



DATE: DECEMBER 8, 2011

SUBJECT: REPORT OF THE URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EUREKA IMPOSING A MORATORIUM ON MEDICAL CANNABIS DISPENSARIES.

Background:

On November 1, 2011 the City Council approved Bill No. 837-CS an urgency ordinance adopting a 45-day moratorium on the establishment of Medical Cannabis Dispensaries in the City of Eureka. The moratorium ordinance directs the City Manager or his designee to suspend the processing of applications pending, or received, for “Medical Cannabis Dispensaries” in the City of Eureka.

This report is prepared in conformance with Government Code Section 65858 (d), which requires the City to “issue a written report describing the measures taken to alleviate the condition(s) which led to the adoption of the ordinance” ten days prior to the expiration of an interim urgency ordinance. On December 20, 2011, staff will present the City Council with an interim urgency ordinance to extend the moratorium for an additional ten months and 15 days, together with a staff report recommending that the City Council adopt the extension.

Discussion:

In 1996, California voters approved by initiative “The Compassionate Use Act of 1996,” also known as Proposition 215. The purpose of Proposition 215 was to allow seriously ill persons to obtain and use medical cannabis under certain specified circumstances. In 2003, the Legislature approved SB420 which, provided additional statutory guidance for those involved with medical cannabis use and also authorized counties and cities to enact rules and regulations with regard to medical cannabis consistent with California law.

Despite the passage of Proposition 215, the United States Supreme Court in *United States v. Oakland Marijuana Buyers’ Cooperative* (2001) 532 U.S. 483, held that the Federal Controlled Substances Act continues to prohibit cannabis use, distribution and possession, and that no medical necessity exceptions exist to those prohibitions. In 2005, the United States Supreme Court further held that federal laws which ban the use of cannabis for medical purposes are constitutional in the case of *Gonzales v. Raich* (2005) 545 U.S. 1.

Currently, the sale, possession, cultivation and distribution of cannabis is prohibited by federal law, specifically 21 U.S.C. sections 812 and 841, part of the Controlled Substances Act. Cannabis continues to be a prohibited Schedule 1 drug for which there is no legally accepted medical use. The U.S. Drug Enforcement Administration’s Office of Chief Counsel issued an Opinion Letter on March 31, 2006 which stated that “the knowing or intentional manufacture, possession, or distribution of cannabis, or aiding and abetting or participating in conspiracy to engage in such conduct, violates federal law regardless of any state law authorizing such conduct.” In addition, the four California U.S. Attorneys have raised concerns that local government regulations that provide for a permitting process for medical cannabis are in direct violation of the Federal laws regulating controlled substances.

In 2008, the California Attorney General issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* (Guidelines). The Guidelines note that although medical cannabis “dispensaries” have been operating in California for years, dispensaries, as such, are not recognized under the law. The only recognized entities are cooperative and collective operating substantially in compliance with the Guidelines. Thus, according to the Attorney General, a properly organized and operated collective or cooperative that dispenses medical cannabis through a storefront may be lawful under California law.

In 2009, in the first California appellate case regarding a medical cannabis dispensary, the California Court of Appeal for the Second Appellate District issued its opinion in *City of Claremont v. Kruse*. Kruse had opened up a medical cannabis dispensary with the City limit of Claremont without obtaining the necessary land use permits. Upon learning of the dispensary, the City Council adopted an Urgency Ordinance barring medical cannabis dispensaries from the City. Kruse challenged the adoption and the trial court upheld the City’s Ordinance. ON appeal, the court upheld the City’s Ordinance stating the neither California Medical Marijuana Program or the Compassionate Use Act (Proposition 215) requires a city to establish local regulations to accommodate medical cannabis dispensaries.

Subsequent cases, in the California Court of Appeal for the Fourth Appellate District, *Qualified Patients Association v. City of Anaheim* and *County of San Diego v. San Diego NORML*, held that a city’s compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical cannabis dispensaries that meet state law requirements would not violate conflicting federal law. The County of San Diego case further concluded that the state’s identification card program was not preempted as an obstacle to the federal Controlled Substances Act because that Act combats recreational drug use, and does not regulate a state’s medical practices.

On October 4, 2011 the California Second District Court of Appeal held in the *Pack v. Superior Court of Los Angeles County (City of Long Beach)* that the Long Beach permitting process for medical cannabis collectives in that city was preempted by federal law. The *Pack* decision appears to be inconsistent with the previous holdings made by the California Fourth District Court of Appeal in that the operation of medical cannabis dispensaries were held to not conflict with federal law. Although the Second and Fourth Districts analyzed the issue of preemption differently, the Fourth District was not confronted with a permitting scheme in either *County of San Diego* or *Qualified Patients*. Thus, it appears that no conflict presently exists with respect to whether cities may permit collectives as *Pack* says the permit scheme is preempted.

On November 9, 2011, the California Court of Appeal, Fourth Appellate District, issued a ruling holding that state law does not preempt the City of Riverside’s ordinance banning medical cannabis dispensaries. *City of Riverside v. Inland Empire Patient’s Health and Wellness Center, Inc.* The Court found that the City’s Ordinance could be reconciled with state law. The Court based its decision on the fact that the Compassionate Use Act is narrow in scope and only provides limited criminal immunity for the use, cultivation and possession of medical cannabis. The Court also found that neither the Compassionate Use

Act nor the Medical Marijuana Program Act created a statutory or constitutional right to use cannabis or allow for the sale or distribution of cannabis by a medical cannabis dispensary. Thus, neither Act mandates that cities and counties permit medical cannabis dispensaries and nothing precludes cities and counties from banning medical cannabis dispensaries.

The lack of consistency between these California Court of Appeal decisions and State and Federal laws and regulations, regarding the distribution of medical cannabis, may result in the City violating the Controlled Substances Act if dispensaries and the like are conditionally permitted. Thus, it was recommended by City staff that an Urgency Ordinance imposing a moratorium on the City's Ordinance providing for the permitting process for medical cannabis cooperatives and collectives for 45 days pending City staff's further analysis.

After the adoption of the urgency ordinance, the City Manager along with the Police Chief, Community Development Director, and City Attorney continued to: research and analyze the operations of medical cannabis dispensaries in other California cities; monitor the legal concerns raised by the US Attorneys in California and related Court of Appeal decisions; and considered revised development regulations that could minimize potential impacts to the public welfare. Due to the complexity of the issue including the legal uncertainty of local government regulations that provide for a permitting process for medical cannabis cultivation, processing, and distribution, staff anticipates that our research will not be completed before the expiration date of the moratorium on December 18, 2011.

Recommendation:

Based on our preliminary analysis, staff will recommend that the City Council extend the urgency ordinance as allowed by Government Code Section 65858 for an additional period of 10 months and 15 days. This urgency ordinance may thereafter be extended for an additional one year period for a total period not to exceed two years.

The City staff continues the process of evaluating relevant legal issues and developing guidance for legally appropriate regulation. There is currently considerable uncertainty regarding the legality of dispensaries and the scope of federal and state preemption with respect to local regulation of medical cannabis.