



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCILMEMBERS

**FROM:** Richard Doyle  
City Attorney

Robert L. Davis,  
Chief of Police

**SUBJECT:** MEDICAL MARIJUANA --  
ACTIVITIES WITHOUT COUNCIL  
ACTION

**DATE:** March 16, 2010

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## SUPPLEMENTAL MEMORANDUM

### BACKGROUND

At its meeting of January 27, 2010, the Rules and Open Government Committee requested additional information pertaining to the Committee's pending consideration of a workload assessment from the City Administration for the possible preparation of local regulations pertaining to the cultivation and use of marijuana for medical purposes. Specifically, the Committee asked for an overview of what actions regarding the cultivation and distribution of marijuana for authorized medical purposes could occur in the City of San José if the City Council took no action at all on this topic.

This Office previously provided to the Rules and Open Government Committee for its meeting of January 27, 2010, a memorandum (dated January 21, 2010) setting forth a brief overview of both federal and state laws pertaining to the cultivation and use of marijuana for medical uses. The key elements from that summary include:

- The fact that under both the California Uniform Controlled Substances Act and the Federal Controlled Substances Act, marijuana remains a controlled substance whose cultivation and sale generally remains a crime under both federal and state laws.
- While the State of California has created some narrow defenses from state criminal prosecution for the possession, cultivation and use of marijuana for medical purposes for certain seriously ill medical patients and their primary caregivers, these state protections – as well as federal enforcement guidelines noting a current intent at the federal level to not criminally prosecute those persons who possess, cultivate or use marijuana in compliance with state compassionate use laws – have in no way actually amended federal laws classifying marijuana as a classified drug whose cultivation, possession and use are unlawful.

Commercial dispensaries that sell marijuana to qualified medical patients or their primary caregivers for medicinal purposes would not comport with either state or federal laws and, so, would constitute a public nuisance and not be allowed anywhere in the City.

## ANALYSIS

### No Action By the City Council

1. Land Use Regulations. As noted above, the possession, cultivation and distribution of marijuana under federal law remains a crime and, therefore, constitutes unlawful activity. If the City Council undertakes no action on this issue, then, under the existing provisions of Title 1 and Title 20 of the San José Municipal Code, the maintenance or use of property in the City in a manner that violates federal law constitutes a public nuisance and would not be allowed anywhere (that is, in any zoning district).

More specifically, this analysis means that if a collective or a cooperative group alleging that they are a nonprofit membership of qualified medical patients (or their primary caregivers), comes to the City for any type of land use development permit or approval to operate a use that would cultivate or dispense marijuana for medicinal purposes, the City would not be able to issue land use permits for that use because the City does not permit uses that violate state or federal laws. This would remain the case even if that cooperative or collective otherwise claims that it would be in compliance with state laws or regulations.

Please note, however, that the City does not specifically regulate (from a land use perspective) the de minimus growing of plants and gardens that commonly occur as an incidental use of residential property. In other words, if a resident grows roses, tomatoes, or other similar household plants or gardens in their yard or on pots in their house or on the porch of their residential property, no land use permits from the City are typically required for that activity. While the growing of marijuana in this context would not require a land use permit, technically it also would not be allowed under the Municipal Code for the reasons previously discussed. Therefore, this situation could pose law enforcement issues, discussed further below.

2. Police Regulations and Practices. When encountering marijuana or concentrated cannabis in a field situation, police officers will, pursuant to existing Police Department policies, first determine if the person possessing or furnishing the drug has a valid Medical Marijuana Identification Card (MMIC) or a physician's written or oral recommendation or approval for its medical use. Police officers will not arrest or cite anyone possessing a valid MMIC authorized by the California Department of Health Services (CDHS) and issued by a county health department for possessing, growing or transporting marijuana or concentrated cannabis in the amounts permitted under the

Medical Marijuana Program Act (MMPA). Officers will not arrest anyone who does not have an MMIC if they can show that they are: (1) a qualified patient, (2) a designated primary caregiver, or (3) an individual who assists a qualified patient or a person with an MMIC or a designated primary caregiver in administering medical marijuana to the qualified patient or person with an identification card or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person with an MMIC. Officers will not impound or seize any marijuana that any of the above persons have in their possession unless the amount exceeds the limits set forth in California Health & Safety Code §11362.77(a), and the person does not have a physician's recommendation that the quantity limits set out in H&S §11362.77(a) do not meet the qualified patient's medical needs. In this case, the qualified patient or primary caregiver may possess a larger amount of marijuana consistent with the patient's medical needs.

California Health and Safety Code Section 11362.775 further provides that qualified patients, persons with valid MMICs, designated primary caregivers of qualified patients or persons with identification cards who associate within the State of California in order to collectively or cooperatively cultivate marijuana for medical purposes will not solely on that basis be subject to state criminal sanctions under state laws that prohibit the possession, possession for sale, cultivation or distribution of marijuana or other stated offenses under the California Uniform Controlled Substances Act.

In cases where marijuana has been seized under state law and it is later discovered that the person from whom it was seized is legally entitled to use, possess or cultivate the marijuana for medicinal use, the Department has the obligation to offer to return the seized property as soon as possible after receiving sufficient proof of the person's entitlement under the Compassionate Use Act.

3. Code Enforcement. Whether or not the Council directs a ban on, or the development of regulations pertaining to, or takes no action related to, a scope of use of marijuana for medical purposes, commercial dispensaries of marijuana will remain unlawful under federal, state and local law and will create a demand on Code Enforcement resources. To date, Code Enforcement has received and investigated complaints of seven (7) medical marijuana dispensaries operating in violation of land use regulations. The property owners and businesses were issued compliance orders requiring that the dispensing of medical marijuana cease by the end of February 2010. One of the businesses ceased operations due to a temporary injunction obtained by the property owner, although that business has simply moved to a different location in San Jose. Code Enforcement, with the assistance of the City Attorney's Office, is preparing to bring noncompliant medical marijuana dispensaries to the San Jose Appeals Hearing Board, with a request that an *Order to Correct* be issued by the Board ordering these businesses to close or face the possible imposition of administrative fines. In addition, Code Enforcement mailed general informational letters to seventeen (17) businesses that may be operating as medical marijuana dispensaries to inform them of possible

land use violation issues related to operating a dispensary, although no complaints have been received for those businesses.

## CONCLUSION

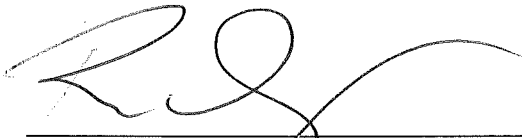
In response to the Committee's question: if the City Council takes no action to either expressly ban or direct the development of regulations pertaining to the possession, cultivation, or distribution of marijuana for medical purposes:

- From a land use perspective, activities pertaining to medical marijuana that would require a land use permit would not be allowed uses of real property under existing provisions of the Municipal Code because uses that violate federal law constitute a nuisance under the Municipal Code. However, the growing of plants as a typical, incidental use of real property is not a separately regulated use under the City's Zoning Code, and no land use permits are required for that de minimus activity. Therefore, those incidental uses would not constitute a land use issue.
- From a Police Department perspective, Individuals who are exempt from state criminal arrest and prosecution for the cultivation, possession, possession for sale, or distribution of marijuana for medical purposes will not be arrested by a Police Officer if they meet the requirements of the California Health & Safety Code described above.
- From a Code Enforcement perspective, commercial businesses dispensing marijuana for any purpose are not an allowed use under federal, state or local laws, and enforcement actions are being pursued whenever a violation is discovered.

Therefore, if the City Council takes no action on this issue, a certain deminimus level of compassionate use of marijuana for medical purposes might occur in the City of San José: qualified patients (including those with MMICs) and their primary caregivers may cultivate, transport and possess those amounts of marijuana for medical purposes that could occur as a typical, ancillary use of real property (that would not trigger a land use permit) and that otherwise comport with the amounts allowed under state laws.

If the City Council desires to allow some level of compassionate use of marijuana for medical purposes, then a decision by Council to take no action would allow for that activity to occur. In that case, the City Council may affirm the City's position on this matter by directing the Police to continue to follow its existing policies of not arresting or pursuing prosecution of individuals who are cultivating, transporting or distributing marijuana in compliance with State law and not initiating any changes to the City's Zoning Code. The City would continue to pursue enforcement action against and seek

closure of dispensaries, farms or other larger-scale operations operating outside of state law parameters.



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For questions please contact the Office of the City Attorney at (408) 535-1900.