



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Angelique Gaeta

SUBJECT: SEE BELOW

DATE: November 20, 2015

Approved

Date

11/20/15

**SUBJECT: AMENDMENTS TO MEDICAL MARIJUANA REGULATORY
ORDINANCE**

RECOMMENDATION

(a) Approve an ordinance of the City of San José amending Chapter 6.88 of Title 6 of the San José Municipal Code to add Section 6.88.295 to add the definition of transport; to add Section 6.88.425 to require collective owners, managers and operators to wear an identification badge issued by the Chief of Police; to add Section 6.88.445 to expressly prohibit deliveries of medical marijuana; to add Section 6.88.465 to allow a registered collective to transfer medical marijuana to other collectives who are registered with the City; to amend Sections 6.88.212, 6.88.235, 6.88.242, 6.88.310, 6.88.330, 6.88.420, 6.88.430, 6.88.435, 6.88.440, 6.88.460 and 6.88.900 to allow registered collectives to manufacture medical marijuana products at their off-site cultivation location, clarify disqualification from the registration process, revise the requirements for cultivation, decrease the time required for storing video from surveillance cameras from 90 to 30 days, limit the square footage used at a residence for personal use cultivation, and to make other technical, nonsubstantive, or typographical changes to Chapter 6.88 of Title 6 of the San José Municipal Code; and

(b) Accept staff's report regarding the exploration of creating a Division of Medical Marijuana Control.

OUTCOME

Approval of the proposed ordinance will provide those Medical Marijuana Collectives (Collectives) that are working their way towards registration with greater flexibility and opportunity for success once they have become registered with the City and provide additional regulations to help the City track the industry operations and require the industry to operate responsibly. In addition, acceptance of the Administration's report regarding the creation of a Division of Medical Marijuana Control will provide the Administration with the opportunity needed to fully explore the creation and staffing of a Division of Medical Marijuana Control within the City.

EXECUTIVE SUMMARY

On June 17, 2014, the Council approved a Medical Marijuana Program (Program) for the regulation of the cultivation and dispensing of medical marijuana in San José. The Program went into effect on July 18, 2014, and required Collectives to “register” with the City and operate in full compliance with Program operational requirements. Presently, Collectives have until December 18, 2015, to register with the City. The Administration is now proposing changes to the Program that would assist Collectives in successfully operating once they become registered with the City and further ensure they are properly regulated to prevent illegal diversion of medical marijuana.

BACKGROUND

The City’s Program is memorialized in Council-adopted ordinances amending both Title 20 and Title 6 of the San José Municipal Code (Code). These ordinances provided siting criteria (the Land Use Ordinance) and operational regulations (the Regulatory Ordinance) for Collectives operating in the City. The Regulatory Ordinance also includes requirements for individual patients and their caregivers who wish to cultivate at home for the patient’s personal use.

As indicated, the Program requires Collectives to “register” with the City. In turn, registration requires them to obtain from the City a Zoning Code Verification Certificate, establishing that they are locating in a site that complies with the Land Use Ordinance; and a Notice of Completed Registration, establishing they are operating in compliance with the Regulatory Ordinance.

As originally approved by the Council, Collectives had until July 17, 2015, to become registered with the City. In addition, the City’s Program was crafted to contemplate a closed-loop, vertically-integrated system where medical marijuana can be tracked from seed to sale in a manner that is both compliant with the state’s Medical Marijuana Program Act (MMPA) and takes into consideration the U.S. Attorney General’s enforcement guidelines for medical marijuana. Specifically, the Program provides that each Collective can only dispense medical marijuana which the Collective members cultivated and manufactured at the Collective’s premises.

Extension of Deadline to Register:

On May 19, 2015, the Administration advised the Council that a number of Collectives in the registration process had yet to fully change their business model to comply with the City’s Program requirements and were continuing to distribute medical marijuana that had been acquired from a third-party vendor and could not be traced to its point of origin. As a consequence, these Collectives would not be able to meet the original the July 17, 2015, deadline to obtain a Notice of Completed Registration from the City. In response, the Administration recommended the Council approve an extension of the deadline to obtain a Notice of Completed Registration to December 18, 2015, with the following milestone deadlines aimed at assisting the Collectives in coming into compliance with the Program and the vertical integration framework:

By July 17, 2105, each Collective must have:

- (1) Completed a preliminary plan review/special tenant improvements review with the Building Division for the build out of cultivation and manufacturing areas at the Collectives premises;
- (2) Scheduled an appointment through the special tenant improvements (STI) program for plan review, submitted applications and paid all application fees for any building permit required to build out each Collective premises located in San José;
- (3) Come current on its payment of Marijuana Business Taxes due to the City;
- (4) Paid all application processing fees for its Application to Register;
- (5) Responded to all requests for information related to its Application to Register; and
- (6) Had all of its owners, managers and individuals engaged in the cultivation, processing, manufacturing, transporting or dispensing of medical marijuana fingerprinted for backgrounding.

To further provide an incentive for Collectives to meet the new deadline, the proposed ordinance provided that a Collective would have until September 18, 2015, to obtain all required site development permits and building permits from the City. In addition, the proposed ordinance provided that each Collective would have until November 20, 2015, to complete its preliminary inspection with the City of all of its locations (dispensing and cultivation) to check compliance with the Regulatory Ordinance. Finally, by December 18, 2015, each Collective must:

- (1) Successfully pass a final inspection of all of its medical marijuana dispensing and cultivation locations;
- (2) Pay the Medical Marijuana Annual Operating Fee to the City;
- (3) Submit to the City Manager a Hold Harmless / Release of Liability form; and
- (4) Obtain a Notice of Completed Registration from the City Manager.

In addition, because the cultivation process, from seed to harvest, can take up to three months, the Administration further recommended that the City Manager Regulations be updated to allow Collectives five months from the date they become registered to comply with the requirement that they dispense only medical marijuana that was cultivated and manufactured by their members. During those five months, Collectives would be allowed to dispense all medical marijuana they had already obtained from third-party vendors (the "carry-over" period).

The Council adopted the Administration's recommendations and further directed staff to:

- Explore the creation of a Division of Medical Marijuana Control headed by an Administrator to be appointed by and report to the City Manager;
- Look closely at the Division of Gaming Control and its organizational structure; and
- Return to Council at some later date with recommendations for limiting "backyard grows."

Actions at the State Level:

On October 9, 2015, the Governor signed three bills into law—AB 243, AB 266, and SB 643. Together, these bills are known as the State Medical Marijuana Regulation and Safety Act (MMRSA) and are intended to work in concert to create a comprehensive scheme for regulating all aspects of commercial medical marijuana activity. As more fully explained in staff's Information Memorandum dated October 30, 2015, while the effective date of MMRSA is January 1, 2016, the State anticipates that the year 2018 is the earliest it will be ready to review applications for licensure and have in place the regulations required to be promulgated under the MMRSA. Accordingly, until such time as the State regulations are in place, the MMRSA relies on medical marijuana establishments to comply with the local regulations of the jurisdictions in which they operate. <http://www.sanjoseca.gov/DocumentCenter/View/47485>.

Actions at the County Level:

Until recently, the cultivation of marijuana, whether indoors or outdoors, was prohibited in the unincorporated areas of Santa Clara County. However, on October 6, 2015, the County Board of Supervisors adopted an ordinance acknowledging the need for qualified patients and their caregivers to cultivate medical marijuana for their personal use. That ordinance limited the personal cultivation of medical marijuana to provide that notwithstanding the number of patients or primary caregivers residing at a residence, indoor cultivation is limited to a single space no larger than 50 square feet, in a single room, and in a single layer. In addition, the County's ordinance limits outdoor personal cultivation to 12 plants per legal parcel. Further, the County limits qualified patients and primary caregivers to possessing or storing no more than 8 ounces of medical marijuana on a legal parcel.

Meetings with Dispensaries:

Since May 2015, the Administration has had ongoing meetings with the Collectives and their representatives, participated in every STI meeting requested by the Collectives (in most cases multiple STIs), exchanged numerous phone calls and emails with Collectives and arranged schedules to assist Collectives in every way possible as they work their way through the registration process. In addition, the Administration has taken all steps necessary to ensure every Collective that remains in the process towards registration is heard and is fully aware of the requirements to become registered.

Most recently, on October 22, 2015, the Administration held a group meeting with the Collectives in the registration process, including Harborside, Lux and those Collectives represented by Susan Landry, Richard De LaRosa, Sean Kali-Rai, Jerry Strangis and Joe Guerra to discuss compliance with the Regulatory Ordinance. During this discussion, Collectives and their representatives expressed concern that if each were limited to dispensing medical marijuana that was cultivated or manufactured by their own Collective, they would not be able to produce enough product to meet the demand of their customers. As a result, some Collectives requested that they be allowed to purchase product from other permitted or licensed cultivators and manufacturers throughout the State of California, while other Collectives felt that the City

allowing them to share product with other Collectives operating in San José would help alleviate the issue. In addition, some Collectives asked if they could purchase excess product from their customers while other Collectives asked to be allowed to cultivate beyond the contiguous counties and requested a second off-site cultivation location be allowed. Collectives also raised a concern with the Regulatory Ordinance limiting their manufacturing activities to their dispensing location and requested that they be afforded the option of manufacturing from either their dispensing location or their cultivation location, if the cultivation location was not at the same site. Finally, Collectives requested the removal of the 50 foot buffer between Collectives and the City open up all the zones previously excluded by the Council. Topics discussed since May have also included: reducing the time from storage surveillance video from ninety (90) days to thirty (30) days; Collectives being allowed to continue to purchase medical marijuana from third-party vendors during the carry-over period and not be limited to the supply they had when they became registered; and the labeling and requirements for medical marijuana packaging.

Current Update:

As of the date of this memo, nineteen (19) Collectives have met the July 17, 2015, the September 20, 2015, and the November 20, 2015 milestone deadlines and remain in process towards possible registration with the City.

ANALYSIS

(a) Amendments to Regulatory Ordinance (Chapter 6.88 of Title 6 of the Municipal Code)

As indicated, since May 2015, the Administration has had ongoing meetings with the Collectives and/or their representatives. In addition, the Administration has taken all steps necessary to ensure every Collective that remains in the process towards registration is heard and is fully aware of the requirements to become registered. Nevertheless, the Collectives have continued to raise the concern that even if they are registered by the December 18, 2015 deadline, they will be challenged to immediately produce enough product to meet the needs of their customers. To assist the Collectives in overcoming this challenge while maintaining the integrity of the City's Program, the Administration recommends the following:

Collective to Collective Transfer of Medical Marijuana

As discussed in previous memoranda, the Administration has long supported a vertically integrated system as it not only allows for robust regulation, it allows the Administration to be in a better position to track the medical marijuana being dispensed by the Collectives from seed to sale. In that regard, the Administration will also be in a better position to help prevent diversion to minors, ensure child-proof packing is used, track what processes are used to manufacture edibles, etc.; and track medical marijuana back to its source in the event a bad batch of medical marijuana is dispensed and causes illness or injury. After considering the feedback from Collectives, the Administration believes that the above goals can still be achieved if Collectives

are allowed to transfer product amongst themselves. Specifically, the Administration is recommending that Collectives that are registered with the City be allowed to provide product to other registered Collectives in the City to help those Collectives maintain their inventory. Such transfers would only be allowed between San José-registered Collectives, which helps to maintain the closed-loop system because the medical marijuana dispensed in the City would only be that medical marijuana cultivated and manufactured by one of the City's registered Collectives.

Manufacturing at Off-Site Cultivation Location

In addition, the Administration is recommending that Collectives be allowed to manufacture at either their dispensing location or their off-site cultivation location, if those sites are not one and the same. This option provides Collectives with the flexibility of finding a venue that is not only suited for cultivation but has enough space to also allow for the manufacturing of products containing medical marijuana. Since the City will be regularly inspecting off-site cultivation locations for compliance with the Regulatory Ordinance, allowing Collectives to manufacture at that site instead of their dispensing location would not impose a greater burden on staff. However, as with cultivation, should the manufacturing occur outside of San José and within one of the counties specified in the Regulatory Ordinance, the Collective is still responsible for finding a location where the activity is allowed by the jurisdiction in which the location is situated.

Transporting of Medical Marijuana

In light of the proposed changes that would allow registered Collectives to share product and manufacture from their off-site cultivation location, the Administration is also proposing that any transporting of medical marijuana between registered Collectives, and from a Collective's off-site cultivation location to its dispensing location, be limited to between the hours of 6:00 a.m. and 12:00 midnight. This timeframe would assist the City in tracking the medical marijuana from seed to sale. In addition, the transportation times are consistent with the hours allowed for all other businesses transporting products from one location to another in the City.

Prohibition on Deliveries

With regard to delivery services or delivery-only establishments, neither has been allowed in the City. However, several members of the industry have reported that the current language is confusing and the Administration receives calls weekly from individuals interested in opening a Collective in the City, and a large percentage of those callers incorrectly believe that delivery is allowed within the City. Additionally, the new state laws require that any jurisdiction wishing to prohibit deliveries within their jurisdiction expressly prohibit the activity in their local ordinances. While deliveries aren't allowed under the current Program, staff is recommending making the prohibition more explicit. Delivery operations offer too many opportunities for diversion of product to minors and other significant risks to the public health and safety.

Clarification on Packaging Requirements

Currently, the Regulatory Ordinance includes packaging and labeling requirements for all medical marijuana dispensed by Collectives. Recently, Collectives have informed the Administration that the provisions are confusing or difficult to follow. As a result, the Administration is proposing the Regulatory Ordinance be amended to specify health and safety warnings regarding the proper use and storage, including: potential side effects, suggested dosage, and warnings regarding the operation of motor vehicles and heavy equipment.

Recording of Surveillance Cameras

Another change the Administration is proposing is to amend the Regulatory Ordinance to decrease the amount of time for which surveillance video needs to be stored by each Collective. Currently, Collectives are required to maintain surveillance video for 90 days. Collectives have informed the City that the cost of maintaining this amount of surveillance video is high and even more expensive if Collectives have a large operation that requires the installation of numerous cameras. The Administration agrees and recommends decreasing the amount of time from 90 to 30 days.

Police-Issued Identification Badge

Under the Regulatory Ordinance, every Collective owner, manager and any individual involved with the cultivation, processing, manufacturing, transporting or dispensing of medical marijuana on behalf of the Collective is required to be finger-printed and undergo a criminal background check. During onsite inspections over the last year, Code Enforcement and the Police Department have had a difficult time identifying which individuals are truly engaged in activities on behalf of Collectives, their role in that regard, and which individuals should be backgrounded. Further, often when inspectors and police question individuals who are onsite, incorrect information is given regarding the individual's identity or what role they play in the operation of the Collective. To address this issue, the Administration is recommending that every owner, manager and individual involved in the above activities be required to wear an identification badge issued by the Chief of Police at all times while they are engaged in duties on behalf of the Collective. This requirement is already in place for owners, operators and employees of nightclubs, tow truck companies, taxicab companies, massage establishments, peddlers, and ice-cream truck operations. There is no reason that individuals operating in the medical marijuana industry should not be required to do the same.

Modifications to the List of Disqualifying Criminal Convictions & Creation of Appeal Process

As it exists, the Regulatory Ordinance allows for a Collective to be disqualified from registration if it continues to have as an owner, manager or individual participating in the cultivation, processing, manufacturing, transporting or dispensing of medical marijuana any person that is on parole or probation for the possession, sale, manufacture, use, distribution or transportation of a controlled substance, has been convicted of a crime of moral turpitude, or has been convicted of any crime within the last ten years involving: the use of violence, force, fear, fraud or deception;

the unlawful possession, sale, manufacture, use, distribution or transportation of a controlled substance; or the use of money to engage in criminal activity. Not included in that list of crimes is a felony conviction in the last ten years for the unlawful possession or use of a firearm. Given the nature of the industry, Collectives have chosen to and, by the Regulatory Ordinance, are required to have onsite security personnel to monitor the operations and security of the operations. Allowing an individual who has been convicted for the misuse of a firearm to participate in the cultivation, processing, manufacturing, transporting or dispensing of medical marijuana is not in the interest of the City, the Collective, or the public. As a result, the Administration is recommending the addition of such a crime to the list of disqualifiers.

In addition, the Administration is recommending that any owner, manager or individual participating in the cultivation, processing, manufacturing, transporting or dispensing of medical marijuana who has a conviction for one of the above crimes, where the Police Department has determined the crime would result in a Collective being disqualified from the registration process, be entitled to an appeal of that determination and request an administrative hearing before the Chief of Police.

Chemical Extraction of THC

Currently, the Regulatory Ordinance prohibits the processing of medical marijuana in violation of California Health and Safety Code Section 11379.6, which prohibits the manufacture by chemical extraction or chemical synthesis. Interpretation of this state law provision varies. Under the strict use of the term "chemical," H₂O (ordinary water) is considered a chemical and Collectives would be prohibited from using water to extract THC from medical marijuana. In addition, the use of Carbon Dioxide (CO₂) in the extraction of THC would also be prohibited. However, according to the City's Fire Department and the National Fire Protection Association's rating, CO₂ rates as follows: flammability = 0, health = 1 and reactivity = 0. A zero rating is defined as, "material that on exposure under fire conditions would offer no hazard beyond that of ordinary combustible materials" and a rating of 1 is defined as, "materials that on exposure under fire conditions could cause irritation or minor residual injury." As such, the Administration is proposing a change to the Regulatory Ordinance that would prohibit the extraction or refinement of THC from medical marijuana by way of a solvent-based extraction method utilizing compressed flammable gases or alcohol. All other extraction methods would still be subject to state law prohibitions, but the City would not enforce these prohibitions.

Paraphernalia Used For Ingestion of Medical Marijuana

Currently, the Regulatory Ordinance prohibits any paraphernalia from being allowed on the Collective's premises. The intent of the prohibition was to assist the Administration in enforcing another provision of the ordinance that prohibits on-site consumption of medical marijuana. However, Collective members are now required to visit separate locations, such as head shops, to purchase the mechanism they would need to ingest the medical marijuana. The Administration will continue to enforce the prohibition against on-site consumption but is proposing that the Regulatory Ordinance be amended to prohibit Collectives from having on their premises

paraphernalia used for the ingestion of any type of controlled substance that is not medical marijuana.

Water Used Shall Be Legally Obtained and Applied

Given the current drought the City, County and State are experiencing and the history of some cultivators of medical marijuana engaging in the illegal diversion of water to cultivation their grow sites, the Administration is recommending language be added to the Regulatory Ordinance which would require that all water used in the cultivation of medical marijuana be legally obtained and applied in accordance with state and local laws. This provision would apply to Collectives as well as to qualified patients and qualified caregivers cultivating for personal use.

Personal Use Cultivation

In recent months, the Administration has experienced an increase in complaints from residents living adjacent to homes where medical marijuana is being cultivated by an individual, both in the backyard and within the residence. To address this issue, the Administration is recommending that cultivation at a residence for personal use be limited to indoor cultivation and to a space of 50 square feet. The limitation to indoor cultivation is consistent with how Collectives must operate and allows for consistency of cultivation and enforcement throughout the City. The recommended square footage is also consistent with the limitation recently approved by Santa Clara County and allows for ease of enforcement. In addition, according to studies by the County, "Limiting the area of indoor cultivation to 50 square feet is necessary because the lights and electricity required by cultivation areas larger than 50 square feet are likely to exceed the wattage supported by a typical household light and receptacle circuit, thereby creating an unreasonable risk to public health, safety, and welfare and a public nuisance through the hazard of fire and overloading of circuits." Also worth noting, limiting the space within which an individual can cultivate in his or her home does not preclude the individual from also acquiring medical marijuana from Collectives in the City or anywhere else where it is legal to do so.

Under the State's MMRSA, the space allowed for personal-use cultivation is as follows: up to 100 square feet for a qualified patient; and, up to 500 square feet for a primary caregiver, that can grow medical marijuana for up to five qualified patients. However, the state's limitations were crafted to meet needs in a wide array of regions, both urban and rural. In fact, the MMRSA expressly allows cities to regulate personal use cultivation more strictly, including banning it. In this instance, the Administration's recommendation is crafted to meet the needs of our city and ensure consistency countywide.

(b) Division of Medical Marijuana Control

The regulation of medical marijuana is complex and continues to evolve. Under the City's Program, Collectives have until December 18, 2015 to be registered with the City, and there is a chance that all 19 remaining may not make that deadline. In addition, the State recently passed three bills to regulate the medical marijuana industry but the regulations required by those bills

won't be in place any time before the year 2018. Also, the County recently approved its own ordinance regulating cultivation in unincorporated areas of the County. It is within this landscape that the Administration is charged with tracking and regulating the operations of Collectives in the City. At this time, the Administration recommends it return to the Council by March 2016 to propose a staffing model for the further regulation of medical marijuana. This will allow the Administration time needed to fully explore the need to consolidate staff into a single Division or Office of Medical Marijuana Regulation. The Administration will also review best practices from other cities, analyze the gaps in the current staffing model, and assess models from other regulated industries (such as the City's Division of Gaming Control). Finally, the Administration's recommendation will also take into account the fact that regulations under the State's program are years away from being developed, the need for the City to engage with the State as those regulations are put into place, and that local jurisdictions are ultimately tasked with enforcing those regulations once they are in place.

CONCLUSION

For the reasons outlined above, the Administration recommends the Council approve the changes the Administration is proposing. Said changes will provide those Collectives that are working their way towards registration with the City with greater flexibility and opportunity for success once they have become registered with the City. In addition the proposed changes will provide the City with the tools necessary to fully track industry operations and require the industry to operate responsibly. Lastly, the proposed changes will help the Administration address community concerns regarding personal use cultivation occurring in backyards and in private residences.

EVALUATION AND FOLLOW-UP

Following the December 18, 2015 deadline for Collectives to register with the City, the Administration will issue an information memorandum informing the Council of the Collectives that successfully registered. Thereafter, the Administration will return to the Council with recommendations on the creation of a Division of Medical Marijuana Control that will be based on the number of Collective that achieved registration.

POLICY ALTERNATIVES

Alternative #1: Do not approve ordinance as recommended by the Administration

Pros: Once registered, Collectives will be limited to dispensing only that medical marijuana which they have cultivated and which they were able to manufacture at their dispensing location. They will not be able to share product with other registered Collectives within the City of San José and they will be limited to manufacturing products from their dispensing location, in the City of San José. In addition, persons cultivating at their residence will not be limited to indoor cultivation or a specific square footage in their residence.

Cons: Many Collectives have raised a concern that they will not have enough product to meet the demands of their patients if they can only dispense what they cultivate and manufacture or if they are limited to manufacturing at their dispensing location.

Reason for not recommending: The Administration supports successful implementation of the City's Program. Approving the recommended ordinance will assist in the Program's success.

PUBLIC OUTREACH

Since the May 19, 2015 Council meeting, the Administration has attended all STI's for the Collectives and had numerous meetings and discussions with the Collectives that remain in the registration process. In addition, on October 22, 2015, the Administration held a group meeting with the Collectives that remain in the process towards registration and/or their representatives to discuss next steps and the Collectives' ability to comply with the City's Program. Further, this memorandum will be posted on the City's Council Agenda website for the December 1, 2015 Council Meeting as well as on the City's Medical Marijuana website at www.sanjoseca.gov/medicalmarijuana.

COORDINATION

This memorandum has been coordinated with the Department of Planning, Building and Code Enforcement, the Fire Department, the Police Department, the Finance Department, and the City Attorney's Office.

COST SUMMARY/IMPLICATIONS

No cost implications are anticipated as a result of the actions outlined above. Collectives would still be required to come into compliance with the City's Program by December 18, 2015, which requires payment of the Medical Marijuana Annual Operating Fee to the City.

CEQA

Negative Declaration (ND) File Number PP11-039, adopted on June 15, 2011 and addenda thereto (File Numbers PP11-076 and PP14-030).

/s/
ANGELIQUE GAETA
Assistant to the City Manager

For questions, please contact Angelique Gaeta, Assistant to the City Manager, at (408) 535-8253.