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MEMORANDUM OF LAW

DATE: January30, 2015

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Local Regulation of the Transportation of Medical Marijuana

INTRODUCTION

The City of San Diego has adopted both operating requirements and land use regulations for medical marijuana consumer cooperatives. San Diego Municipal Code §§ 42.1501 - 42.1513, 113.0103, 141.0614.[1]

On January 20, 2015, the City Council introduced an ordinance amending the operating requirements for medical marijuana consumer cooperatives. In the staff report there was reference to previous actions of the Public Safety & Livable Neighborhoods Committee (PS&LN Committee), and the ordinance before the Council "included the changes previously recommended by the committee, with the exception of provisions regarding the transportation of medical marijuana, because the City Attorney's Office believes those proposed changes raise concerns regarding preemption and equal protection." The PS&LN Committee direction regarding amendments to San Diego Municipal Code Chapter 4 (the operating requirements) for deliveries was as follows:

> Require that drivers making deliveries to patient's homes must possess a County issued medical marijuana ID card, and documentation that they are a making a delivery from a permitted cooperative storefront. In addition, such deliveries must originate from the storefront, and any marijuana they are delivering must be labeled for the specific patients it is being delivered to.

[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); City Att'y Report 2011-14 (Mar. 15, 2011); City Att'y MOL 2011-9 (July 21, 2011); City Att'y MOL 2013-6 (Apr. 17, 2013); City Att'y Report 2014-5 (Feb. 10, 2014); City Att'y MS 2015-1 (Jan. 8, 2015).

PS&LN Committee Actions, Item 4 (April 16, 2014).

The review of the draft ordinance by the City Attorney's Office at the July 16, 2014 PS&LN Committee meeting pointed out that identification (ID) cards are expressly voluntary under state law, transportation is alreadya state crime unless one has a defense under state law, and that the City does not regulate other types of delivery services; therefore if the City desired to regulate medical marijuana deliveries, a rational basis would be needed to support regulating this type of delivery differently. At the conclusion of the PS&LN Committee hearing, the PS&LN Committee did not include any further direction regarding transportation of marijuana or delivery services.

This memorandum is intended to expand on this Office's position on the law regarding transportation and delivery services, with the understanding that this area of the law (medical marijuana) is still evolving.

QUESTION PRESENTED

May the City regulate the transportation of medical marijuana delivery services, and if so, how and under what circumstances?

SHORT ANSWER

The City's abilityto regulate the transportation of medical marijuana, including the regulation of delivery services, depends on what the specific regulations are, as well as the basis for the regulations. If the regulations pertain to the transportation of medical marijuana by and between caregivers and patients, those regulations cannot contradict state law. If the regulations pertain to delivery businesses that are not conducted in accordance with state law, those regulations are likely preempted by the California Health and SafetyCode, which already makes transportation of marijuana illegal. A regulation to ban the use of vehicles to conduct medical marijuana transactions, similar to the City of Los Angeles, must include, as theirs does and as the San Diego Municipal Code does, an exception for transportation done in accordance with state law. The City has broad authorityto ban medical marijuana facilities, so long as it does not infringe on the protections provided in the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA).

BACKGROUND

The general background for the medical marijuana laws is described in numerous reports by this Office. *See* footnote 1; *see* City Att'y MOL 2013-6 at 1-2. In short, the voters enacted the CUA in 1996, and the Legislature enacted the MMPA in 2003, with amendments at later dates. *See* Cal. Health & SafetyCode §§ 11362.5, 11362.7-11362.83. Those laws provide, *inter alia,* protections for qualified patients, caregivers and persons with ID cards, fromprosecution for state law crimes involving marijuana.

The California Supreme Court has made clear in *City of Riverside v. InlandEmpire Patients Health & Wellness Center*, 56 Cal. 4th 729 (2013), that the MMPA and CUA do not

preempt local land use regulation of medical marijuana collectives, cooperatives and dispensaries, including a total ban on such facilities. *Id*. at 749. Further, the Court affirmed that the medical marijuana laws are modest, removing state criminal and civil sanctions for certain activities, and do not override the local jurisdiction's zoning, licensing, and police powers to regulate facilities for the cultivation and distribution of marijuana. *Id*. at 763.

Both state and federal law prohibit the transportation of marijuana. Cal. Health & Safety Code § 11360; 21 U.S.C §§ 812(c)(1), 841(a). However, pursuant to MMPA, qualified patients, primarycaregivers, and persons with ID cards, as defined, are not subject to prosecution for the transportation of marijuana on that sole basis. Cal. Health & SafetyCode §§ 11362.765, 11362.775. These provisions allow such persons to present an affirmative defense to a criminal charge of transportation of marijuana. *People v. Trippet*, 56 Cal. App. 4th 1532, 1551 (1997); *People v. Colvin*, 203 Cal. App. 4th 1029 (2012).

The subject of the transportation of medical marijuana was addressed generally in City Attorney Reports 2010-19 (May 21, 2010) and 2011-14 (Mar. 15, 2011).The City subsequently enacted operating requirements addressing medical marijuana consumer cooperatives. San Diego Ordinance O-20043 (Apr. 27, 2011). As part of those regulations, consistent with state law, San Diego Municipal Code § 42.1511 states "[a]ll persons transporting medical *marijuana* in connection with a *medical marijuana consumer cooperative* shall do so in accordance with state law."

ANALYSIS

I. POLICE POWERS

Generally, the City has 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 law. Cal. Const., art. XI, § 7 (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 plenaryauthorityto 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 fromthis limitation, the "police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself."

Candid Enterprises, Inc. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 885 (1985) (quoting *Birkenfield v. City of Berkeley*, 17 Cal. 3d 129, 140 (1990)).

"Judicial review of police power is limited to determining whether a regulation is reasonablyrelated 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)).

II. PREEMPTION

A conflict with state or federal law 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); *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (federal preemption analysis will look to whether the federal government has determined that it has exclusive governance, or whether the state or local law conflicts with federal law).[2]

Whether an ordinance regulating the transportation of medical marijuana duplicates or contradicts a general law will depend on the specifics of any proposed regulation. Duplication is found when the local regulation imposes the same criminal prohibition that the general law imposed. *Sherwin–Williams*, 4 Cal. 4th 893. An ordinance contradicts state law if one cannot comply with both the local and state laws or the local ordinance is harmful to the state law. *Id.* Courts have found that a local ordinance that criminalizes an activity that the state already prohibited to be preempted. *Ex parte Stephen*, 114 Cal. 278 (1896) (a local ordinance prohibited the operation of a liquor business without a license, which was already a violation of state law); *Ex parte Mingo*, 190 Cal. 769 (1923) (local ordinance prohibiting the possession of intoxicating liquor was preempted by state law, notwithstanding the fact that the state statute expressly stated that it was not a limitation on local power to regulate; the legislature could not give authority to local governments that was contrary to that in the Constitution). The Constitutional prohibition against double jeopardy may prevent prosecution for a violation of the state offense, if a defendant has already been prosecuted for a violation of the local ordinance.[3] *Id.* Local regulations that do not criminalize precisely the same acts which are prohibited by state statute are not duplicative of state law, and thus are not preempted. *Nordyke v. King*, 27 Cal. 4th 875 (2002) (county ordinance prohibiting possession of a firearm on county property found not to be preempted by state firearms statutes).

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[2] Although, as noted above, the transportation of marijuana remains a federal crime under all circumstances, criminalization of drug possession has historically been a field occupied by the states, which favors a conclusion that federal laws not preempting the state controlled substances laws. *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008). In addition, the federal Controlled Substances Act specifically states that there is no intent to occupy the field to the exclusion of any state law on the subject, unless the federal law and state law cannot "stand together." 21 U.S.C. § 903. Further, the Attorney General Guidelines, created pursuant to the requirements of the MMPA (Cal. Health & Safety Code § 11362.81(d)), state that the MMPA does not conflict with federal law because the state did not legalize marijuana, it simply chose not to punish certain offenses under state law. *California Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* at 3 (August 2008).

[3] Violation of municipal ordinances is a misdemeanor, unless by ordinance made an infraction. Cal. Gov't Code § 36900(a). Misdemeanors are punishable by imprisonment in the county jail for not more than six months, or by a fine not to exceed $1000, or by both. Cal. Penal Code § 19. Violations of the San Diego Municipal Code are misdemeanors, but may, at the discretion of the prosecutor, be reduced to infractions. SDMC § 12.0201. Violation of the California Health and Safety Code statutes prohibiting the transportation of marijuana is a felony punishable by imprisonment for two, three, or four years. Cal. Health & Safety Code § 11360(a).

An ordinance is also preempted if there has been an express or implied intent by the state legislature to fully occupy the field. *Id.* The California Uniform Controlled Substances Act (CSA), found at California Health and Safety Code sections 11000-11651, occupies the field of defining drug crimes and specifying penalties for those crimes. *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1071-72 (2007). The MMPA is contained within the CSA. However, the MMPA expressly allows local regulation of the location, operation, or establishment of a medical marijuana cooperative and the enactment of the other laws consistent with the MMPA. Cal. Health & Safety Code §§ 11362.768, 11362.83. The MMPA does not define "medical marijuana cooperative" and in regards to delivery services specifically, the MMPA's only reference is that a "mobile retail outlet which ordinarily requires a local business license" must to be located at least 600 feet from a school, as defined. Cal. Health & Safety Code § 11362.768(b).[4]

In *Riverside*, 56 Cal. 4th 729, a challenge to a zoning ordinance prohibiting facilities that cultivated and distributed medical marijuana enacted pursuant to the City of Riverside's authority to regulate local land uses, the California Supreme Court addressed the scope of the state medical marijuana laws. The court found that the state statutes do not establish a comprehensive state system of legalized medical marijuana, or grant a right of convenient access, or limit the government's zoning, licensing and police powers to regulate facilities for the cultivation and distribution of marijuana of local government, nor do they mandate local accommodation of cooperatives, collectives or dispensaries.

Therefore, it is clear that local jurisdictions maintain their traditional right to regulate land use, including regulating or prohibiting medical marijuana facilities. As noted above however, whether any regulation of transportation may be determined to be preempted depends on the specifics of the regulation.

III. EQUAL PROTECTION

The California Constitution, Article I, Section 7, guarantees the equal protection of the law, and is interpreted co-extensively with the federal Constitutional provision. 13 Cal. Jur. 3d *Constitutional Law* § 339 (2014); *Landau v. Superior Court*, 81 Cal. App. 4th 191 (1998). Simply put, equal protection requires that people who are similarly situated to others be treated the same under the law. *People v. Cruz*, 207 Cal. App. 4th 664, 674 (2012). A threshold requirement of any meritorious equal protection claim is a showing that the government has adopted a classification that affects two similarly situated groups unequally for the purposes of the law that is challenged. *Id.* When distinctions are not based on a suspect classification or a fundamental interest, then the government must only demonstrate a rational relationship to a legitimate governmental purpose.[5] *Dandridge v. Williams*, 397 U.S. 471 (1970). When applying

[4] Although this section refers to "retail," there is no case that has interpreted the section to mean that the other provisions of the MMPA, requiring that there be no distribution of marijuana for profit and that persons are only entitled to recover out of pocket expenses, are inapplicable. Cal. Health & Safety Code § 11362.765. Further, case law has affirmed that medical marijuana enterprises must not be for profit. *People v. Jackson*, 210 Cal. App. 4th 525, 538 (2012); *see People v. Baniani*, 229 Cal. App. 4th 45, 58 (2014) (California Health & Safety Code section 11362.768 is a legislative enactment inherently recognizing the lawfulness of the disbursement of medical marijuana from storefront or mobile retail outlets).

[5] Suspect classifications are typically those based on characteristics such as race, alienage, or national origin. *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439 (1985).

the rational relationship test, the court is to uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cruz*, 207 Cal. App. 4th at 675 (citation and internal quotation omitted).

If the City desires to regulate a "mobile" model of dispensing medical marijuana, i.e. a "delivery service," then the City must set forth a rational basis for doing so. As a preliminary matter, any such delivery service must otherwise comport with state law, or it is not entitled to immunity under state law—the persons involved would be subject to prosecution for illegally transporting marijuana as well as possibly other charges, including unlawful possession, and aiding and abetting the unlawful distribution of marijuana. The City cannot make "legal" what is currently illegal under state law, so any regulation of a "mobile" model must start from the premise that those so engaged are in fact in conformance with state law. The current San Diego Municipal Code section regarding transportation requires compliance with state law. SDMC § 42.1511.

Assuming compliance with state law, any proposed regulation of delivery services should be crafted to withstand an equal protection challenge as the City does not regulate other delivery services such as pizza, furniture, or groceries. This means that the City must set forth a rational basis for the regulation.[6] As discussed in the case law above, absent regulation of a protected class, only a rational basis standard must be met. Although this standard is not as stringent as the strict scrutiny used when regulating in the area of suspect classifications, there still must be some basis in the record for a reviewing court to conclude that the regulation is not arbitrary or capricious. Comments and reports from City staff, the public, and the Council could all be utilized to form that basis; however, no record has yet been developed to provide a rational basis.

IV. PROPOSALS TO ADDRESS TRANSPORTATION

Turning to the specific proposals recommended in April by the PS&LN Committee:

Requiring a driver to possess a County issued medical marijuana ID card is subject to challenge as preempted by the MMPA and CUA. The MMPA allows, but does not require, patients and caregivers to obtain an ID card in order to protect patients and caregivers from unnecessary arrest. Cal. Health & Safety Code § 11362.71. Thus, a patient or a primary caregiver is fully entitled to the protections of the MMPA and CUA, whether or not that patient or caregiver has an ID card. *See San Diego NORML,* 165 Cal. App. 4th, at 829-30 (the MMPA's implementation of a voluntary identification card system was not an unconstitutional amendment of the CUA; the card system did not limit the protections afforded by the CUA because it was voluntary and persons may claim full entitlement to the protections of the CUA without the card).

There was also a proposal requiring drivers to make deliveries from a permitted storefront and requiring that deliveries originate from the storefront, with documentation to that effect.[7] State law provides for a defense to various provisions of the CSA, if those activities are

[6] This point was made by the City Attorney's Office at the PS&LN Committee meeting of July 16, 2014.
[7] There was a proposed requirement that the patient's marijuana be labeled. Labeling is already addressed in San Diego Municipal Code Chapter 4, Article 2, Division 15.

conducted by a qualified patient or primarycaregiver, with no requirement that a patient or primarycaregiver belong to a cooperative or obtain medical marijuana froma cooperative in order to present a defense as allowed under the CUA or MMPA. Even if one belongs to a cooperative, one is also entitled to obtain medical marijuana in other ways, so long as those ways are consistent with state law. For example, a qualified patient may belong to a cooperative, and obtain medical marijuana from that cooperative. That patient may also have a primary caregiver who does not belong to a cooperative but provides medical marijuana to that patient; the primary caregiver is entitled to the protections of state law with respect to transportation of the medical marijuana he or she provides to that patient, and the city cannot infringe on those protections. Therefore, a requirement that the deliveryoriginate froma permitted storefront would likely be preempted by the MMPA and CUA.

If the matter of concern is that there are a separate group of persons who are "drivers" and who do not meet the state's requirements of being a qualified patient, primarycaregiver, or who has a County issued ID card, who transport in accordance with state law, then those persons are already subject to criminal liability under the state's drug laws. They are not entitled to the immunities provided by the CUA and MMPA.

V. LOS ANGELES PROPOSITION D

The City of Los Angeles, pursuant to Proposition D, generally bans medical marijuana businesses from both fixed locations and vehicles.[8] City of Los Angeles Municipal Code §§ 45.19.6.1.A, 45.19.6.2. However, the City of Los Angeles Municipal Code contains numerous exemptions fromthe definition of a "medical marijuana business":

- Any dwelling unit where three or fewer qualified patients and/or caregivers process or collectively or cooperatively cultivate marijuana on-site, with respect to the personal use for qualified patients.
- Any location during only that time reasonably required for a primary caregiver to distribute, deliver, or give away marijuana to a qualified patient.
- Clinics, licensed health care facilities, residential care facilities, hospices, or home health agencies as listed, where the qualified patient is receiving care and the owner or other is designated as a primarycaregiver.
- Any vehicle during only that time reasonably required to its use by a qualified patient to transport medical marijuana for his or her use, or by a primary caregiver to transport, distribute, deliver, or give away marijuana to a qualified patient or primary caregiver for the personal use of the qualified patient.[9]

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[8] The City of Los Angeles' ordinance and its historyare described in this Office's Report to Mayor and City Council, City Att'y Report 2014-5 (Feb. 10, 2014).

[9] The City of Los Angeles recentlyobtained a preliminary injunction against a companythat developed and markets an "app" that allows consumers to order marijuana by touch screen, so that consumers may connect with sellers at unknown locations in order to have marijuana delivered. Los Angeles alleges that the "app" violates their Proposition D, because the persons involved in the "app" aspect of the transaction are neither qualified patients nor primarycaregivers, and no transactions may be conducted with the use of a vehicle unless that transaction falls within the exceptions to Prop D (i.e. the transaction and use of the vehicle are immunized under state law).

City of Los Angeles Municipal Code § 45.19.6.1.A.[10]

Therefore, the transportation of medical marijuana is not a violation of the Los Angeles Municipal Code, if the participants are those who already have a defense under state law. Although the City of Los Angeles approaches medical marijuana regulation from the aspect of prohibiting most medical marijuana transactions, and then immunizing some transactions, the City of Los Angeles Municipal Code provisions are essentiallythe same as the City of San Diego's, in that both jurisdictions require the transportation or deliveryto be by a patient or qualified caregiver, consistent with the MMPA. A regulation that prohibited or regulated deliveries without recognition of the protections afforded by state law would be preempted.

CONCLUSION

The area of local land use regulation of medical marijuana is fairly settled – cities retain their traditional land use authority. The *Riverside* case supports the exercise of local police powers in regulating medical marijuana facilities, but such regulation cannot contradict state law and any particular proposed regulation must be evaluated as to whether the authorityexists to enact such regulation, and whether such regulation fits within the parameters of state law. As this Office has previously said (*see* City Att'y MOL 2013-6 at 4; 2010 City Att'y Report at 670), the courts generally have not yet evaluated particular local regulatory requirements (as opposed to those cases which evaluate conduct that entitles one to a defense when prosecuted in a criminal case). Any proposal for additional local regulations brought forward must be evaluated under the concerns expressed above.

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[10] In addition, those medical marijuana businesses that meet certain criteria, such as registering by a certain date and operating in compliance with certain criteria have limited immunityfrom prosecution for violation of City municipal code sections. City of Los Angeles Municipal Code § 45.19.6.3.