OFFICE OF THE CITY ATTORNEY

TO: **Honorable Mayor and Members of the City Council**
FROM: **Michele Beal Bagneris, City Attorney** MBB
DATE: **July 14, 2005**
RE: **Medical Marijuana Dispensaries**
City Council Meeting July 18, 2005, Agenda Item

Summary

This memorandum addresses the current state of the law regarding medical marijuana dispensaries in relation to federal and state laws in the context of relevant case authority. As discussed below, the U.S. Supreme Court recently ruled that someone who cultivates, distributes or uses marijuana as allowed under California's Proposition 215 (the "Compassionate Use of Marijuana Law") for medical purposes can be prosecuted for violation of the federal Controlled Substances Act ("CSA"). The Court further concluded that the Commerce Clause of the U.S. Constitution establishes the basis for the CSA validly prohibiting marijuana use which is allowed by a state law. Accordingly, locations which serve as marijuana dispensaries, even for medicinal purposes, are not allowed by federal law. It is within the City's police power authority to enact zoning laws which prohibit medical marijuana dispensaries. Currently, our municipal code does not allow medical marijuana dispensaries as they are not listed as either a permitted or conditionally permitted use in any zone within the City. Given the inconsistency between the State's Proposition 215 and the federal CSA, it is recommended that the City adopt an ordinance prohibiting establishment of such a use in any zone within the City to clarify that, consistent with federal laws, the use is not an allowed use in the City.

Background

Almost since the inception of Proposition 215 (the "Compassionate Use of Marijuana Law" codified under Health and Safety Code Sections 11362 et. seq.) in 1996, California Courts have recognized that possession and distribution of marijuana remain unlawful under the federal Controlled Substances Act (21 USC 801 et seq.). See *People ex rel Lundgren v Peron* (1997) 59 Cal App 4th 1383, 1387, fn. 2.)

In June, 2005, the United States Supreme Court affirmed what the California Court of Appeal had already acknowledged, ruling that California's law allowing for the use of marijuana for

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medical purposes does not supersede federal law (the CSA) which prohibits cultivation, distribution and use of marijuana. The Court, further observed that Federal law (the Controlled Substances Act) contains no "compassionate use" exemption for medical necessity. *Gonzales v Raich* (2005) __ U.S. __ ; 2005 WL 1321358 (June 6, 2005). As a result, it appears that persons can still be prosecuted for violation of the CSA, even if they are acting in a manner consistent with the State's Compassionate Use law.

The Court's decision rejected Raich's argument that because California had enacted Proposition 215, this "subclass" of medical marijuana users should be held distinct and exempt from federal laws as these users had physicians "prescribing" the drug. Although the Court recognized that many patients found that marijuana use alleviated their pain, the "magnitude of the commercial market" requires that there be no exemption not authorized by Federal law. *Raich* at 16. Since home grown marijuana is indistinguishable from that sold in interstate commerce, it was rational for the federal government to conclude that the only way to enforce the federal drug law must include the elimination of local growers and distributors. Accordingly, federal law still prevails and it is unlawful to possess, distribute, cultivate, transfer, give or sell marijuana.

On June 9, 2005, the California Attorney General issued a bulletin to all California law enforcement agencies which concluded that "law enforcement agencies should not change their current practices for the non-arrest and non-prosecutions of individuals who are within the legal scope of California's Compassionate Use Act." The AG's office apparently reached this conclusion because the *Raich* case did not directly address the validity of Prop 215 (although the Court acknowledged that the federal CSA was found to be a valid exercise of Congress' legislative power). However, even if use of marijuana for medicinal purposes is considered "legal" under state law, it is still illegal under federal law and subject to federal enforcement and prosecution.

Medical Marijuana Dispensaries

Prior to the Supreme Court decision in the *Raich* case and in light of Prop 215, the City was reviewing the issue of medical marijuana dispensaries from a land use perspective. Zoning Code amendments were proposed but public hearings were put on hold as the Supreme Court's decision in the *Raich* case was imminent. When the decision came down, the ruling did not invalidate California's Compassionate Use Law, rather the Court held that California's law will not protect a person from prosecution under federal law (the CSA). In other words, federal agencies can and probably will enforce the CSA..

The question as to what the effect the *Raich* decision has on the issue of medical marijuana dispensaries has been raised. *Raich* confirmed that federal law still prevails and it is unlawful to possess, distribute, cultivate, transfer, give or sell marijuana. Although, the State may not enforce this law, it is clear that the federal government can and will. Thus, a medical marijuana dispensary is still an illegal use under federal law.

Under the City's police power authority, it is reasonable to establish zoning laws which are consistent with federal laws which the Supreme Court has ruled are validly enforced in States, even when the State's laws are inconsistent. Indeed, it would create potential legal issues and perhaps be difficult to defend an ordinance which would allow a medical marijuana dispensary use when such use is now a clear violation of federal law. Under current zoning laws, uses are not allowed unless they are expressly permitted or conditionally permitted in our municipal code. Since there is currently no provision in our code which allows such use or a use which is so similar that a medical marijuana dispensary could come within its definition, such a use is not allowed in any zone within the City.

Conclusion

In view of the fact that federal law prohibits distribution, cultivation, possession or use of marijuana, even for medicinal purposes and that the CSA applies in California notwithstanding our Compassionate Use law, it is advisable to adopt a zoning ordinance prohibiting medical marijuana dispensaries within the City. The City's zoning ordinance currently does not allow such uses, however, given the apparent conflict between state and federal laws, it is recommended that an ordinance be adopted to clarify and specifically state that such uses are not allowed.

Agenda Report

TO: CITY COUNCIL **DATE:** MARCH 21, 2005

FROM: CITY MANAGER

SUBJECT: RECOMMENDATION FOR AN AMENDMENT TO THE ZONING CODE TO PROHIBIT MEDICAL MARIJUANA DISPENSARIES

RECOMMENDATION

It is recommended that the City Council, following a public hearing:

1. Find that the project is exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15061 (b) (3);

2. Find that the proposed amendment as contained in this report is consistent with the General Plan;

3. Approve the recommendation to amend the Zoning Code to define medical marijuana dispensaries and prohibit this use within the City of Pasadena; and

4. Direct the City Attorney to prepare an ordinance amending Title 17.

PLANNING COMMISSION'S RECOMMENDATION

The Commission voted to recommend that the City Council approve the amendment as recommended by staff and that the Pasadena Public Health Department monitor changes in State and Federal laws and policies regarding the use of medical marijuana and return at an appropriate time to evaluate the prohibition on medical marijuana dispensaries. The Planning Commission considered this amendment on January 26, 2005.

BACKGROUND

In 1995, the California voters approved Proposition 215, known as the "Compassionate Use Act of 1996." The intent of this proposition was to enable persons needing marijuana for medical purposes to obtain and use it without fear of criminal prosecution

under limited, specific circumstances. Recently, the Governor signed a bill approved by the California legislature to clarify the scope of the Compassionate Use Act of 1996 and allow local governing bodies to adopt and enforce rules and regulations regarding medical marijuana dispensaries. However, the State has not adopted any rules to effectively regulate distribution of medical marijuana. In response, some cities have adopted ordinances that allow medical marijuana dispensaries under restrictive rules while others have prohibited such uses. The cities that have approved medical marijuana dispensaries indicate that there have been problems.

Under Section 17.16.010 of the Zoning Code, the zoning administrator has the authority to determine whether a specific use shall be deemed to be within one or more use classifications or not within any classification. The zoning administrator may determine that a specific use is not within any use classification if its characteristics are substantially incompatible with those typical of uses named within the classification. The zoning administrator has determined the medical marijuana dispensaries are not within a specific use within the Zoning Code and that the characteristics of this use are substantially incompatible with similar uses. This interpretation is contained in Attachment A and the proposed amendment would codify the zoning administrator's interpretation.

ANALYSIS

Because of the Compassionate Use Act of 1996, medical marijuana dispensaries operate separately from the standard prescription drug system. Prescription drugs are controlled by the Federal Food and Drug Administration. For legal medications such as morphine, tight regulations have been established in the prescription and control of these medications that allow for tracking and verification of legitimate use. No such standards exist for medical marijuana. Marijuana is still categorized as a Schedule I drug under the Controlled Substance Act; meaning that under Federal law, the use, possession, transportation, and distribution of marijuana (even for medical purposes) is illegal. A pharmacy cannot distribute medical marijuana without running afoul of Federal laws. There is a conflict between Federal and State regulations. With no formal standards, medical marijuana dispensaries would operate as businesses with little support and governance through existing legislation. In addition, the current limited regulatory and enforcement systems in place do not adequately address fraud and abuse associated with marijuana dispensing businesses.

While this proposed amendment will codify the zoning administrator's interpretation to prohibit medical marijuana dispensaries, consideration was also given to amending the Zoning Code to conditionally permit this use and establish standards for the operation of such uses. Consideration was also given to the issue as to where Pasadena residents will obtain medical marijuana. Currently, there are no medical marijuana dispensaries in the San Gabriel and San Fernando Valleys. The closest distributors are West Hollywood where there are three. There are also distributors in Inglewood, Los Angeles (south of Downtown Los Angeles), and Long Beach.

There does not appear to be a high demand for a medical marijuana dispensary locally. A survey of several medical providers at local institutions such as the Huntington Hospital Phil Simon HIV Clinic, the Huntington Hospital Oncology Department, Hospice of Pasadena, the Andrew Escajeda HIV/AIDS Clinic and the Community Health Alliance of Pasadena found no physicians that currently prescribe medical marijuana.

The recommendation to prohibit the use was the result of discussions with the Police and Public Health Departments as well as a review of secondary impacts of the use in other cities. The City of Rocklin, California is one that has recently prohibited medical marijuana dispensaries. Rocklin's Police Chief wrote a memo regarding the secondary impacts found to be associated with the operation of such facilities in other communities. The communities reviewed in this memo included: Roseville, Oakland, Hayward, Lake County, and Fairfax. This information is included in Attachment B. The memo illustrates the secondary impacts of this use.

The Police Department and the Public Health Department for Pasadena have expressed concern about the location of a dispensary in the City. The Public Health Department contacted other health departments throughout the state and confirmed reports of negative secondary impacts in locations surrounding dispensaries. It is possible that over time issues associated with this use may become minimized as the State sets up programs and establishes operational criteria and/or restrictions. For example, a State operated 24/7 medical marijuana verification card system should be operational by the end of the year, which would allow cardholders and law enforcement to have a mechanism to verify legitimate use. Because of the conflict in State and Federal law, the U. S. Supreme Court has recently taken up this issue and should provide a decision this year. Their decision most likely will impact the use of medical marijuana.

CONCLUSION

Because of a lack of a state-wide uniform management system and the potential for secondary impacts, it is recommended that medical marijuana dispensaries be prohibited in the City at this time. This issue will need to be revisited as the State develops a uniform management system for dispensaries. The Public Health and Planning staff will track any new developments in this regard and return to the Planning Commission within a year. At that time reconsideration can be given to the prohibition of medical marijuana dispensaries.

The Zoning Code will be amended by adding the following definition:

> Medical Marijuana Dispensary. A medical marijuana dispensary is a facility or location where medical marijuana is made available to and/or distributed by or to the following: a primary caregiver, a qualified patient, or a person with an identification card, in strict accordance with California Health and Safety Code Section 11362.5 et seq.

CONSISTENCY WITH THE GENERAL PLAN

The proposed amendment to prohibit medical marijuana dispensaries is consistent with the City's General Plan related to alcohol and drug abuse.

Objective 16 – Alcohol and Drug Abuse – Reduce the impact of alcohol and other drug related problems in Pasadena.

ENVIRONMENTAL DETERMINATION

The State CEQA Guidelines Article 5 under review for exemption (Section 15061 (b) (3) describes what is known as the "general rule." The general rule states that CEQA applies only to projects which have the potential for causing a significant effect on the environment. In this case, an amendment to the Zoning Code to prohibit medical marijuana dispensaries does not a significant effect on the environment.

CHILDREN, YOUTH AND FAMILY IMPACT

The proposed Zoning Code Amendment will result in prohibiting medical marijuana dispensaries in the City. This will ensure that potential secondary impacts of this use will not have an impact on children, youths and families.

FISCAL IMPACT

There will be no fiscal impacts associated with the proposed code amendment.

Respectfully Submitted,

CYNTHIA J. KURTZ
CITY MANAGER

Prepared by:

DENVER E. MILLER
PRINCIPAL PLANNER

Approved by:

RICHARD J. BRUCKNER
DIRECTOR PLANNING AND DEVELOPMENT

Concurrence:

WILMA ALLEN
DIRECTOR OF PUBLIC HEALTH DEPARTMENT

BERNARD MELEKIAN
CHIEF OF POLICE

Subject: CALIFORNIA SUSPENDS MEDICAL MARIJUANA ID CARD PROGRAM, SEEKS LEGAL ADVICE FROM ATTORNEY GENERAL

News Release

CALIFORNIA DEPARTMENT OF HEALTH SERVICES

NUMBER:	05-36	**DATE:**	July 8, 2005
FOR RELEASE:	IMMEDIATE	**CONTACT:**	Ken August
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CALIFORNIA SUSPENDS MEDICAL MARIJUANA ID CARD PROGRAM, SEEKS LEGAL ADVICE FROM ATTORNEY GENERAL

SACRAMENTO – California's program that issues identification cards to seriously ill patients using marijuana under a physician's recommendation has been suspended to allow for legal review, State Health Director Sandra Shewry announced today.

"In light of a recent Supreme Court decision, I am concerned about unintended potential consequences of issuing medical marijuana ID cards that could affect medical marijuana users, their families and staff of the California Department of Health Services (CDHS)," Shewry said.

The U.S. Supreme Court affirmed that the personal cultivation and possession of marijuana continues to be a punishable federal offense. After reviewing the decision, CDHS became concerned that, by issuing ID cards to patients, the Medical Marijuana Identification Card Program potentially aids and abets individuals in committing a federal crime, Shewry said. If so, CDHS staff that implement the program could potentially face prosecution.

CDHS has asked State Attorney General Bill Lockyer to review whether continued operation of the program would, under federal law, aid and abet individuals in committing a federal crime.

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Other factors in the state's decision to suspend the program, Shewry said, were that possession of a state medical marijuana card could give patients a false sense of security and lead them to believe that they are protected from federal prosecution. In addition, information gathered from card holders could potentially be seized by federal officials to identify medical marijuana users for prosecution.

On June 6, 2005, in *Gonzales v. Raich*, the U.S. Supreme Court ruled against two California women who sought a ruling that the federal government does not have jurisdiction to enforce federal law against individuals growing marijuana for their personal medical use. The court determined that Congress does have the authority to prohibit local cultivation and use of marijuana.

Although the court's decision does not directly affect California's Compassionate Use Act, approved by voters in 1996, and state law, the decision raises questions about whether the state can legally conduct a program that assists in the violation of federal law.

California's Compassionate Use Act says that with the recommendation of a physician, a patient may obtain and use marijuana for personal medical purposes.

The Controlled Substance Act makes it a federal crime to possess, manufacture, distribute or dispense a controlled substance. Federal law also says that "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The Medical Marijuana Identification Card Program was designed to provide patients an ID card that could be used as evidence that they had received a recommendation from their physician to use marijuana for medicinal purposes. The card can assist law enforcement officials in determining whether an individual using marijuana meets the requirements of the Compassionate Use Act.

In May CDHS began pilot testing an identification card and registry system in three counties: Amador, Del Norte and Mendocino. To date, 123 cards have been issued. The pilot testing was scheduled to be completed at the end of July. However, CDHS has now directed these three counties to cease processing their applications through the state system until further notice. In addition, CDHS has postponed processing requests from counties to implement the program locally.

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