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REPORT TO THE HONORABLE MAYOR AND CITY COUNCIL

MEDICAL MARIJUANA REPORT FOLLOWING THE APRIL 22, 2013 DIRECTION FROM CITY COUNCIL

INTRODUCTION

In March of 2011, the City Council amended the San Diego Municipal Code (SDMC) to address land use and non land use matters related to medical marijuana, including medical marijuana cooperatives. The land use ordinance (San Diego Ordinance O-20042 (Apr. 27, 2011)) was subsequently successfully referended. The non land use amendments (also referred to as the Public Safety Ordinance) are found in Chapter 4, Article 2, Divisions 13 and 15[1] of the SDMC.

On April 22, 2013, the Council discussed and considered a draft medical marijuana ordinance and enforcement issues regarding medical marijuana. The Council gave direction to staff, including the City Attorney, to bring back a land use ordinance using O-20042 as a template, and provide legal analyses, more fully described in San Diego Resolution R-308124 (May 10, 2013).[2] The City Attorney, as requested, provides the following analyses to the issues posed by the Council.

ISSUES PRESENTED

1. Prohibiting the Placement and Permitting of Medical Marijuana Vending Machines.

2. Legal Options Regarding Fees and Taxes Beyond Cost Recovery.

3. Ability to Monitor Doctors Who Recommend Medical Marijuana to Patients.

4. Options Regarding the System for Medical Card Issuing.

5. Limiting the Number of Dispensaries[3] by Council District.

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[1] Division 15 requires a city permit for medical marijuana cooperatives, and contains operational requirements. The regulatory scheme is not currently enforced because medical marijuana cooperatives are not a recognized use in the SDMC. Put differently, there must be a place for cooperatives to legally operate before the regulatory system can be implemented. SDMC § 42.1504(e).

[2] The revisions to O-20042 requested by the Council were published by this Office in draft form on May 13, 2013. Memorandum to the Honorable Mayor and City Council from the Office of the San Diego City Attorney, entitled, "Draft Land Use Medical Marijuana Consumer Cooperative Ordinance."

[3] "Dispensary" is not defined in state or local law, but is commonly used to describe facilities that purport to comply with state law in associating to collectively or cooperatively cultivate medical marijuana. *See* Cal. Health & Safety

BACKGROUND

As more fully described in previous memoranda[4] issued by this Office, the voters in California and the Legislature have provided limited immunities from criminal prosecution for qualified patients and their caregivers in obtaining and using medical marijuana. The Compassionate Use Act, (CUA) found at California Health and Safety Code section 11362.5, was added by initiative in November 1996, and the Medical Marijuana Program, (MMP) found at California Health and Safety Code sections 11362.7-11362.9, was added by the Legislature in 2003, with some further amendments in 2010 and 2011.

The ability of local government to regulate medical marijuana, and particularly cooperatives, has been controversial, despite language in the MMP allowing for such regulation. Cal. Health & Safety Code §§ 11362.768, 11362.83. The California Supreme Court recently issued an opinion upholding the City of Riverside's ban on medical marijuana dispensaries,[5] and made clear that nothing in the CUA or MMP limits the inherent authority of a local jurisdiction to regulate the use of its land. *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.,* 56 Cal. 4th 729, 738 (2013). Additionally, the Court noted that the MMP is a limited measure, not a comprehensive scheme for the regulation of medical marijuana facilities. *Id*. at 738, 755. *See also Maral v. City of Live Oak*, 221 Cal. App. 4th 975 (2013), upholding an ordinance prohibiting the cultivation of marijuana for any purpose within the City of Live Oak, and rejecting the argument that there exists a "right" to cultivate marijuana under the CUA and MMP. Thus, there is room for local regulation. As this Office has previously stated,[6] the permissible contours of that regulation will likely be the subject of future litigation, and there may be additional state[7] or federal[8] action.

Code § 11362.775. The City has described and defined such entities as "Medical marijuana consumer cooperatives." SDMC § 42.1502. For ease, we refer to these facilities as "cooperatives" in this Report.

[4] 1999 City Att'y Report 169 (99-8; Aug. 31, 1999); 2002 City Att'y MOL 79 (02-5; Sept. 19, 2002); 2007 Op. City Att'y 381 (07-3; June 21, 2007); 2009 City Att'y Report 496 (09-18; July 24, 2009); 2010 City Att'y Report 660 (10-19; May 21, 2010); 2010 City Att'y Report 673 (10-20; May 27, 2010); City Att'y Report 11-14 (Mar. 15, 2011); and City Att'y MOL No. 13-6 (Apr. 17, 2013).

[5] Riverside made any dispensary, defined as a facility where marijuana is made available in accordance with the CUA, a prohibited use, subject to the city's public nuisance abatement procedures. *City of Riverside*, 56 Cal. 4th at 740.

[6] City Attorney Report to Public Safety and Neighborhood Services Committee, 10-19 (May 21, 2010), p.12; City Att'y Report 11-14 (Mar. 15, 2011), p.10.

[7] For example, in the 2011-2012 session, Assemblyman Ammiano proposed establishing a commission to address issues regarding the legality and implementation of the CUA (AB 223). In 2013, he proposed a statewide system of regulation under the Department of ABC (AB 473). Neither bill passed.

[8] In City Att'y MOL No. 13-6 (Apr. 17, 2013), this Office explained that the United States Attorney's Office had intensified its enforcement of the Controlled Substances Act against cooperatives. Further, we noted the Department of Justice had issued the "Cole" memorandum dated June 29, 2011, which stated, inter alia, that local officials and employees were not immune from liability under federal law for activities related to medical marijuana mandated by local ordinances. *Id.* at 4-7. The Department of Justice has updated its position in a memorandum from James Cole, Deputy Attorney General, entitled "*Guidance Regarding Marijuana Enforcement*," dated August 29, 2013 (Attachment A). In short, the memorandum advises prosecutors (U.S. Attorneys) to consider the existence of a strong and effective state regulatory system when determining whether a particular marijuana operation implicates federal enforcement priorities. Those priorities include preventing: distribution to minors; revenue to criminal enterprises, gangs, and cartels; violence and the use of firearms; adverse public health consequences, and environmental dangers.

ANALYSIS

I. PROHIBITING THE PLACEMENT AND PERMITTING OF MEDICAL MARIJUANA VENDING MACHINES

There is nothing in the CUA or MMP, nor are there any cases, that address medical marijuana vending machines. In fact, the scope of the statutes is "limited and circumscribed." *City of Riverside,* 56 Cal. 4th at 738. The CUA and MMP provide limited immunity from criminal prosecution for those who are engaged in specified conduct under those statutes, exempting particular medical marijuana activities from state laws that would otherwise prohibit them. *Id.* at 748. The statutory scheme is not a comprehensive scheme for the distribution of marijuana. *Id.* at 755.

Further, in the *City of Riverside,* the Court said that "[t]he MMP has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana." *Id.* at 759-60. The court upheld Riverside's ban on medical marijuana dispensaries, which were defined in Riverside's Municipal Code as a facility where marijuana is made available in accordance with the CUA. *Id.* at 738, 740, 752. Given that the Supreme Court upheld Riverside's dispensary ban, a ban on a machine that distributes marijuana through a presumably retail model such as a vending machine will likely be upheld as an appropriate exercise of the City's police power. Therefore, we think that the City may prohibit the placement and permitting of medical marijuana vending machines. The draft land use ordinance prepared by this Office, as requested by the Council at its April 22, 2013 meeting, includes a prohibition against the placement of vending machines in medical marijuana cooperatives. If the Council desires to prohibit the placement of medical marijuana vending machines anywhere in the City, the SDMC must be amended to do so.

Should the Council decide to consider allowing such machines, further analysis will need to be done to determine the method of distribution, and whether that method of distribution is protected activity under the CUA and MMP.

II. LEGAL OPTIONS REGARDING FEES AND TAXES BEYOND COST RECOVERY

A. Cost recovery fees are permissible.

As described in City Att'y MOL No. 11-3 (Mar. 4, 2011), Proposition 26 limits the ability of local government to impose fees. Unless the fee fits into an exception under Proposition 26, it is considered a tax. Proposition 26 amended article XIII C, section 1(e) of the California Constitution to define "tax" as "any levy, charge, or exaction of any kind imposed by a local government," unless it falls within one of the seven exceptions.[9]

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[9] The seven exceptions are:

(1) A charge 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.

Local government bears the burden of proving by a preponderance of the evidence that: (1) a fee is not a tax, (2) the amount of the fee does not exceed the reasonable costs of the governmental activity, and (3) the costs allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. *Id.* at § 1(e).

Thus, the City may impose a regulatory fee to recover the costs of processing any required permits, or for any required compliance inspections. However, regulatory fees may not exceed the costs of the regulatory purpose, and the fee calculations must be studied, documented, and presented to the Council. City Att'y MOL No. 11-3 at 8 (Mar. 4, 2011); *see also* Council Policy 100-05, User Fee Policy.

In 2011, the Council enacted legislation that allows the City to recover its costs for permitting and regulating medical marijuana cooperatives. SDMC § 42.1506. At its April 22, 2013 meeting, the Council requested that the Mayor develop the fee structure for issuing and enforcing the "public safety" permit. The ability to charge fees for any permits or certifications required by the Land Development Code for medical marijuana cooperatives is already established in SDMC Chapter 11, Article 2, Division 2.

So long as these fees are reasonable cost recovery fees, they should be legally defensible. As we stated in City Att'y MOL No. 11-3 (Mar. 4, 2011), staff must explain the link between the cost and the regulations being enforced, and justify the fee calculations based on a study of those costs. The City's approval of the fee should be based on facts presented, and the basis for the decision documented. *Id.* at 8.

B. The Imposition of Taxes on Cooperatives Requires a Vote of the People.

At the April 22, 2013 Council meeting, former Mayor Filner sought direction from the Council on drafting an ordinance addressing medical marijuana cooperatives operating in the City of San Diego. The Mayor proposed that the ordinance include a $5,000 annual permit fee on each cooperative, and a two percent "excise tax" on all medical marijuana "acquired" by each cooperative from its members. In response, the Council asked for information on the avenues

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(2) A charge imposed for a specific government service or product provided 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 providing the service or product.

(3) 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.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of article XIII D.

available to the City to impose taxes or charges on cooperatives beyond cost recovery, in order to raise general revenue. Below we provide preliminary guidance on taxes the City could impose on cooperatives and the related requirements of doing so.

1. All taxes, general or special, require voter approval.

Every tax imposed by a local government is either a general tax or a special tax. Cal. Const. art. XIII C, § 2(a). A special tax is any tax imposed for specific purposes, even if the revenue from the tax is placed into the general fund. Cal. Const. art. XIII C, § 1(d). A tax is "special" if its proceeds are legally obligated for a specific purpose. Cal. Const. art. XIII C, § 1(d); *Bay Area Cellular Telephone Co. v. City of Union City*, 162 Cal. App. 4th 686, 696, *rev. denied* (2008) (The essence of a "special tax" is that its proceeds are earmarked to a specific project or projects.).

In contrast, a general tax is any tax imposed for general government purposes. Cal. Const. art. XIII C, § 1(a). The revenues from a general tax must be available to be spent on any and all governmental purposes. *Howard Jarvis Taxpayers Ass'n v. City of Roseville*, 106 Cal. App. 4th 1178, 1185 (2003).

Before a local government may "impose, extend, or increase" any tax, the tax must be submitted to the electorate for approval. A general tax must be approved by a majority vote of the electorate. Cal. Const. art. XIII C, at § 2(b). A special tax must be approved by a two-thirds vote of the electorate. *Id*. at § 2(d).

2. An excise tax is either a general tax or a special tax, requiring voter approval.

When referring to state and local taxes, an excise tax is any tax that isn't a poll tax or a property tax. 71 Am. Jur. 2d, State and Local Taxation, Part One, § 22 (1990). Excise taxes, sometimes referred to as license or privilege taxes, include: sales and use tax, business license tax, utility user tax, transient occupancy tax, real property transfer tax, admissions tax, and development tax.

An excise tax is either a general tax or a special tax. Former Mayor Filner's proposed $5,000 business license tax on dispensaries, and 2% "excise" tax on the marijuana acquired from members of dispensaries, are both excise taxes. A sales tax on marijuana would also be an excise tax, as would any other tax the City would impose on medical marijuana cooperatives.

Should the Council desire to tax cooperatives, the acquisition of marijuana acquired by cooperatives, or some other aspect of the operation, whether for a general government purpose or a special purpose, our Office will provide further guidance in drafting and placing such a measure on the ballot.

C. The Business Tax Certificate Requirement.

We next analyze whether medical marijuana cooperatives must obtain a business tax certificate.

The City of San Diego imposes a business tax "solely to raise revenue for municipal purposes." SDMC § 31.0101. Business tax is not imposed "for the purpose of regulation," and the issuance of a business tax certificate does not "authorize the conduct or continuance of any illegal or unlawful business or of any business for which a license or permit is required by state law, county ordinance or the San Diego Municipal Code . . . ." *Id.*; SDMC § 31.0120(a).

SDMC section 31.0121 states, "No person shall engage in any business, trade, calling or occupation required to be taxed under the provisions of this Article until a certificate of payment is obtained." A certificate of payment is evidenced by the issuance of a business tax certificate. A person[10] is engaged in the business, profession, occupation, operation, or practice if the person owns, conducts, operates, manages or carries on "a commercial or industrial enterprise through which services or property are sold, furnished, or constructed . . . ." SDMC § 31.0110(d). Therefore, we must determine whether medical marijuana cooperatives are engaged in activity requiring a business certificate. To determine that, we must first analyze what the Code means with respect to "commercial enterprises."

When interpreting a statute, we look first to the plain meaning of the language used. "Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use." *Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988). The term "commercial" has at least two different meanings. Webster's Dictionary generally defines "commercial" as: (1) Of or relating to commerce; or, (2) Having profit as a primary aim. Webster's II New College Dictionary 231 (3rd ed. 2005). "Commerce" is defined as "[t]he buying and selling of goods." *Id.*

Given the varying dictionary definitions, we cannot rely upon a plain meaning analysis and therefore must apply general rules of statutory interpretation. *Mason v. Retirement Board of City and County of San Francisco*, 111 Cal. App. 4th 1221, 1227 (2003). "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent." *Burden v. Snowden*, 2 Cal. 4th 556, 562 (1992). In determining intent, we first look to the language of the statute, giving words used "their usual, ordinary and common sense meaning, keeping in mind the purpose for which the statute was adopted." *Hamilton v. State Board of Education*, 117 Cal. App. 3d 132, 141 (1981).

Consideration should be given to the consequences that will flow from a particular interpretation. *Id.* "[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387 (1987). Furthermore, "[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Based on the context in which the term "commercial" is used as it relates to the assessment of business taxes, it appears that the definition "of or relating to commerce" is the most appropriate. While it is true that *many* not-for-profit organizations are exempt from the

[10] A person includes "all natural persons and all domestic and foreign corporations, associations, syndicates, joint stock companies, partnerships of every kind, clubs, Massachusetts business or common law trusts, societies and individuals engaged in any business as defined herein in the City of San Diego." SDMC § 31.0110(e).

payment of business tax under SDMC section 31.0201, if the term "commercial" in this context meant "having profit as a primary aim," *all* not-for-profit organizations would be exempt. An interpretation of the term "commercial" to mean "having profit as a primary aim" would therefore render the language regarding the enumerated list of specific types of not-for-profit entities meaningless. *Id.*

For purposes of business tax, the operation of a medical marijuana cooperative where the purchase or sale of medical marijuana takes place is a "commercial enterprise" because medical marijuana is considered both a good and personal property. There are a number of organizations that are exempt from the payment of business taxes, particularly non-profit organizations, but we do not believe that any of the exemptions generally apply to medical marijuana cooperatives.[11]

For example, SDMC section 31.0201(a) exempts "[a]ny charitable institution, organization or association organized and conducted exclusively for charitable purposes, and not for private gain or profit. The issuance by the California Franchise Tax Board of a certificate of exemption from state income taxation shall conclusively establish the exempt status of any such entity."

It would be difficult for a medical marijuana cooperative to establish that this exemption applies because a medical marijuana cooperative cannot obtain tax exempt status under California Revenue and Taxation Code section 23701(d) or under the Internal Revenue Code. The August 2008 *California Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* (AG Guidelines) indicate that "[t]he State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit . . . ." AG Guidelines, p. 9. Thus, the state has determined that medical marijuana cooperatives are not tax-exempt in California. Likewise, to be eligible for tax exempt status under the Internal Revenue Code, an organization must be organized for legal purposes and must not engage in activities that are illegal or contrary to public policy. *Green v. Connally*, 330 F. Supp. 1150, 1161-62 (1971); *See also* Internal Revenue Service (IRS) Publication entitled "Applying for 501(c)(3) Tax-Exempt Status," p. 3. Despite the enactment of the CUA and the MMP, the manufacture, dispensing, possession, and distribution of marijuana is still illegal under federal law. *See* 21 U.S.C. §§ 841(a)(1), 844(a); *Gonzales v. Raich*, 545 U.S. 1, 9, 13, 22 (2005); *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 811-12 (2008). Therefore, we do not believe that medical marijuana cooperatives qualify as charitable organizations, under state or federal law.

Another type of entity exempt from the payment of business tax is a service club or organization. SDMC section 31.0201(e) provides that "[n]o business tax shall be levied nor

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[11] It is important to note that medical marijuana cooperatives themselves have never asserted to the City that they are exempt from the payment of business tax. Indeed, quite the opposite has occurred. Two lawsuits were filed against the San Diego City Treasurer in an effort to compel the City Treasurer to issue a business tax certificate to medical marijuana cooperatives. *See Next Generation Delivery, Inc. v. Gail Granewich,* Case No. 37-2012-00098334-CU-WM-CTL; *Wisdom Organics, Inc. v. Gail Granewich*, Case No. 37-2011-00090340-CU-WM-CTL. In both of those cases, the City Treasurer refused to issue a business tax certificate because the U.S. Attorney issued cease and desist notices to marijuana cooperatives on the basis that marijuana is a controlled substance under federal law and distribution of marijuana is a federal crime. In *Wisdom Organics*, the state court found that "issuing a Business Tax Certificate under these circumstances would tend to aid in an unlawful purpose." Since that time, the U.S. Department of Justice issued its August 29, 2013 memo. *See* footnote 8.

certificate of payment be issued" to "[a]ny service club or organization, such as Kiwanis, Rotary or Lions Clubs, nonprofit automobile clubs, Chambers of Commerce, trade associations, manufacturers associations, labor organizations, and similar community or professional service clubs or organizations which do not contemplate the distribution of profits or dividends to the members thereof."

While medical marijuana cooperatives should not be distributing profits or dividends to its members,[12] we do not believe that they qualify as service clubs or organizations. The Merriam-Webster Online Dictionary,[13] defines a "service club" as a club of business or professional men or women organized for their common benefit and active in community service." BusinessDictionary.com[14] defines "professional services" as "[a]ccounting, legal, medical and other such services provided by a formally certified member of a professional body."

The rule of statutory construction known as "ejusdem generis" instructs that when an ordinance contains a list of items, as here, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. In other words, the class of things is restricted to those things that are similar to, of the same general nature or class, as those that are enumerated specifically. *Clark v. Superior Court*, 50 Cal. 4th 605, 613-14 (2010). Here, the service organization exemption includes examples of business tax exempt organizations "such as Kiwanis, Rotary or Lions Clubs, nonprofit automobile clubs, Chambers of Commerce, trade associations, manufacturers associations, labor organizations . . . ." SDMC § 31.0201(e).

Arguably, medical marijuana cooperatives organize individuals who help others in need by growing and cultivating marijuana for medicinal purposes. However, unlike the exempt service organizations set forth in the SDMC, one of the main purposes of medical marijuana cooperatives is to facilitate the distribution of a *product*, namely marijuana. The Kiwanis, Rotary, Lions Clubs, Chambers of Commerce and the like are organized primarily or even exclusively to facilitate or provide *services* to its members as opposed to products and thus are appropriately characterized as *service* organizations. With its primary focus on a product, it is unlikely that a medical marijuana cooperative would be construed to be a service organization as set forth in the SDMC.

Based on the foregoing, we believe that marijuana cooperatives established under California law have to obtain a business tax certificate in order to operate within the City of San Diego consistent with the SDMC. If the City desires that medical marijuana cooperatives be

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[12] The SDMC requires those who organize to collectively and cooperatively cultivate marijuana also organize as consumer cooperatives pursuant to the California Corporations Code. SDMC § 42.1503. Such corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." Cal. Corp. Code § 12201. Under local law, a medical marijuana cooperative is prohibited from operating for profit for itself or its members. SDMC § 42.1509(a). Furthermore, there is a provision in the MMP that makes it clear that the MMP does not authorize the cultivation or distribution of marijuana for profit. Cal. Health & Safety Code § 11362.765.

[13] A*vailable at* http://www.merriam-webster.com/dictionary/service%20club.

[14] *Available at* http://www.businessdictionary.com/definition/professional-services.html.

exempt from the payment of business tax, the Council could amend the SDMC to create such an exemption.

III. ABILITY TO MONITOR DOCTORS WHO RECOMMEND MEDICAL MARIJUANA TO PATIENTS

The Council asked about "monitoring" doctors. The Council would likely be preempted from passing laws in the areas already addressed by the state and federal government. *City of Riverside*, 56 Cal. 4th at 743.

The ability to prescribe controlled substances is regulated by the federal government. 21 U.S.C. § 821 (2013). "Marijuana" is not recognized by the federal government as having any acceptable use, therefore doctors may not "prescribe" marijuana. 21 U.S.C. 801, 812(b)(1). However, doctors may recommend medical marijuana without risking their license to prescribe controlled substances.[15] *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). Doctors may not go beyond recommending marijuana; they may not engage in "aiding and abetting" the acquisition of marijuana by their patients. *Id.* at 635-36. ("A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana.")

The State of California, through the Department of Consumer Affairs, Medical Board of California (Board), licenses and disciplines medical doctors. Cal. Bus. & Prof. Code § 2004(c), (h); Cal. Code Regs. title 16, §§ 1301, 1361. In 2004, the Board stated that the acceptable standards for recommending marijuana are the same as those any reasonable and prudent doctor would follow when recommending any other medication, including:

1. History and an appropriate prior examination of the patient.
2. Development of a treatment plan with objectives.
3. Provision of informed consent including discussion of side effects.
4. Periodic review of the treatment's efficacy.
5. Consultation, as necessary.
6. Proper record keeping that supports the decision to recommend the use of medical marijuana.

http://www.mbc.ca.gov/licenses/prescribng/medical_marijuana.aspx

The California Attorney General reiterated these standards in the *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, Aug. 2008, I.E.

The Council is considering a land use ordinance which prohibits consultations by medical professionals as an accessory use at a medical marijuana consumer cooperative. This is consistent with the California Medical Association (CMA) guidelines on physician recommendation of medical marijuana, which cautions against employment agreements with cooperatives. CMA, Physician Recommendation of Medical Cannabis, Guidelines of the Council of Scientific Affairs Subcommittee on Medical Marijuana Practice Advisory.

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[15] Doctors may recommend marijuana under state law without fear of being punished or denied any right or privilege for having recommended marijuana to a patient for medical purposes. Cal. Health & Safety Code § 11362.5(c).

If the Council has a specific action it would like to take with respect to doctors, we will need to analyze that action further.

IV. OPTIONS FOR CHANGES TO THE PUBLIC SAFETY ORDINANCE REGARDING THE SYSTEM FOR MEDICAL CARD ISSUING

The MMP established a voluntary statewide identification card system for qualified patients and their primary caregivers. The program is maintained by the state Department of Public Health, and the issuance of the cards is accomplished through the counties. The purpose of the cards is to provide the holder protection from arrest for the possession, transportation, delivery or cultivation of medical marijuana in the amounts established in the MMP. Cal. Health & Safety Code § 11362.71. A verification database is available online and via a 24-hour telephone number, to assist law enforcement in verifying the card holder's status. The program is voluntary; one need not possess a card to claim the protections of the CUA and MMP. *San Diego NORML*, 165 Cal. App. 4th at 798, 811. The cards facilitate the prompt identification of patients and caregivers in order to avoid unnecessary arrest and prosecution of those individuals. *Id.* at 810. However, local governments may not enact their own identification card program, nor may the counties delegate their obligations under the program to cities. 88 Op. Cal. Att'y Gen. 113-21, (2005).

During the April 22, 2013 Council meeting, a proposal was made to use the identification cards as a requirement to join a cooperative. The MMP allows local governments to adopt regulations governing the operation of a medical marijuana cooperative, and to adopt any other laws consistent with the CUA and MMP. Cal. Health & Safety Code § 11362.83. Additionally, the California Supreme Court in the *City of Riverside* case stated that nothing in the CUA or MMP preempted the authority of local government, under its traditional land use and police powers, to allow, restrict, limit or exclude facilities that distribute medical marijuana. *City of Riverside,* 56 Cal. 4th at 762. It thus appears that the City has broad authority to enact regulations governing the operations of cooperatives, including requiring cooperative members to have state identification cards.

The Council cannot enact its own card program, or enact any regulation contrary to the statewide program. Beyond that, there may be room for additional regulation that utilizes the existence of the system that is permissible. If the Council has proposals regarding the use of the cards, we will further analyze that specific proposal.

V. LIMITING THE NUMBER OF DISPENSARIES[16] BY COUNCIL DISTRICT

It is now settled law that the City may, pursuant to its police powers, ban medical marijuana cooperatives. *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc*., 56 Cal. 4th at 749 (2013). As noted previously, the California Supreme Court upheld a ban that Riverside had enacted on facilities that distribute medical marijuana. The Court opined that the steps of the CUA were "modest" and those of the MMP were "limited and specific," providing for a defense from specific, enumerated state criminal statutes, and nothing more. *Id.* at 744-45, 760-61. The Court concluded that local jurisdictions may, pursuant to their traditional

[16] See footnote 3.

land use and police powers, "allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana . . . ." *Id.* at 762. The CUA and MMP do not override the zoning, licensing, and police powers of local jurisdictions. *Id.* at 762-63. In that a limit on the number of cooperatives is a lesser prohibition than a ban, a limit on the number of cooperatives based on the City of San Diego's police powers is also permissible.

In addition, the state statutes themselves make it clear that local authorities retain powers to regulate medical marijuana. California Health and Safety Code section 11362.83 of the MMP as originally enacted, stated, "[n]othing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article." In 2011, the section was amended to state,

> [n]othing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following:
> (a) Adopting local ordinances that regulate the *location, operation, or establishment* of a medical marijuana cooperative or collective.
> (b) The civil and criminal enforcement of local ordinances described in subdivision (a).
> (c) Enacting other laws consistent with this article. (Emphasis added.)

In 2010, California Health and Safety Code section 11362.768 was enacted which, in addition to requiring any cooperatives to be at least 600 feet from any school, states that "[n]othing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider."

The imposition of limits on the number of dispensaries by two California cities has led to decisions by the appellate courts. Although one of the opinions may not be cited as legal authority, a summary of the facts of the case and the reasoning of the Court of Appeal may be useful. In March 2009, the City of Palm Springs imposed a limit of two collectives or cooperatives in the city.[17] The Court of Appeal found that the limit was not preempted by federal or state law, nor was it a violation of equal protection. The Court ruled that federal preemption was not the correct challenge to the local zoning ordinance; the key issue in determining the enforceability of the ordinance is whether the state medical marijuana statutes preempt the ordinance. The Court went on to find that neither the CUA nor the MMP preempted local zoning regulations such as this. *City of Palm Springs v. The Holistic Collective*, 2012 WL 1959571 (Cal. App. 4th Dist. 2012). The Court noted the specific authority granted by California Health and Safety Code section 11362.83 to local jurisdictions to adopt and enforce laws consistent with the MMP, and by California Health and Safety Code section 11362.768 to allow local jurisdictions to adopt ordinances and policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.[18]

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[17] The limit was later increased to three collectives or cooperatives.

[18] This opinion is not published, and therefore is not citable and may not be relied upon by a court or non-party to the action, pursuant to California Rules of Court, rule 8.1115(a).

The City of Los Angeles enacted a temporary ban on cooperatives in 2007, but exempted those in operation prior to the effective date of the ordinance, if they were operating in compliance with state law and if they registered with the city within two months of the ordinance's effective date. The city then passed a permanent ordinance in 2010 that initially allowed up to 70 cooperatives to register and receive approvals to continue to operate, with priority given to those who were already registered pursuant to the temporary ban (in addition to compliance with other requirements). The cooperatives were to be distributed proportionally around the city's various neighborhoods, according to population densities. In the event that the number of eligible cooperatives exceeded 70, those additional cooperatives were also eligible to register for operation and also were required to be distributed proportionally throughout the city, based on the population densities. The ordinance sunsetted after two years, unless extended by the council. At that time, all cooperatives would be required to cease operation.

A number of the cooperatives challenged the implementation of the new ordinance, which resulted in an injunction against the enforcement of the ordinance. On appeal, the Court determined that the provisions of the ordinance giving preference to certain categories of cooperatives did not violate equal protection.[19] *420 Caregivers, LLC v. City of Los Angeles,* 219 Cal. App. 4th 1316, 1341 (2012). The ordinance did not involve suspect classifications or fundamental rights, and so was subject to review under the rational basis test, which meant that the legislation need only bear a rational relationship to a legitimate government interest. *Id* at 1335. The Court noted that Los Angeles could easily have articulated a preference for those cooperatives in operation on the ordinance's effective date and registered in compliance with the ordinance, in that they had a record of compliance based on their registration and by then a two-year record of lawful operation. *Id* at 1337. The Court determined that the cooperatives failed to "bear the heavy burden of demonstrating the Ordinance unconstitutional." *Id.* at 1339.

The City may impose a limit on the number of cooperatives allowed to operate in the City of San Diego, either pursuant to a city-wide limit, a Council District-wide limit, or other criteria. If the Council desires to impose such a limit, the SDMC will need to be amended. Additionally, this Office may need to review any implementation measures.

CONCLUSION

If the Council desires to take action with respect to vending machines, monitoring doctors, or medical card issuance, further analysis by our Office will be needed once the specifics of those proposals are known. If the Council desires to place a tax measure on the ballot, whether for a general government purpose or a special purpose, our Office will provide further guidance in drafting and placing such a measure on the ballot. If the Council desires to place a numerical cap on the number of cooperatives allowed in the City, further direction is needed as to the criteria, and on any implementation measures.

[19] The Court also upheld the ordinance against challenges based on procedural due process and the right to privacy, which are not relevant to the discussion here regarding numerical limits.

We take this opportunity to remind the Council that it is unknown what, if any, federal action may be taken when the City implements its regulatory schemes.[20] For example, there was a media article pertaining to California on September 9, 2013, entitled "US Attorney Hints Medical Marijuana Crackdown to Continue," Josh Crank, http://blogs.lawyers.com/2013/09/us-attorney-hints-medical-marijuana-crackdown-to-continue/. On the other hand, two states have legalized marijuana, with no federal action against government officials in those states, as of this writing.

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Chief Deputy City Attorney

MTN:amt
Attachment
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[20] Employees may have concerns about running afoul of federal law. *See* City Att'y MOL No. 13-6, pp. 4-7, advising that there is no "safe harbor" for employees, and further advising consideration of engaging in meet and confer with the impacted bargaining units.

[21] Thank you to Deputy City Attorneys Roxanne Story Parks, Mara Elliott, Kenneth So, and Shannon Thomas, who contributed to this Report.