**COUNCIL AGENDA: 12-10-13** 

ITEM: 8.1



# Memorandum

TO: HONORABLE MAYOR AND

CITY COUNCIL

FROM:

Councilmember

Donald Rocha

**SUBJECT:** 

MEDICAL MARIJUANA

DATE:

December 6, 2013

Approved (

Don Rocks

Date

12/6/13

#### **RECOMMENDATION**

- 1. Approve staff recommendation (a) pertaining to expansion of priority enforcement areas, and provide the following additional direction pertaining to enforcement:
  - a. Direct the City Attorney to identify steps we could take to increase our enforcement powers, such as having the City Attorney prosecute misdemeanor violations, and to seek commitments from the District Attorney and the United States Attorney to prosecute serious violators of the regulatory program.
  - b. Direct the City Manager to bring back in the budget process an analysis of the cost of a multi-department task force to focus on getting compliance with the marijuana tax and a goal of doubling the annual total amount paid.
  - c. Direct the City Manager and City Attorney, in coordination with the Police Chief, to pursue discussions with the County Sheriff and District Attorney regarding potential joint enforcement efforts.
- 2. Approve staff recommendation (b)(1) to return within 90 days with a complete Medical Marijuana regulatory program, with the following additional direction:
  - a. The program should comply with the Guidance Regarding Marijuana Enforcement Memorandum to US Attorneys dated August 29, 2013 (attached) that identifies the need for a strong and effective regulatory and enforcement system to control the cultivation, distribution, sale and possession of medical marijuana and the necessary resources to enforce our laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

- b. As detailed in the Enforcement Memorandum, include measures to ensure a tightly regulated market in which revenues are tracked and accounted for, effective measures to prevent diversion of marijuana outside of the regulated system, and prohibition of access to marijuana to minors through the prohibition of:
  - i. Sales or transfers to minors
  - ii. Trafficking near areas associated with minors
  - iii. Marketing in a manner that appeals to minors
  - iv. Diversion, directly or indirectly, and purposefully or otherwise, to minors.
- c. Staff should have the flexibility to recommend any regulatory program that complies with the above direction, but in the interest of testing out a variety of regulatory options, I recommend the Council direct staff to return with a regulatory proposal based on the below criteria, in addition to any other proposals staff wishes to recommend.

Issue	Proposal
Zoning Districts	Provide maps showing available parcels under the following zoning
where collectives	scenarios, and taking into account the other zoning provisions (such
are allowed	as setbacks) recommended in this matrix
	1. Provide one option that includes the following districts:
	Commercial General, Downtown Primary Commercial,
	Light Industrial, Combined Industrial Commerical
	2. Provide a second option that includes the above districts
D 1 1 1	with the addition of Industrial Park
Required setbacks	1000 feet from public and private schools, child daycares, churches
	with child daycares, parks, community centers, libraries, and other
	marijuana collectives; 500 feet from substance abuse rehab centers;
Hours of Operation	150 foot path of travel from residential uses.
Hours of Operation Prohibition in	9:00 am – 9:00 pm
<del>-</del>	Prohibited in ground floors of buildings within Downtown Primary
pedestrian areas	Commercial
	Prohibited on all floors of shopping centers located on a parcel or
T ' ' D	parcels totaling over 40 acres in size.
Licensing Process	Licenses issued to operators as follows:
	1. Only operators who can show proof that they were in
	operation and paying the City's marijuana tax as of a certain
	date shall be allowed to apply for a license
·	2. Operators that were located in compliance with the above
	zoning regulations as of a certain date, and are still at the
	same location, may apply for a license at that location.
	3. Operators that were not located in compliance with the

Issue	Proposal
	above zoning regulations as of a certain date may secure a
	new site that is in compliance and apply for a license at that
	location
	4. Applications from operators remaining in the same location
	as of a certain date shall take precedence over those
	applying under new locations.
	5. Staff shall establish application standards (such as criminal
	background checks and proof of paid taxes) that must be
	met in order to obtain a license. To the extent that conflicts
	arise between applications (such as two applicants being
	within 1000 feet of each other) the applicant in compliance
	with the application standards shall take precedence.
	6. In the event that conflicting applications meet the standards,
	the application with the earliest submittal date shall take
	precedence.
	7. Compliance with zoning regulations shall be certified with a
	Zoning Verification Certificate
	8. Licenses granted by the City should include an expiration
	date and be subject to renewal
Operational	Staff shall develop operational regulations for licensed
regulations	collectives. These regulations should establish zero
·	tolerance for serious violations, such as selling to a minor or
	an individual who doesn't have a doctor's authorization,
	with penalties up to license revocation.
	2. The City should also establish the ability to audit the books
	of the collectives it licenses.
	3. All monitoring and enforcement activities should be funded
	by fees on a cost recovery basis.
Maximum number	I would recommend that we consider not taking action on these
of collectives	issues in the initial regulatory program, but coming back to consider
Regulation of	them as part of a second regulatory phase after the initial program
Cultivation	has been implemented, should it be necessary.
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## **ANALYSIS**

The City first began talking about medical marijuana regulations in November 2009, but in the four years since we have not successfully implemented a regulatory program. As dispensaries have proliferated in the city, I have heard loud and clear from my residents that the City must act now to solve this problem. Given this sense of urgency, I am encouraged by staff's proposal to increase distances from sensitive uses and by their willingness to return with a regulatory program within 90 days.

As we proceed to develop regulations, I think it's important that we keep in mind the lessons of our last attempt. Given the difficult situation we find ourselves in, it may not be possible to design a perfect regulatory program at the local level. I believe we should acknowledge this fact, and concentrate not on solving every problem, but on solving the most pressing problem our residents face: the nuisance and compatibility issues caused by dispensaries. If we hone in on that primary goal, I think we have a better chance of success than if we get caught up in the tangle of other regulatory problems that surround medical marijuana in California.

To that end, I recommend that the Council ask staff to prepare a regulatory proposal based on the criteria I outline above, in addition to any other proposal staff desires to bring forward. My approach prioritizes addressing the compatibility concerns of our residents while at the same time attempting to reduce opposition from existing dispensaries, to the extent possible. We will never develop a regulatory approach that pleases all dispensaries—the reality is that we will end up shutting some of them down—but if we can have some meeting of the minds we may be more likely to succeed at implementing the ordinance quickly. If the regulations the Council passes end up on the ballot, it may be necessary for us to make the case to voters in the context of an election. I think the voters will likely uphold a City regulatory program, but an election could entail a significant implementation delay.

In particular, my proposal recommends that we consider holding off on taking action on the issues of maximum number and regulation of cultivation. As to maximum number, depending on which zoning districts are allowed, the available sites may be so few as to result in a natural maximum, eliminating the need for us to decide the issue explicitly. On the question of cultivation, I strongly believe that this is an issue that needs to be regulated at the state level. By requiring growth on-site, or even within the city limits, we not only take on an extremely complex and difficult regulatory challenge, we concentrate the industrial production of marijuana in San Jose. I don't know that we're up to the regulatory challenge, and I don't know whether it benefits our residents to concentrate production here. If we decide we need to come back and regulate cultivation after our initial regulatory program is in place, we always have that option. One thing is certain: the current absence of regulation in San Jose has made it the Wild West of cannabis. My sense is that a good regulatory program—even if it's not perfect—is preferable to no regulatory program.

It is our responsibility as the City's elected leadership to implement a regulatory program and solve this problem. One way or another, we need to make that happen.



## U.S. Department of Justice

## Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM:

James M. Cole

Deputy Attorney General

SÜBJECT:

Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels:
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states:
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.<sup>1</sup>

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

<sup>&</sup>lt;sup>1</sup> These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
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