

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

SHANNON M. THOMAS
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

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

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REPORT TO HONORABLE MAYOR AND CITY COUNCILMEMBERS

2015 STATE LEGISLATION REGARDING MEDICAL MARIJUANA: THE MEDICAL MARIJUANA REGULATION AND SAFETY ACT

INTRODUCTION

In 1996, Proposition 215, the Compassionate Use Act, was passed by the electorate. Proposition 215, codified at California Health and Safety Code section 11362.5, allowed the use of marijuana for medical purposes when recommended by a physician, and excluded 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 (MMPA) that set forth requirements for the issuance of voluntary identification cards; allowed the cultivation, possession, sale, or storage of marijuana; prohibited the distribution of marijuana for profit; exempted from prosecution qualified patients and designated primary caregivers who associate to collectively or cooperatively cultivate marijuana for medical purposes; required the Attorney General to issue guidelines for the security and nondiversion of medical marijuana; and allowed cities to adopt and enforce laws consistent with the MMPA. The MMPA is codified at California Health and Safety Code sections 11362.7-11362.9.

On March 25, 2014, the City of San Diego adopted land use regulations amending the Land Development Code portion of the San Diego Municipal Code (Municipal Code or SDMC) to allow medical marijuana consumer cooperatives (MMCC), defined as a facility where marijuana is transferred to qualified patients or primary caregivers, to operate in certain zones, under certain conditions.¹ San Diego Ordinance O-20356 (Mar. 25, 2014). The City also adopted regulations relating to the operations of the MMCCs. SDMC, Chapter 4, Article 2, Division 15.

On October 9, 2015, Governor Brown signed into law three bills relating to medical marijuana, which will all be effective January 1, 2016. Assembly Bill 266, Assembly Bill 243, and Senate Bill 643 collectively enact the Medical Marijuana Regulation and Safety Act (Act),

¹ Various issues associated with medical marijuana have been the subject of numerous memoranda and reports from this Office. *See* 1999 City Att’y Report 169 (99-8; Aug. 31, 1999); 2001 City Att’y Report 627 (2001-17; May 18, 2001); 2001 City Att’y MOL 156 (2001-11; July 2, 2001); 2002 City Att’y MOL 79 (2002-5; Sept. 19, 2002); 2007 Op. City Att’y 381 (2007-3; June 21, 2007); 2009 City Att’y Report 496 (2009-18; July 24, 2009); 2010 City Att’y Report 660 (2010-19; May 21, 2010); 2010 City Att’y Report 673 (2010-20; May 27, 2010); 2011 City Att’y Report 314 (2011-14; Mar. 15, 2011); City Att’y MOL 2011-9 (July 21, 2011); 2013 City Att’y MOL 55 (2013-6; Apr. 17, 2013); City Att’y Report 2014-5 (Feb. 10, 2014); City Att’y MS 2015-1 (Jan. 8, 2015); City Att’y MOL 2015-2 (Jan. 30, 2015); City Att’y MS-2015-21 (Oct. 6, 2015).

Business and Professions Code sections 19300 through 19360, and related code sections. This Report summarizes the Act, and highlights the need for the City to have an ordinance in effect by March 1, 2016, should the Mayor and City Council desire to have specific regulations regarding the cultivation of marijuana.²

DISCUSSION

Assembly Bill 266 is the most comprehensive of the three bills. It provides for the licensure and regulation of medical marijuana by a newly created Bureau of Medical Marijuana Regulation (Bureau) within the Department of Consumer Affairs. Cal. Bus. & Prof. Code § 19302.³ Licensees with cultivation or manufacturing licenses must have all medical marijuana and products tested prior to distribution to a dispensary. Cal. Bus. & Prof. Code § 19326(b). Assembly Bill 243 provides that for the purposes of the Act, medical marijuana is an agricultural product. Assembly Bill 243 charges the California Department of Food and Agriculture (DFA) with the licensure and regulation of the cultivation of medical marijuana, indoor and outdoor. In addition, Assembly Bill 243 requires that the California Department of Public Health develop standards for the production and labeling of all edible marijuana products. Senate Bill 643 regulates the recommendation of medical marijuana by physicians and surgeons and makes it illegal for a recommending physician or surgeon to receive remuneration from a licensed medical marijuana facility if the physician or surgeon's immediate family has a financial interest in the facility. Cal. Bus. & Prof. Code §§ 2220.05, 2241.5, 2525. The Medical Board of California is required to consult with the California Medical Marijuana Research Program to develop and adopt medical marijuana guidelines for the administration and use of medical marijuana. Cal. Bus. & Prof. Code § 2525.1.

The cultivation, possession, storage, manufacture, or transportation of marijuana by a qualified patient for his or her personal use and who does not engage in commercial cannabis activity is exempt from these licensure requirements. Cal. Bus. & Prof. Code § 19319(a). Further, a primary caregiver who cultivates, possesses, stores, manufactures, transports, donates, or provides marijuana for the personal medical use of no more than five specified qualified patients, who does not receive compensation except for actual expenses, is also exempt from these licensure requirements. Cal. Health & Safety Code § 19319(b).

I. LICENSURE

Generally, the Act requires dual licenses: one from the State and one from the local jurisdiction (however, see the discussion below regarding cultivation). Cal. Bus. & Prof. Code § 19322(a). The local license must be received before application for a State license may be made. *Id.* Upon the date of implementation of the regulations by the State licensing authorities, it is illegal to engage in "commercial cannabis activity" without possessing both a State and local

² Marijuana remains a schedule I controlled substance under federal law; the possession, cultivation, and distribution remains a federal crime. 21 U.S.C. § 801, et seq.

³ The State Department of Consumer Affairs anticipates regulations to be developed by January 1, 2018. California Department of Consumer Affairs, <http://dca.ca.gov/marijuanafaqs.shtml> (last visited Dec. 23, 2015).

license. Cal. Bus. & Prof. Code § 19320(a). “Commercial cannabis activity” includes “cultivation, possession, manufacture, processing, storing, laboratory testing, labeling, transporting, distribution, or sale” of medical marijuana or products. Cal. Bus. & Prof. Code § 19300.5(k). The revocation of a local license will terminate the ability of a medical marijuana business to operate in that local jurisdiction, and the revocation of a State license will terminate the ability of a medical marijuana business to operate within the State of California. Cal. Bus. & Prof. Code § 19320(b), (c). State licenses are valid for 12 months, and may be renewed, however, any facility or entity that is operating in compliance with local zoning laws and requirements on or before January 1, 2018, may continue operations until its application is acted on by the State agencies pursuant to the Act. Cal. Bus. & Prof. Code § 19321(b), (c).

The Bureau is charged with issuing the following four types of license:

- 1) Dispensary, which is a facility where medical marijuana, medical marijuana products, or devices for the use of the medical marijuana or medical marijuana products are offered for retail sale, which includes delivery of the above when expressly authorized by local ordinance.
- 2) Distributor, which is a person engaged in the business of purchasing medical marijuana from a licensed cultivator or medical marijuana products from a licensed manufacturer, for sale to a licensed dispensary. Each location where medical marijuana is stored must be licensed.
- 3) Transport, which is the transfer of medical marijuana or medical marijuana products from the permitted business location of one licensee to the permitted business location of another licensee, for the purposes of conducting commercial cannabis activity pursuant to the Act.
- 4) Special dispensary status, for those dispensaries with no more than three licensed dispensary facilities; delivery is allowed when expressly authorized by local ordinance.

Cal. Bus. & Prof. Code §§ 19334, 19300.5(n), 19300.5(q), 19300.5(am). Each type of use licensed by the Bureau, as well as uses to be licensed by other State agencies is discussed in more detail below. Some of these classifications have sub-categories. Cal. Bus. & Prof. Code § 19300.7. A licensee shall not also be licensed as a retailer of alcoholic beverages. Cal. Bus. & Prof. Code § 19329.

II. CULTIVATION

Cultivation will be regulated and licensed at the State level by the DFA, through a newly established Medical Marijuana Cultivation Program. Cal. Bus. & Prof. Code § 19332; Cal. Health & Safety Code § 11362.777. There are ten different types of licenses in the Act, based on whether the cultivation is indoor or outdoor, the size, whether artificial or natural lighting will be used, and whether the cultivation will be solely as a nursery. Cal. Health & Safety Code § 19332(g). The cultivation of medical marijuana without both a license from the State and the

local jurisdiction is illegal. Cal. Health & Safety Code § 11362.777(b). Local regulation of cultivation is expressly allowed, however, any local requirements must be at least as stringent as the State's. Cal. Health & Safety Code § 11362.777(c)(1), (3). Any locally issued permit shall not become active until after the licensing by the State has occurred. Cal. Health & Safety Code § 11362.777(c)(1).

An application for a State license shall not be made until the applicant has obtained the required entitlements from the local jurisdiction, nor shall an application for a State license be made if the proposed cultivation is prohibited in the local jurisdiction, either expressly, or "otherwise under the principles of permissive zoning."⁴ Cal. Health & Safety Code § 11362.777(b)(2), (3). However, if a local jurisdiction does not have land use regulations or ordinances regulating or prohibiting the cultivation of medical marijuana, either expressly or through the principles of permissive zoning, or chooses not to administer a conditional use permit program pursuant to the Act, then beginning March 1, 2016, the State shall be the sole licensing authority in that jurisdiction. Cal. Health & Safety Code § 11362.777(c)(4).

Qualified patients with a cultivation area that does not exceed 100 square feet and who do not in any manner distribute the medical marijuana are exempt from these regulations. Cal. Health & Safety Code § 11362.777(g). In addition, primary caregivers are exempt from these regulations if the cultivation area does not exceed 500 square feet, the cultivation is for no more than five specified qualified patients, and the primary caregiver does not receive any compensation other than for actual expenses. *Id.*

III. TESTING

The California Department of Public Health is required to promulgate regulations governing the licensing of medical marijuana manufacturers and testing laboratories. Cal. Bus. & Prof. Code § 19341. A licensed testing laboratory may test both medical marijuana and products, and must analyze and report (1) whether the chemical profile conforms to the specifications for certain listed compounds, including any additional compounds to be required by the State Department of Public Health, and (2) that the presence of contaminants does not exceed levels set by certain bodies. Cal. Bus. & Prof. Code § 19344(a). In addition, the residual levels of volatile organic compounds must be below standards set by certain referenced bodies. Cal. Bus. & Prof. Code § 19344(b).

⁴ Under "permissive zoning" regulations, allowed uses are listed; any uses not expressly listed as allowed are therefore deemed to be prohibited. 83 Am. Jur. 2d *Zoning and Planning* § 129; *Corona v. Naulls*, 166 Cal. App. 4th 418, 425 (2008); *County of Sonoma v. Superior Court*, 118 Cal. Rptr. 3d 915 (2010). However, even under permissive zoning regulations, implied accessory uses are not precluded, due to the impossibility of listing all possible accessory uses. 83 Am. Jur. 2d *Zoning and Planning* § 129. The City has permissive zoning; any uses not listed in the Municipal Code are not allowed. For example, Municipal Code section 131.0420(b), regarding residential uses, states that premises may not be "used or maintained except for one or more of the purposes or activities listed . . ." Prior to the Municipal Code amendments in 2014 which created MMCCs as a separately regulated commercial services use category, commercial retail-type facilities were determined to be not an allowed use. See Memorandum to Public Safety & Neighborhood Services from Kelly Broughton, Development Services Director, July 27, 2009.

Testing laboratories may receive medical marijuana from facilities licensed pursuant to the Act; cannot distribute, sell, deliver, transfer, transport, or dispense medical marijuana; and products must maintain a chain of custody. Cal. Bus. & Prof. Code § 19345(a). In addition, testing laboratories may also perform testing for qualified patients and primary caregivers, if the request is accompanied by a physician's recommendation. Cal. Bus. & Prof. Code § 19345(b).

The California Department of Public Health is required to develop procedures and rules to ensure that testing of the medical marijuana and products occurs prior to delivery to dispensaries⁵ and to specify how often testing must occur. Cal. Bus. & Prof. Code § 19345(c).

IV. LABELING

Prior to delivery or sale at a dispensary, medical marijuana products must be labeled and in a tamper-evident package. The labels and packages must meet certain requirements, for example, the packaging must not be attractive to children, it must include the manufacturing date and source, include specified warnings, list the pharmacologically active ingredients and amount of cannabinoid in each serving, and any other requirements set by the Bureau. Cal. Bus. & Prof. Code § 19347.

V. DISPENSARIES

A dispensary, defined as a facility where medical marijuana, products, or devices for their use are offered for retail sale, requires both a State license and a local license. Cal. Bus. & Prof. Code §§ 19300.5(n), 19320(a), 19334. Licensed dispensaries are required to comply with specified security measures, and report to local law enforcement within 24 hours of the discovery of certain specified discrepancies or losses. Cal. Bus. & Prof. Code § 19334. Dispensaries may also deliver the medical marijuana and products, *see* Section VI, below.

Prior to retail sale or dispensing, medical marijuana and products must be tested by a registered testing laboratory, *see* Section III, above. Cal. Bus. & Prof. Code § 19326(d). In addition, the medical marijuana or products must be labeled, *see* Section IV, above. Cal. Bus. & Prof. Code § 19347.

As noted earlier, a dispensary operating in compliance with local zoning laws and requirements on or before January 1, 2018, may continue operations until its application is acted on by the State agencies pursuant to the Act. Cal. Bus. & Prof. Code § 19321(b), (c).

VI. DELIVERY AND TRANSPORTATION

Delivery, defined in the Act as the commercial transfer of medical marijuana or products from a dispensary to a primary caregiver, patient, or testing laboratory, may only be made by a dispensary, and only in and to a city or county that does not, by local ordinance, explicitly

⁵ The California Business and Professions Code also references "or any other business" here but it is not clear from the statutory scheme what other businesses this refers to. Cal. Bus. & Prof. Code § 19345(c).

prohibit deliveries.⁶ Cal. Bus. & Prof. Code §§ 19300.5(m), 19340. Employees making a delivery must carry a copy of the dispensary's current license, government issued identification, and the delivery request (however, the confidentiality of medical information is to be maintained). Cal. Bus. & Prof. Code § 19340(b)(2). The qualified patient or primary caregiver must also maintain a copy of the delivery request. Cal. Bus. & Prof. Code § 19340(e). Transportation, defined in the Act as the transfer of medical marijuana products from the permitted business location of one licensee to the permitted business location of another licensee, for the purposes of conducting commercial cannabis activity pursuant to the Act, requires a separate State-issued permit. Cal. Bus. & Prof. Code §§ 19300.5(am), 19326. The Bureau is to establish minimum security requirements for the commercial transportation and delivery of medical marijuana and products. Cal. Bus. & Prof. Code § 19334(b).

This Office previously opined on a proposal by the City to require all deliveries to be made only by those persons with County-issued medical marijuana identification cards and only from dispensaries. City Att'y MOL 2015-2 (Jan. 30, 2015). Our conclusion was that these requirements were preempted by State law, which provides for a defense to the charge of illegal transportation of marijuana by qualified patients and primary caregivers. To the extent the proposal was intended to regulate all legal means of delivery and transportation, thereby making all other delivery and transportation of medical marijuana illegal, those conclusions remain the opinion of this Office.⁷ The Act regulates delivery and transportation by persons or entities that are not qualified patients or primary caregivers. As noted earlier, transportation or delivery by qualified patients or primary caregivers is exempt from these licensure requirements. Cal. Bus. & Prof. Code § 19319. If the City desires to ban deliveries before the State licensing begins, it should do so before January 1, 2018 at the latest.

VII. THE CITY'S OPTIONS REGARDING THE REGULATION OF THE CULTIVATION OF MEDICAL MARIJUANA

The City may decide to continue to implement and enforce the current zoning regulations regarding agriculture generally, or enact regulations specific to the cultivation of medical marijuana.⁸

1. Enforce Current Agricultural Zoning Regulations

The City currently has agricultural zones. *See* SDMC Chapter 13, Article 1, Division 3. The purpose of the agricultural zones is "to provide for areas that are rural in character or areas

⁶ A "delivery" includes the use by a dispensary of any technology platform owned and controlled by the dispensary or independently licensed under the Act, that enables qualified patients or primary caregivers to arrange for or facilitate the commercial transfer of medical marijuana or products by a licensed dispensary. Cal. Bus. & Prof. Code § 19300.5(m).

⁷ The prior memorandum also noted the Equal Protection concerns related to regulating some types of deliveries differently than others; to justify disparate treatment, the City must demonstrate a rational relationship to a legislative governmental purpose. City Att'y MOL No. 2015-2 (Jan. 30, 2015).

⁸ Municipal Code section 42.1303 contains medical marijuana cultivation limits, however, these limitations are not land use regulations prohibiting or regulating the cultivation of medical marijuana, rather, they provide immunity from arrest for those individuals in possession of State identification cards.

where agricultural uses are currently desirable. The agricultural zones are intended to accommodate a wide range of agriculture and agriculture-related uses as well as *single dwelling units.*” SDMC § 131.0301. The agricultural use category “includes uses that involve the raising and harvesting of crops, the raising of animals, and the processing of plant and animal by-products.” SDMC § 131.0112(a)(2). The subcategories are: Agricultural Processing; Aquaculture Facilities; Dairies; Horticulture Nurseries and Greenhouses; Raising and Harvesting of Crops; and Raising, Maintaining, and Keeping of Animals. *Id.* Several of these agricultural subcategories could be applicable to the cultivation of medical marijuana.

2. Enact New Zoning Regulations Specific to the Cultivation of Medical Marijuana

Should the City desire to regulate the cultivation of medical marijuana separately from agricultural uses in general, as noted above, the City must have an ordinance effective by March 1, 2016. Cal. Health & Safety Code § 11362.777(c)(4). Otherwise, based on the statute, the State will be the sole licensing authority specifically for medical marijuana cultivation.

To meet the March 1, 2016 deadline, the City would likely need to enact a moratorium on the cultivation of medical marijuana. A moratorium may be placed on any uses in order to protect the public safety, health and welfare. Cal. Gov’t Code § 65858. The otherwise applicable procedures for the adoption of a zoning ordinance need not be complied with, however, the following legal standards and processes for enacting a moratorium apply:

- The prohibited use must be in conflict with a contemplated general plan, specific plan or zoning proposal that the legislative body, planning commission or planning department is considering, studying or will consider or will study within a reasonable time.
- The urgency measure requires a four-fifths vote.
- The interim ordinance is of no effect 45 days after adoption.
- An extension of the ordinance may be obtained for 10 months and 15 days, and a subsequent one year extension, after compliance with the requirements of Government Code section 65090 and a public hearing. These extensions also require a four-fifths vote.
- Alternatively, an extension may be obtained for 22 months and 15 days by compliance with Government Code section 65090 and a public hearing; also with a four-fifths vote.
- The adoption and any extension must contain a finding that there is a current and immediate threat to the public health, safety, or welfare and that the approval of any additional entitlements would result in a threat to public health, safety, or welfare.
- 10 days prior to the expiration of the interim ordinance or any extension, the legislative body must issue a written report describing the measures taken to alleviate the condition that led to the adoption of the ordinance.

- At the end of the effective date or any extensions, a new urgency ordinance may not be enacted to address the same threat to public safety, health and welfare as the prior interim ordinance.

Id.

It should be noted that the provision allowing the State to become the sole cultivation licensing authority if local governments do not “opt in” by enacting their own local regulations by March 1, 2016, seems to be a drafting oversight for the following reasons:

- 1) The overall statutory scheme is one of dual licensure. Legislative Counsel’s Digest § 2, Assembly Bill 266 (2015-2016 Reg. Sess.) Cal. Bus. & Prof. Code §§ 19317, 19320(a).
- 2) The Act explicitly recognizes and preserves local authority to adopt ordinances establishing standards, requirements, and regulations for local licenses and permits for commercial cannabis activity, which by definition includes cultivation. Cal. Bus. & Prof. Code §§ 19300.5(k), 19316.
- 3) The “opt in” date is unreasonable given the effective date of the Act and the statutory requirements local jurisdictions must comply with, especially to enact a land use ordinance, such as noticed hearings, planning commission recommendations, separate introduction and adoption hearings, a 30-day referendum period, airport land use commission consistency determinations, and California Coastal Commission certification.
- 4) It is extremely unlikely that the State will have its licensure and regulations for the cultivation in place by March 1, 2016. The Department of Food and Agriculture will not begin its rulemaking process until January 1, 2016. <https://www.cdfa.ca.gov/is/pdfs/medicalCannabis/mccultivationprogram.pdf>. January 1, 2016 is a holiday, which means the rulemaking process would actually begin on January 4, 2016. Those regulations are subject to the California Administrative Procedure Act rulemaking process, which requires a minimum 45-day public review process. Cal. Gov’t Code § 11340.5, 11346.4. If the proposed rules were available for public review on January 4, 2016, that 45-day review process would end on February 18, 2016. In addition, any interested person may request a public hearing on the proposed rules, in which case a public hearing must be held. Cal. Gov’t Code § 11346.8. Upon completion of the rulemaking process, DFA must submit the proposed rule(s) to the California Office of Administrative Law, which has 30 working days to review the file and either approve the rule(s) and file them with the California Secretary of State or reject the rule(s). Cal. Gov’t Code § 11349.3. Any substantial changes to the proposed rules made during the rulemaking process would require an additional 15-day review period. Cal. Gov’t Code § 11346.8(c).

Despite the apparent State drafting oversight, unless the State rules are changed, they remain the law of the State and must be followed.

CONCLUSION

The Act creates a complex State licensing scheme that, once complete, will regulate medical marijuana and products from cultivation and manufacture to delivery or receipt by the qualified patients or primary caregivers. This State scheme is intended to also require a local license. However, due to specific, perhaps unintended, requirements pertaining to cultivation, if the City desires to specifically regulate or prohibit the cultivation of medical marijuana, it will need to have this ordinance effective by March 1, 2016. The only way to meet the statutory deadline is likely through a moratorium. This Office is available to provide legal assistance, upon request.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/Shannon M. Thomas
Shannon M. Thomas
Deputy City Attorney

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