate against minors and limit their liberty. *In re Walter P.*, 170 Cal. App. 4th at 101 (upholding curfew imposed against a minor who violated his probation). California Labor Code section 1294 prohibits minors from working in "any occupation dangerous to the life or limb, or injurious to the health or morals of the minor."

It is unclear what is meant by "employing" those under 18 years of age. A person under the age of 18 may wish to participate in the collective endeavor as a way to obtain medical marijuana as a patient or caregiver, and a limitation on such ability based on age could be problematic because no such distinction currently exists in the CUA, MMP, or guidelines. It may be more defensible to create age restrictions for persons who are in positions of management of the cooperative or collective. It is unknown how a court will evaluate such age restrictions related to collective and cooperative associations.

7. Restrictions on Dispensing Medical Marijuana to Qualified Patients Under 18 Years of Age.

The MMTF recommends that qualified patients 18 or older or parents/legal guardians of a minor who is a qualified patient may obtain medical cannabis for the patient. It is

acknowledged that medical marijuana may be dangerous in the hands of juveniles and the use must be appropriately supervised by a parent or legal guardian.

Neither the CUA nor the MMP require a parent or guardian's participation in the acquisition of medical marijuana for an otherwise qualified patient or caregiver who happens to be under the age of 18. The AG Guidelines do not address or suggest any such requirement.¹⁰ Our comments on recommendation number 6 are applicable here.

8. Prohibition Against Physicians' Consultations at Dispensaries.

The MMTF recommends that dispensing medical marijuana collectives and cooperatives be prohibited from offering physicians' consultations and recommendations on dispensary premises.

This recommendation, if desired to be adopted by the Council, can be incorporated into a CUP process as a prohibited accessory use.

9. Restrictions on Medical Marijuana Transportation.

The MMTF recommends that medical marijuana may be transported only by patients, caregivers or a member of a collective.

This recommendation is consistent with state law, California Health and Safety Code sections 11362.765 and 11362.775, and the AG Guidelines. Any person transporting marijuana who is not a patient or caregiver would not be entitled to the protection of the CUA and MMP, and would be in violation of the CSA. The City cannot make criminal what is already illegal, but it could include such a requirement as part of a regulatory scheme or set of guidelines to be followed.

10. Packaging and Labeling.

The MMTF recommends that (a) all packing of medical marijuana be sealed in an airtight manner and (b) a label be affixed to the package containing the following information: Patient's name; Dispensing date; Name of product; Product ingredients; It must be used as recommended; It must be kept out of reach of children; Patients must not operate heavy machinery while under the influence of medical marijuana; It is prohibited to sell or transfer medical marijuana to non-patients; The product is intended for medical use only as stated under the California Health and Safety Code section 11362.5; Any use instructions and warning.

¹⁰ The City of Los Angeles does not allow any person under the age of 18 at a collective unless the person is a patient or has an ID card, and is accompanied by his or her doctor, parent or guardian. City of Los Angeles Ordinance No. 181069.

The packaging and labeling of substances that are ingested is generally regulated by the federal Food and Drug Administration, and also regulated in California by the Sherman Food, Drug and Cosmetic Law. Cal. Health & Safety Code §§ 109875-110040. However, there are no regulations addressing the packaging and labeling of medical marijuana. We are not aware of any way the City can determine the medical or scientific accuracy of the product specific contents of the packaging and labeling requirements proposed here. Some of the information, such as requiring patient name and date, does not require additional expertise and can likely be incorporated into a regulatory scheme. The City could incorporate general warnings based on existing statutes, such as the prohibition against driving while under the influence of a controlled substance, and references to the use being consistent with the CUA, MMP, and a doctor's recommendation. This type of recommendation is not addressed in the AG guidelines, the CUA, MMP or case law.

11. Patient Advisory for Edible Products and Concentrates.

The MMTF recommends that the warning on the use of edible products and concentrates contained in Attachment A be posted on a wall in the dispensary and that edible products and concentrates must be labeled with an appropriate warning label.

See comments for number 10.

12. Applicability of Patients' Bill of Rights to Medical Marijuana Patients.

The MMTF recommends that the City acknowledge that the Patients' Bill of Rights applies to medical marijuana patients.

California has a number of regulations that could be considered a "Patients' Bill of Rights." See e.g. California Health and Safety Code sections 1599-1599.4, relating to skilled nursing facilities, and sections 124960-124961, relating to patients suffering from severe chronic intractable pain. These regulations generally describe the relationship and duties of the patient and doctor. Assuming a more precise reference to a particular set of rights, the City's acknowledgement of such rights cannot create obligations that do not already exist under state and federal law, nor can the City otherwise regulate the practice of medicine.

If the City desires to express its support for some type of "patients' bill of rights" related to medical marijuana users, it is more appropriate to do so in a resolution rather than as part of an ordinance or regulatory scheme.

13. Revisions to Existing San Diego Municipal Code Provisions Relating to Medical Marijuana.

The MMTF recommends that the City of San Diego revise existing municipal code provisions relating to medical marijuana in accordance with Attachment B.

California Health and Safety Code section 11362.77 sets forth possession amounts which protect patients, caregivers, and those with state ID cards from arrest, and allows counties and cities to enact guidelines allowing greater limits. San Diego Municipal Code, Chapter 4, Article 2, Division 13, "San Diego Medical Cannabis Voluntary Verification Card Program," created a City identification card program for medical marijuana patients and caregivers. As part of that program, SDMC section 42.1308(a)-(e) sets forth possession limits for both processed marijuana as indoor plants, as well as requiring outdoor plants to be fully contained in a structure with the same limits as indoor plants. Persons with the identification cards were not subject to arrest for possessing amounts within the limits. SDMC section 42.1308(f) states that the San Diego Police Department may evaluate persons who possess amounts in excess of the limits on a case-by-case basis. San Diego's limits are higher than state law limits.

The City identification card program was never implemented, and is now preempted by state law because San Diego County is currently issuing ID cards.¹¹ 88 Op. Cal. Att'y Gen. 113 (2005). The SDMC amounts are used as guidelines by the San Diego Police Department. San Diego Police Department Procedure 3.28, 06/19/06.¹²

The California Supreme Court recently addressed the issue of possession limits in *People v. Kelly*, 47 Cal. 4th 1008 (2010). The Court said that under the CUA, patients need only have a doctor's recommendation to use marijuana, and that if arrested and prosecuted, the patient/defendant has an affirmative defense to the charges if the amount possessed is reasonably related to the patient's current medical needs. The CUA did not place a numeric cap on how much is sufficient for personal use. *Id.* at 1027-28. In *Kelly*, the defendant possessed more than the state law limit contained in California Health and Safety Code section 11362.77, and the prosecution argued that defendant had not proven that he had a doctor's recommendation for more. The Court said that insofar as California Health and Safety Code section 11362.77 burdens the defense set forth in the CUA, it unconstitutionally amended the CUA.¹³ *Id.* at 1024, 1046. However, the Court did not sever that section; it held that insofar as there are other applications that do not burden a defense available under the CUA, those applications are enforceable. *Id.* at 1046-48.

¹¹ Although not part of the MMTF recommendations, this may be an appropriate time for the City Council to consider repealing those sections of the SDMC Code that are preempted.

¹² Our understanding is that Procedure 3.28 is currently under review by the San Diego Police Department.

¹³ The CUA, an initiative measure, cannot be "amended" by an act of the Legislature. Cal. Const. art. II, § 10.

The MMP states in California Health and Safety Code section 11362.71(e), that a police officer is prohibited *from arresting* either a primary caregiver or a qualified patient for possession, transportation, delivery, or cultivation of marijuana in an amount that is lawful under state law (up to 8 ounces and either 6 mature or 12 immature plants), if the person has a valid County-issued medical marijuana ID card. Under California Health and Safety Code section 11362.71(e), an officer can only make such an arrest of an official ID card holder if the officer has probable cause to believe that the ID card is false or falsified, the ID card has been obtained by means of fraud, or the person has violated the quantity limits or other provisions of the medical marijuana laws. *Id.* The court in *Kelly* expressly noted this rule and did not disturb it. *Id.* at 1016-17. The Court noted that the ID card program is voluntary, and so long as a defendant can present a defense based on his or her current medical needs, the use of limits to provide protection from arrest for cardholders is not unconstitutional. *Id.*

The MMTF, aware of the *Kelly* decision, appears to suggest that to the extent the MMP provides protection from arrest for ID cardholders, the City should set the limits at the amounts described in Attachment B to their report. As noted above, the *Kelly* case did not invalidate the possession limits to the extent they are used to provide protection from arrest for ID cardholders. The City can likely set limits at a higher amount than provided in the MMP, as such legislation is allowed pursuant to California Health and Safety Code section 11362.77(e).

The suggested language also extends protection to persons with a valid physician's recommendation. It is unknown whether a court would interpret such a regulation as a burden on a defense, even if it is intended to provide protection to patients and caregivers. There is no requirement under the CUA that a physician specify an amount when providing a recommendation, thus such a requirement could be construed as conflicting with the CUA, similar to the situation in *Kelly*.

CONCLUSION

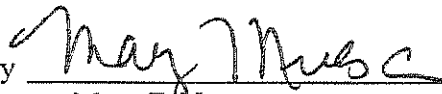
There is little judicial guidance for the City in creating regulations that fall outside of the land use arena. The *Claremont* case does indicate localities have that authority, and there is express authorization in the California Health and Safety Code for regulations consistent with the MMP and CUA. The conflict between state and federal law continues to be litigated. The legal issues around "medical marijuana" are still unsettled, and thus ripe for litigation—from both the

May 21, 2010

perspective that local regulations restrict patients' and caregivers' rights under the CUA and MMP, and from the perspective that local regulations conflict with state and federal law prohibiting the use of controlled substances.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By 
Mary T. Nuesca
Chief Deputy City Attorney

MTN:amt
RC-2010-19

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 4, ARTICLE 2, DIVISION 13 OF THE SAN DIEGO MUNICIPAL CODE BY RENAMING DIVISION 13 TO "MEDICAL MARIJUANA REGULATIONS: PATIENTS AND CAREGIVERS," AMENDING SECTIONS 42.1301 AND 42.1302; REPEALING SECTIONS 42.1303, 42.1304, 42.1305, 42.1306 AND 42.1307; AMENDING AND RENUMBERING SECTION 42.1308 TO SECTION 42.1303; REPEALING SECTIONS 42.1309, 42.1310, 42.1311, AND 42.1312; AND AMENDING AND RENUMBERING SECTION 42.1313 TO SECTION 42.1304, AND BY AMENDING CHAPTER 4, ARTICLE 2, BY ADDING A NEW DIVISION 15, TITLED "MEDICAL MARIJUANA CONSUMER COOPERATIVES," AND ADDING NEW SECTIONS 42.1501, 42.1502, 42.1503, 42.1504, 42.1505, 42.1506, 42.1507, 42.1508, 42.1509, 42.1510, 42.1511, 42.1512, AND 42.1513 ALL RELATING TO MEDICAL MARIJUANA REGULATIONS FOR QUALIFIED PATIENTS, CAREGIVERS, AND MEDICAL MARIJUANA CONSUMER COOPERATIVES.

WHEREAS, on October 6, 2009, the City Council created a citizen advisory task force known as the Medical Marijuana Task Force (MMTF) for the purpose of recommending guidelines for patients and caregivers, the structure and operation of collectives and cooperatives, and police enforcement related to medical marijuana; and

WHEREAS, the MMTF produced two reports, one addressing land use and zoning issues dated November 12, 2009, and one addressing regulations outside of land use and zoning dated April 21, 2009; and

WHEREAS, on May 26, 2010, the Public Safety and Neighborhood Services Committee directed the City Attorney to prepare an ordinance incorporating the MMTF recommendations for regulations outside land use and zoning, to add a requirement that all cooperatives organize

as statutory entities, and to add additional labeling requirements on medical marijuana in the ordinance; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 4, Article 2, Division 13 of the San Diego Municipal Code is amended by amending the title of Division 13, by amending sections 42.1301 and 42.1302, by repealing sections 42.1303, 42.1304, 42.1305, 42.1306, 42.1307, 42.1309, 42.1310, 42.1311, and 42.1312, by amending and renumbering section 42.1308 to section 42.1303, and by amending and renumbering section 42.1313 to section 42.1304, to read as follows.:

Division 13: Medical Marijuana Regulations: Patients and Caregivers

§ 42.1301 Purpose and Intent

- (a) It is the intent of the Council to adopt regulations consistent with California Health and Safety Code section 11362.5 (Compassionate Use Act) and California Health and Safety Code sections 11362.7-11362.83 (Medical Marijuana Program), to protect the public health, safety, and welfare.
- (b) Nothing in this Division is intended to override a peace officer's judgment and discretion based on a case-by-case evaluation of the totality of the circumstances, or to interfere with a peace officer's sworn duty to enforce applicable law.

- (c) Nothing in this Division is intended to reduce the rights of a *qualified patient* or *primary caregiver* otherwise authorized by California Health and Safety Code section 11362.5(d).
- (d) This Division shall be interpreted in a manner consistent with state law. Nothing in this Division is intended to authorize the sale, distribution, possession of *marijuana*, or any other transaction, in violation of state law.

§ 42.1302 Definitions

For the purpose of this Division the following definitions shall apply and appear in italicized letters:

Marijuana has the same meaning as in California Health and Safety Code section 11018.

Primary caregiver means the individual designated by the *qualified patient* who has consistently assumed responsibility for the housing, health, or safety of the *qualified patient*, in accordance with state law, including California Health and Safety Code section 11362.5. As explained in *People v. Mentch*, 45 Cal. 4th 274 (2008), a *primary caregiver* is a person who consistently provides caregiving to a *qualified patient*, independent of any assistance in taking medical *marijuana*, at or before the time he or she assumed responsibility for assisting with medical *marijuana*.

Processed marijuana means harvested *marijuana* that is in a form other than a live plant.

Qualified patient means a California resident having the right to obtain and use *marijuana* for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of *marijuana* in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which *marijuana* provides relief in accordance with state law, including California Health and Safety Code section 11362.5.

SDPD means the City of San Diego Police Department.

State identification card means the card issued to a patient or caregiver in accordance with California Health and Safety Code sections 11362.71-11362.76.

§ 42.1303 State Identification Card Holders: Permissible Amounts of Marijuana

A person in possession of a current and valid *state identification card* and who is within the jurisdictional limits of the City, is not subject to arrest by the *SDPD* for possession of *marijuana*, or detention by the *SDPD* longer than necessary to verify his or her status, or seizure by the *SDPD* of *marijuana* in his or her possession, if the amount of *marijuana* possessed is within the following limits:

(a) *Processed Marijuana - Qualified Patients.*

An individual who is a *qualified patient* may possess the total amount of *processed marijuana*, regardless of growing method, recommended by his or her physician for the length of time recommended by the physician, not to exceed one pound, or an amount consistent with the physician's recommendation, whichever is less.

(b) *Processed Marijuana - Primary Caregivers.*

An individual who is a *primary caregiver* may possess no more than the amount specified in section 42.1303(a) for each *qualified patient* for whom the individual serves as a verified *primary caregiver*, except that such amount shall not exceed two pounds, or an amount consistent with the physician's recommendation, whichever is less.

(c) *Indoor Plants - Qualified Patients.*

A *qualified patient* may possess a maximum of twenty-four unharvested *marijuana* plants growing in an area of no more than 64 square feet, or an amount consistent with the physician's recommendation, whichever is less.

(d) *Indoor Plants - Primary Caregivers.*

A *primary caregiver* may possess no more than the amount of *marijuana* specified in section 42.1303(c) and growing in the space specified in 42.1303(c), for each *qualified patient* for whom the individual serves as a *primary caregiver*, not to exceed a total of ninety-nine plants, or an amount consistent with the recommendation of the physician or physicians, whichever is less.

(e) *Outdoor/Greenhouse Plants.*

No unsupervised outdoor *marijuana* cultivation shall be permitted. Growing *marijuana* shall only be permitted in a fully enclosed

yard with a minimum six-foot fence perimeter or a greenhouse or structure that must be locked and contained. The amount of *marijuana* grown in the enclosed yard with a minimum six-foot fence perimeter or greenhouses or structures that are locked and contained shall not exceed the permissible amounts for indoor plants according to sections 42.1303(c) and 42.1303(d).

- (f) Possession of *marijuana* in amounts which exceed those set forth in section 42.1303(a)-(d) by persons with *state identification cards* will be evaluated by *SDPD* on a case-by-case basis according to the totality of the circumstances, taking into account facts such as whether the amount possessed is consistent with a physician's recommendation.

§ 42.1304 Smoking

Qualified patients, including those with *state identification cards*, are prohibited from smoking *marijuana* in any public place or in any place open to the public.

Any person who violates this section is guilty of an infraction.

Section 2. That Chapter 4, Article 2 of the San Diego Municipal Code is hereby amended by adding new Division 15, and by adding new sections 42.1501, 42.1502, 42.1503, 42.1504, 42.1505, 42.1506, 42.1507, 42.1508, 42.1509, 42.1510, 42.1511, 42.1512, and 42.1513, to read as follows:

Division 15: Medical Marijuana Consumer Cooperatives**§ 42.1501 Purpose and Intent**

It is the intent of this Division to promote and protect the public health, safety, and welfare of the citizens of San Diego by allowing and strictly regulating the cooperative cultivation and exchange of medical *marijuana* among *qualified patients, primary caregivers, and state identification card* holders consistent with state law. It is further the intent of this Division to ensure that *marijuana* is not diverted for illegal purposes, and to limit its use to those persons authorized under state law. Nothing in this Division is intended to authorize the sale, distribution, possession of *marijuana*, or other transaction, in violation of state law.

It is not the intent of this Division to supersede or conflict with state law, but to implement the Compassionate Use Act (California Health and Safety Code section 11362.5) and the Medical Marijuana Program (California Health and Safety Code sections 11362.7-11362.83). Further, the California Corporations Code may allow some conduct for consumer cooperatives that is not otherwise permissible under the California Health and Safety Code and this Division, such as the distribution of profits to members; in those circumstances, it is the intent of the City that the state and municipal laws governing medical *marijuana* control.

§ 42.1502 Definitions

For the purpose of this Division, the following definitions shall apply and appear in italicized letters:

Marijuana has the same meaning as in California Health and Safety Code section 11018.

Medical marijuana consumer cooperative means a cooperative organized as a consumer cooperative under state law for the purpose of collectively or cooperatively cultivating *marijuana* for medical purposes in accordance with state law.

Primary caregiver means the individual designated by the *qualified patient* who has consistently assumed responsibility for the housing, health, or safety of the *qualified patient*, in accordance with state law, including California Health and Safety Code section 11362.5. As explained in *People v. Mentch*, 45 Cal. 4th 274 (2008), a *primary caregiver* is a person who consistently provides caregiving to a *qualified patient*, independent of any assistance in taking medical *marijuana*, at or before the time he or she assumed responsibility for assisting with medical *marijuana*.

Qualified patient means a California resident having the right to obtain and use *marijuana* for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of *marijuana* in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which *marijuana* provides relief, in accordance with state law, including California Health and Safety Code section 11362.5.

Reasonable compensation means compensation for directors, managers, and responsible persons of the *medical marijuana consumer cooperative*

commensurate with reasonable wages and benefits paid to employees of IRS qualified non-profit organizations who have similar descriptions and duties.

Responsible person has the same meaning as in San Diego Municipal Code section 11.0210, and includes an employee and each person upon whom a duty, requirement or obligation is imposed by this Division, or who is otherwise responsible for the operation, management, direction, or policy of a *medical marijuana consumer cooperative*. It also includes an employee who is in apparent charge of the *medical marijuana consumer cooperative*.

State identification card means the card issued to a *qualified patient* or *primary caregiver* in accordance with California Health and Safety Code sections 11362.71-11362.76.

Violent felony means the same as it does in California Penal Code section 667.5(c) as may be amended from time to time.

§ 42.1503 Cooperatives—Organization

All persons who organize to collectively and cooperatively cultivate medical *marijuana* pursuant to state law shall organize as a “Consumer Cooperative Corporation” pursuant to California Corporations Code Title 1, Division 3, Part 2.

§ 42.1504 Cooperatives—Permit Required

- (a) It is unlawful for any person to operate any cooperative, collective, dispensary, or establishment which collectively or cooperatively cultivates medical *marijuana* without a permit issued pursuant to this Division.

- (b) In addition to any other information requested by the City, a permit applicant must provide evidence that the applicant is in compliance with section 42.1503.
- (c) The *medical marijuana consumer cooperative* shall designate one of its officers or managers to act as its responsible managing officer. The responsible managing officer may complete and sign the permit application on behalf of the *medical marijuana consumer cooperative*.
- (d) The issuance of a permit pursuant to this Division does not relieve any person from obtaining any other permit, license, certificate, or other similar approval that may be required by the City, the County of San Diego, or state or federal law.

§ 42.1505 Exemptions

- (a) This Division does not apply to persons collectively or cooperatively cultivating medical *marijuana* in the following facilities licensed by the State of California pursuant to California Health and Safety Code Division 2:
 - (1) A clinic licensed pursuant to Chapter 1;
 - (2) A health facility licensed pursuant to Chapter 2;
 - (3) A residential care facility for persons with chronic, life-threatening illnesses licensed pursuant to Chapter 3.01;
 - (4) A residential care facility for the elderly licensed pursuant to Chapter 3.2; or
 - (5) A hospice or a home health agency licensed pursuant to Chapter 8.

- (b) This Division does not apply to the cultivation of *marijuana* by a *qualified patient* at that patient's home, so long as the patient is only growing for his or her own personal medical needs in a manner consistent with state law.

§ 42.1506 Cooperatives—Cost Recovery Fees

Notwithstanding any other provision of this Code, the City may recover its costs in the form of a permit fee for the costs of permitting and regulating *medical marijuana consumer cooperatives*.

§ 42.1507 Cooperatives—Background Checks

- (a) All *responsible persons* in the *medical marijuana consumer cooperative* shall undergo fingerprinting prior to acting as a *responsible person*. The fingerprints shall be provided to and kept on file with the City.
- (b) The City may conduct a background check of all *responsible persons*. Any person who has been convicted of a *violent felony* or a crime of moral turpitude within the past seven years, cannot act as a *responsible person* in the *medical marijuana consumer cooperative*.
- (c) It is unlawful for any *responsible person* in a *medical marijuana consumer cooperative* to act as a responsible person for the *medical marijuana consumer cooperative* if he or she:
 - (1) fails to provide their fingerprints to the City; or
 - (2) has been convicted of a *violent felony* or crime of moral turpitude within the past seven years.
- (d) The cost of the fingerprinting and attendant background check shall be borne by the *responsible person*.

§ 42.1508 Cooperatives—Verification and Documentation

- (a) *Responsible persons* shall ensure that all transactions involving money, in-kind contributions, reimbursements, *reasonable compensation*, and *marijuana* are fully documented, including documenting each member's contribution of labor, resources, or money to the *medical marijuana consumer cooperative*, and the source of their *marijuana*.
- (b) Upon the City's request, *responsible persons* for the *medical marijuana consumer cooperative* shall provide to the City an audit of its operations for the previous calendar year, completed and certified by an independent certified public accountant in accordance with generally accepted auditing and accounting principles.

§ 42.1509 Cooperatives—Not-for-Profit

Responsible persons shall ensure that:

- (a) No *medical marijuana consumer cooperative* operates for profit for itself or its members. Cash and in-kind contributions, reimbursements, and *reasonable compensation* provided by members towards the *medical marijuana consumer cooperative's* actual expenses for the growth, cultivation, and provision of *medical marijuana* shall be allowed in accordance with state law.
- (b) *Medical marijuana consumer cooperative responsible persons*, including directors, managers, and employees, are limited to receiving *reasonable compensation* and shall not receive a bonus.

- (c) Members who bring medical *marijuana* from their own personal grows to the *medical marijuana consumer cooperative*, may be compensated by cash or trade in-kind. Members may be compensated for their expenses as provided by state law at the time the harvest is brought to the *medical marijuana consumer cooperative*.

§ 42.1510 Cooperatives—Age Limitations

- (a) No person under the age of eighteen is allowed at or in any *medical marijuana consumer cooperative* unless the person is a *qualified patient* or *state identification card* holder and accompanied by their parent, legal guardian, or a *primary caregiver* who is over the age of eighteen.
- (b) No person under the age of eighteen may be employed by or act as a *responsible person* on behalf of the *medical marijuana consumer cooperative*.

§ 42.1511 Marijuana—Transportation

All persons transporting medical *marijuana* in connection with a *medical marijuana consumer cooperative* shall do so in accordance with state law.

§ 42.1512 Marijuana—Packaging and Labeling

Responsible persons for the *medical marijuana consumer cooperative* shall ensure that medical *marijuana*, edible products containing medical *marijuana*, and concentrates comply with the following packaging and labeling requirements:

- (a) *Marijuana*
 - (1) Must be sealed in an airtight manner; and

(2) must have a label affixed to the package containing the following information:

- a. Patient's name;
- b. Dispensing date;
- c. Name and address of dispensing cooperative;
- d. Name of product;
- e. Product ingredients;
- f. Product must be used as recommended;
- g. Product must be kept out of the reach of children;
- h. Product users must not operate heavy machinery while under the influence of *marijuana*;
- i. Sale or transfer of product to non-patients is prohibited;
- j. Product is intended for medical use only. Cal. Health & Safety Code § 11362.5; and
- k. Any additional use instructions and warnings that may be applicable.

(b) Edible Products and Concentrates

(1) Must be labeled with the following:

- a. Patient's name;
- b. Dispensing date;

- c. Name and address of dispensing cooperative;
- d. A warning label; and
- e. The source of the food production.

§ 42.1513 Interior Signage

A sign shall be posted on a wall in the *medical marijuana consumer cooperative* which states the following:

CANNABIS PATIENT ADVISORY

THIS IS A WARNING REGARDING EDIBLE CANNABIS/MARIJUANA PRODUCTS

CAUTION – Edible products containing cannabis extracts (THC – Tetra Hydro Cannabinol) have serious risks associated with the consumption. KEEP OUT OF THE REACH OF CHILDREN.

Common Names: Cannabis Sativa, Cannabis Indica

Uses: Edible cannabis products must always be consumed with caution! The fact that most edibles are produced in kitchens which have not been certified by the health department creates a risk of serious illness and/or an agonizing painful death. THE CITY OF SAN DIEGO CANNOT REGULATE THIS POTENTIALLY DANGEROUS PRODUCT! Edible cannabis products provide thirty-seven additional variations of the THC – (Tetra Hydro Cannabinol) molecule over the benefits received from the inhalation of medical cannabis. Patients with terminal cancer, and those suffering from respiratory problems will benefit from orally consuming cannabis since inhalation is impossible for them; however, there are associated side risks. DO NOT OPERATE A MOTOR

VEHICLE OR MACHINERY WITHIN EIGHT HOURS OF CONSUMING
EDIBLE CANNABIS PRODUCTS.

Side Effects: Severe Extreme Anxiety attacks lasting for up to four hours may occur without proper use of this product. Unless you have experience with this substance, do not drive within seven hours of consumption.

Non-Health Department Certified Kitchens: Food products and other ingestible items containing cannabis are usually not produced in Health Department Certified Kitchens. Consuming these products is a risk.

Dosages: It is difficult to regulate the doses of THC in edible products. It is advised that each new lot be tested by consuming only small portions over a period of several hours.

Anxiety Sufferers: Patients suffering from anxiety should consult a physician before considering the use of edible products containing THC. The increased risk of anxiety attacks may be associated with their consumption.

This warning sign was drafted by the Medical Marijuana Task Force (San Diego Resolution R-305305, Medical Marijuana Task Force Report to Council No. 10-060 (Apr 21, 2010)). The City of San Diego is not responsible for the accuracy of the statements contained in this sign and cannot verify its contents.

Section 3. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been made available to the City Council and the public prior to the day of its passage.

Section 4. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By Mary T. Nuesca
Mary T. Nuesca
Chief Deputy City Attorney

MTN:amt
3/14/11
Or.Dept:PSNS

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor