



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Angelique Gaeta
Joseph Horwedel
Christopher Moore

SUBJECT: MEDICAL MARIJUANA

DATE: September 13, 2011

Approved

Date

9/2/11

COUNCIL DISTRICT: City-Wide
SNI: All

RECOMMENDATION

- (a) Adoption of a resolution to adopt the Negative Declaration prepared for the Medical Marijuana Regulatory Program, File No. PP11-039, as having been completed in compliance with the California Environmental Quality Act and reflecting the City's independent judgment and analysis and finding that adoption of the proposed ordinances will not result in a significant effect on the environment; and
- (b) Approval of an ordinance of the City of San Jose amending Title 20 of the San Jose Municipal Code to establish land use regulations pertaining to Medical Marijuana Collectives and to establish a Zoning Verification Certificate process; and
- (c) Approval of an ordinance of the City of San Jose amending Title 6 of the San Jose Municipal Code to add a new Chapter 6.88 to establish a registration process pertaining to Medical Marijuana Collectives; and, to establish regulations pertaining to Medical Marijuana Collectives and to the individual cultivation and use of medical marijuana.

OUTCOME

Adoption of the proposed environmental clearance and approval of the proposed ordinances would result in the establishment and implementation of a Medical Marijuana Regulatory Program, together with related sitting criteria, as more fully set forth below.

BACKGROUND

On April 1, 2011, the City's Administration issued a memorandum to the City Council proposing a complete Medical Marijuana Regulatory Program (Program) which would enable the City of

September 13, 2011

Subject: Medical Marijuana

Page 2 of 15

San Jose to regulate Medical Marijuana Collectives (Collectives) operating within the City limits. In that memorandum, the Administration recommended the following to the Council:

- (a) Adoption of a resolution to initiate proposed amendments to Title 20 of the San Jose Municipal Code to establish land use regulations pertaining to Collectives and to establish a Zoning Verification Certificate process; to forward these proposed amendments to the Planning Commission for its report and recommendation; and, to set a public hearing date on these proposed amendments before the Council;
- (b) Approval of an ordinance amending Title 6 of the San Jose Municipal Code to add Parts 1, 2 and 3 of a new Chapter 6.88 to establish a registration process pertaining to Collectives;
- (c) Approval of an ordinance of the City of San Jose amending Title 6 of the San Jose Municipal Code to add Parts 4 through 9 of a new Chapter 6.88 to establish regulations pertaining to Collectives and to the individual cultivation and use of medical marijuana;
- (d) Direction to the Administration to issue a Manager's Budget Addendum (MBA) to establish an appropriate FY 2011-2012 staffing plan; amendments to the Schedule of Fees and Charges to include an Annual Operating Fee; and, amendments to the Schedule of Fines, to be considered as part of the Mayor's June Budget Message; and,
- (e) Adoption of a resolution to amend the Adopted 2010-2011 Schedule of Fees and Charges Resolution to add a Collective Application Process Fee at \$4,182 per Collective and to add a Medical Marijuana Investigation Hourly Fee at \$126 per hour.

On April 15, 2011, the City Attorney issued a supplemental memorandum recommending parts (b) and (c) of the Administration's recommendations be amended to: (1) include a definition for medical marijuana sales that was consistent with the District Attorney's Draft Medical Marijuana Protocols; and, (2) delete the list of things that could be considered as "overhead expenses" for a Collective so that salaries were not excluded from those expenses. The City Attorney also clarified that medical marijuana products such as baked goods, lotions and ointments were not prohibited by the ordinances proposed in parts (b) or (c) of the Administration's recommendation. In addition, the City Attorney indicated that the on-site cultivation requirement set forth in parts (b) and (c) of the Administration's recommendations addressed public safety concerns of law enforcement and the District Attorney and it was the City Attorney's recommendation that the requirement not be removed from the proposed ordinances.

On April 19, 2011, at its general meeting, the Council considered the Administration's recommendations, as amended by the City Attorney, and took the following action.

With regard to the Administration's recommendation "(a)", Council initiated an ordinance (hereinafter referred to as "the Land Use Ordinance") and referred that ordinance to the Planning Commission for its report and recommendation. The Land Use Ordinance initiated by the Council was consistent with the Administration's recommendations, with some modifications. Specifically, those modifications included the memorandum from Mayor Reed, dated April 11, 2011, which was approved by Council as follows:

- (1) The locations where Collectives could be permitted would be limited to parcels zoned Commercial General, Downtown Primary Commercial, Combined Industrial Commercial and Light Industrial; and
- (2) Collectives must comply with the California Assembly Bill (AB) 2650 distance requirements for schools; and, the same distance requirements as are currently required in the City for liquor stores and for all other sensitive uses, as follows:
 - 600 feet from Public and Private Schools; and
 - 500 feet from child daycare facilities, churches with child daycare facilities, community/recreation centers, parks, libraries, substance abuse rehabilitation centers and other Collectives; and
 - 150 feet from residential uses; and,
 - No Collective shall be allowed to locate in ground floor establishments in pedestrian areas such as Downtown or in areas intended to have high pedestrian traffic, including but not limited to major shopping malls (i.e. The Plant, Oakridge, Eastridge, etc.).
- (3) Additional criteria should be added to the approval process at the discretion of the Director of Planning to protect the Light Industrial Districts;
- (4) Zoning Verification Certificates would be the mechanism used to approve the land use;
- (5) No off-site cultivation of medical marijuana would be permitted; and
- (6) A maximum of ten (10) Collectives would be allowed to operate in the City, with no more than two (2) per Council District.

With regard to the Administration's recommendations "(b)" and "(c)" (hereinafter referred to as "the Regulatory Ordinance"), Council approved the Administration's recommendations, as modified by Vice Mayor Nguyen's memorandum, dated April 15, 2011, which provided:

- (1) A maximum of ten (10) Collectives would be allowed to operate in the City, with no more than two (2) per Council District;
- (2) The City would select the 10 Collectives based on a rigorous registration, "first-come, first-served" approach, with Collectives being required to submit applications to register as one of the 10 Collectives allowed by a deadline set by staff; and, the order for consideration of the applications being based on each application's time stamp;
- (3) The Collectives would be given 30 days notice of the date and time set for them to submit applications to register;
- (4) No off-site cultivation of medical marijuana shall be permitted;
- (5) Each Collective would be required to have twenty-four (24) hour security;
- (6) No person with a prior felony or misdemeanor conviction could be engaged in the actual cultivation of medical marijuana, or the management or ownership of the Collective;
- (7) The category of medical marijuana uses allowed would be expanded to allow edibles, ointments and other non-smoke based medical marijuana products, with all distribution of food products complying with Santa Clara County's health regulations; and

- (8) The supplemental memorandum from the City Attorney, dated April 15, 2011, is approved.

With regard to the Administration's recommendation "(d)", Council adopted the recommendation and requested that the Administration circulate an informational memorandum on the process and the implementation schedule for the Program.

With regard to the Administration's recommendation "(e)", Council adopted the Administration's recommendation with no amendments.

DEVELOPMENTS SINCE THE APRIL 2011 COUNCIL MEETING

Since the Council's meeting on April 19th, a number of events have occurred that the Administration believes may impact the Council-initiated Land Use Ordinance and the Council-approved Regulatory Ordinance. All events and the Administration's discussion of the same are laid out below.

The District Attorney Updates Draft Protocols Regarding Sales & The Manufacturing of Medical Marijuana Products

Following the April 19th meeting, the Administration received a copy of the District Attorney's Draft Medical Marijuana Protocols (Draft Protocols) which had been updated to delete the allowance for medical marijuana "sales" and replace it with medical marijuana "transfers." The Draft Protocols were also updated to include provisions regarding the manufacture of medical marijuana so that the manufacture must occur within the Collective (to maintain a closed-loop system) and must not occur in violation of the state's Health and Safety Code. The Draft Protocols were reviewed by the City Attorney's office for analyses regarding the updates. Specifically, the Administration was concerned with how those changes might impact the definitions set forth in the Regulatory Ordinance and/or Council's direction that the Regulatory Ordinance be amended to allow for the use of manufactured medical marijuana products, such as edibles and ointments.

Informational Memo Regarding Program Implementation

Consistent with Council's adoption of the Administration's recommendation "(d)", on April 21st and again on May 13th, the Administration provided Council with memoranda to provide a timeline and information about the next steps related to the establishment and implementation of the Program.

Manager's Budget Addendum To Establish Staffing Plan, Fees and Fines

Further consistent with Council's adoption of the Administration's recommendation "(d)", on May 27th, the Administration brought forward a Manager's Budget Addendum (MBA) to establish an appropriate FY 2011-2012 staffing plan for the Program as well as amendments to the Schedule of Fees and Charges and Schedule of Administrative Fines. This MBA was considered by Council on June 14th and approved as part of the Mayor's June Budget Message.

The Planning Commission's Review - Environmental Clearance, The Land Use Ordinance and The Regulatory Ordinance

On June 22nd, as required by the San Jose Municipal Code and per the Council referral of the Land Use Ordinance to the Planning Commission for its report and recommendation, the Commission conducted a public hearing to consider the ordinance. On that date, the Commission heard public testimony, discussed parts of the Land Use Ordinance, and requested additional information be submitted by the Administration, particularly regarding the Regulatory Ordinance, prior to the Commission making its final recommendations to Council.

On July 13, the Commission heard a presentation from the Planning Division of the Department of Planning, Building and Code Enforcement, the Police Department, and the City Attorney's Office regarding the proposed environmental clearance and both the Land Use and the Regulatory Ordinances. For a discussion on environmental clearance, please refer to the CEQA section of this memorandum set forth below. With regard to the ordinances, the Administration presented the Commission with the Council's direction on both. The Commission then heard public testimony and engaged in a dialogue with the Administration. After the discussion, the Commission was prepared to make its recommendation; however, because the public was previously informed that the Commission's recommendation would occur on July 27th, the Commission continued the hearing to that date to make its recommendation.

On July 27, the Commission heard additional public testimony then made its recommendations. With regard to the environmental clearance, please refer to the CEQA section of this memorandum. With regard to the Land use Ordinance, the Commission gave those recommendations set forth below. Finally, although outside of the land use purview of the Commission, the Commission provided recommendations to the Council regarding the Regulatory Ordinance. Specifically, the Commission made recommendations regarding the maximum number of Collectives that could operate in San Jose, the off-site cultivation of medical marijuana, and the process by which Collectives would become registered with the City.

ANALYSIS

For ease of discussion, attached as "Exhibit A" to this memorandum is a table providing a side-by-side comparison between the Council-initiated Land Use Ordinance and the Council-approved Regulatory Ordinance, the Planning Commission's recommendations of July 27th, and any further recommendations by the Administration. A separate memorandum from the Planning Commission, dated August 29, 2011 and detailing the Commission's recommendations from July 27th, has been forwarded to the Council under separate cover.

For a better understanding of Exhibit A, the contents contained therein are more fully discussed below, beginning with an analysis of the Land Use Ordinance and ending with an analysis of the Regulatory Ordinance. Additionally, the Administration has previously prepared and provided to Council comprehensive reports regarding the specifics of the Program. These specifics were presented to Council in several memoranda in June and December of 2010 and again in April of 2011. For a complete understanding of the Program, the Administration urges the Council to consider those reports in conjunction with its review of this memorandum. Those reports can be

easily accessed and found on the City's Medical Marijuana website located at:
<http://www.sanjoseca.gov/medicalmarijuana.asp>.

The Land Use Ordinance (*Where Should Collectives Locate?*)

Before proceeding through a discussion of the Land Use Ordinance, it is important to note that the Administration has reviewed and considered the Planning Commission's recommendations regarding the same. However, as explained below, based on the Administration's prior analyses provided to the Council regarding land use considerations for Collectives and based on the Administration's consideration of Council's action on April 19th, the Administration's current recommendations are very similar to Council's Land Use Ordinance. Moreover, any refinements to the Land Use Ordinance being recommended by the Administration are only intended to facilitate its implementation in a manner that is consistent with the Council's action.

Zoning Districts:

The Land Use Ordinance initiated by Council specifies that permitted Collectives be located in the Commercial General (CG), Downtown Primary Commercial (DC), Light Industrial (LI) and Combined Industrial Commercial (CIC) Districts. The Planning Commission recommended those zones be expanded to also include: Commercial Pedestrian (CP), Commercial Office (CO), Commercial Neighborhood (CN), Heavy Industrial (HI) and Industrial Park (IP). This recommendation by the Commission would result in all non-residential Districts permitting Collectives. The Administration recommends the zoning districts remain as initiated by Council on April 19th for two reasons. First, they provide reasonable opportunities for Collectives that balance considerations such as land use compatibility with the need to preserve employment lands. Second, they are based on the deliberations of Council in June and December of 2010 and again in April 2011.

Distance Requirements:

The Land Use Ordinance initiated by Council also provides that Collectives shall comply with AB 2650's distance requirements for schools; and, that Collectives shall comply with the same distance requirements as are currently required for liquor stores and for all other sensitive uses, as follows:

- 600 feet from Public and Private Schools;
- 500 feet from child daycare facilities, churches with child daycare facilities, community/recreation centers, parks, libraries, substance abuse rehabilitation centers and other Collectives; and
- 150 feet from residential uses

The Planning Commission recommended the distances be expanded to 1,000 feet from all of the above-mentioned uses, with the exception of substance abuse rehabilitation centers and residential uses, which the Commission recommended should remain at a minimum of 500 feet and 150 feet, respectively and as measured property line to property line.

In considering the Commission's recommendations, the Administration revisited its prior studies supporting its prior recommendations as well as Council's direction on April 19th. The Administration recommends that the Council-initiated distance requirements remain for two reasons. They provide a reasonable opportunity for Collectives within San Jose that balances considerations such as land use compatibility with the preservation of employment lands. And, they are based on the deliberations of the Council at its meetings in June and December 2010 and in April 2011.

Pedestrian Area Restrictions:

The Council-initiated Land Use Ordinance provides that no Collective shall be located on the ground floors of buildings with active pedestrian use. The Planning Commission recommended that Collectives not be allowed to locate on the ground floor of buildings within the Commercial Pedestrian (CP) and Downtown Primary Commercial (DC) zoning districts.

In attempting to capture Council's intent for a clear and unambiguous standard and, for ease of implementation, the Administration is recommending the Land Use Ordinance be amended to include language which would prohibit Collectives from locating on the ground floor of buildings within the CP and DC zoning districts; **and**, which would prohibit Collectives from locating on all floors of shopping centers located on a parcel or parcels totaling over 40 acres in size. By way of example, such centers would include Eastridge Mall, the Plant, Oakridge Mall, and other similarly-sized shopping centers. The Administration believes these refinements meet the intent of Council's action on April 19th with a clear definition and standard that can be easily understood by Collectives as they seek potentially appropriate locations from which to operate.

Additional Criteria for Light Industrial Parcels:

With regard to Light Industrial parcels, Council directed the Administration to include in the approval process for the Land Use Ordinance language that would give the Director of Planning discretion to protect the Light Industrial areas. However, in light of the ministerial method of the Zoning Verification Certificate included in the Land Use Ordinance, it is critical that Council's intent to protect Light Industrial areas be implemented in a clear "yes/no" approach. Accordingly, during its presentation to the Planning Commission in July 2011, the Administration suggested specific criteria, rather than open ended discretion, be used to evaluate the proper location for Collectives which would protect Light Industrial areas. These criteria were as follows: (1) no Collective be allowed to locate within an Enterprise Zone or other incentive zone and (2) no Collective be allowed to locate within 1,000 feet of businesses that use and/or store hazardous materials.

The Administration recommended Collectives not be permitted to locate within an Enterprise Zone because such zones are areas determined by the State, upon application by a City, to be economically depressed and in need of business investments to stimulate growth. In return for private businesses locating in such areas and spurring job growth, the State offers significant tax benefits such as hiring tax and sales and use tax credits. By prohibiting Collectives from locating in these areas, potential employment lands are preserved for future use. The recommendation to include "other incentive zones" was based on the Administration's

recognition that the City might have an opportunity to create other zones (e.g., geographically based Foreign Trade Zones).

With regard to the recommendation that no Collective be located within 1,000 feet of businesses with hazardous materials, the Administration made this recommendation because Light Industrial areas contain many businesses that use and/or store hazardous materials. The introduction of sensitive receptors (in this case, members of a Collective) within 1,000 feet of such businesses could require those businesses to implement costly safety measures to ensure their use/storage of hazardous materials will not have a negative impact on the Collective membership.

Following the Administration's recommendations above, the Planning Commission agreed with the inclusion of both criteria in the Land Use Ordinance. However, the Administration has since learned that there is no publicly available database identifying businesses that use or store hazardous materials, which would negate any ease of implementation based upon this criterion. For this reason, the Administration is now recommending that to protect Light Industrial areas, the Land Use Ordinance be amended to include language prohibiting Collectives from locating within an Enterprise Zone or other incentive zone. These areas are easily identifiable on the City's website and will allow staff to make a simple yes/no determination during the Zoning Verification Certificate review process.

Zoning Verification Certificate:

The Land Use Ordinance as initiated by Council includes a Zoning Verification Certification process. The Planning Commission recommended that process remain in the Land Use Ordinance.

The Regulatory Ordinance (Who Will Operate? How Will They Operate?)

As with the Land Use Ordinance, before proceeding through a discussion of the Regulatory Ordinance, it is important to note that the Administration has reviewed and considered the Planning Commission's recommendations. However, as explained below, based on the Administration's prior analyses regarding regulatory considerations for Collectives and based on the Council's action of April 19th, the Administration's current recommendations are very similar to the Regulatory Ordinance approved by the Council. Moreover, any refinements to the Regulatory Ordinance currently being recommended by the Administration are only intended to facilitate its implementation in a manner that is consistent with the Council's action and that is compliant with state law.

Maximum Number of Collectives:

Council approved the Administration's recommendation for a maximum of ten (10) Collectives in San Jose and expanded that requirement to provide that there shall be no more than two (2) Collectives per Council District. Although this issue is outside the purview of the Planning Commission, the Commission recommended increasing the numbers to a maximum of twenty-five (25) Collectives in the City, with no more than three (3) per Council District. The Administration has reviewed and considered the Commission's recommendations and revisited

the concerns laid out in the Administration's previous memoranda to the Council. Those concerns include, but are not limited to:

- Regulation of Collectives has not previously been undertaken by the City;
- This particular area of regulation poses significant health and safety risks;
- Regulating 10 Collectives has been evaluated and estimated to be manageable based on the staffing plan constructed;
- Currently there are significant limitations on City resources;
- The Program, as proposed, would allow for full cost recovery;
- There is a serious need to evaluate the operations of Collectives once the Program has been implemented and the Collectives are operating under the Program to understand the true need of the medical marijuana community; and
- The Administration can return to Council to expand or restrict the Program, if necessary.

In light of the above concerns and the Council's reasoning on April 19th, the Administration recommends no change to the numbers approved by Council.

Registration (First-Come, First-Served)

Council did not approve the registration lottery process recommended by the Administration on April 19th. Instead, the Council preferred and approved a first-come, first-served approach to registration. The lottery process recommended by the Administration allowed all Collectives to submit a one-page form to the City Manager indicating their desire to register as a Collective in the City and identifying the Collective's owners and managers. Once all the forms were received by the City Manager, they would be reviewed to ensure all owners and managers passed a criminal background check. Those Collectives with owners and managers that passed a criminal background check were then allowed to proceed through the registration process. To then determine the order in which those Collectives' applications would be considered, the City Manager would hold a lottery. The names of Collectives would then be drawn. The Collective's name that was drawn first would be the Collective whose application would be reviewed first, and so on. Once that order was determined by the lottery, Collectives would submit full applications to register to the City Manager for review and determine whether the Collective was actually qualified to operate in the City.

In contrast and per Council direction, the Regulatory Ordinance has been updated to reflect a first-come, first-served approach. Accordingly, on a date and time established by the City Manager, all Collectives interested in registering with the City can submit an application to register. To ensure Collectives receive adequate notice of the date established to submit applications, 30 days in advance of the established date, the City will post on the City's website, and in a daily newspaper of general circulation, the specific date, time and place for applicants to submit their applications. On the date specified, Collectives can line up and submit their applications to register. Upon the City's receipt of each application, the City will time-stamp the application and provide the applicant with a "priority number." The priority number will determine in which order the application was received, which will then be the order in which it will be reviewed. If challenges are made as to which applicant was first-in-time, the City will

look to the time stamp placed on each application to make the final determination. If during review of the application, the City identifies grounds for disqualification from the registration process, the City will move to the application carrying the next priority number in line and review that application for qualification and registration.

Although the process by which Collectives become registered is not a land use issue, the Commission recommended that upon the Council's approval of a land use ordinance, a moratorium should be in place to prevent new Collectives from opening. The Commission also recommended:

1. All operating Collectives should obtain a "Zoning Verification" from the Planning Department within 30 days of the approval of a land use ordinance;
2. Within 60 days of said approval, the City should post an application on line and Collectives should submit applications;
3. Only the first 45 applications received by the City should be considered;
4. Applicants should be able to operate while their applications are pending, so long as they operate within the guidelines and pay a prorated monthly licensing fee; and
5. As soon as thereafter possible, the City Manager should conduct an RFP process and rank the top 25 Collectives.

Off-site Cultivation of Marijuana:

Council approved the Administration's proposal to limit the Collectives to on-site cultivation of medical marijuana. Again, although not a land use issue, the Planning Commission recommended off-site cultivation be permitted provided that it remained within the City of San Jose. The Administration has reviewed and considered the Commission's recommendations. In addition, the Administration has revisited its prior concerns regarding off-site cultivation. Those concerns include, but are not limited to:

- The need to limit the number of locations which might attract criminal activity;
- The need for a closed-loop system to trace product origination in the event of a health scare; and
- The Police Department's ability to monitor the Collective's operations, including cultivation and distribution

In light of the above, the Administration recommends no change to Council's action.

Security:

Council approved the Administration's recommendation regarding required security. As such, no change to the Regulatory Ordinance was needed. The purpose in raising the issue here is to address all points of direction that came from Council on April 19th.

Individuals With Criminal Convictions Participating in the Grow of Medical Marijuana or the Management or Ownership of the Collective:

The Regulatory Ordinance as originally proposed by the Administration included language prohibiting Collectives from allowing members with criminal records to manage or have an ownership interest in the Collective. Per Council direction, that language has been expanded to include any member involved in the actual grow activities for the Collective.

Alternative Delivery Systems (Edibles, Ointments and Oils):

Council approved expanding the category of allowed medical marijuana uses to include edibles, ointments and other non-smoke based medical marijuana products. In drafting language to capture Council's intent, the Administration was presented with several questions: (1) how those products would be manufactured (2) where and by whom they would be manufactured and (3) where they could be consumed. In attempting to answer those questions, the Administration reviewed the Draft Protocols from the District Attorney's office and the California Health & Safety Code.

The District Attorney's office updated its Draft Protocols to include a discussion on the manufacture of medical marijuana products. That discussion provided that,

"None of the laws related to medical marijuana authorize the manufacture of products containing marijuana or marijuana concentrates for wholesale distribution...Individuals or businesses who manufacture such products are outside the protections of the [Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA)]."

The Draft Protocol also provided that Collectives that purchase products containing marijuana from wholesalers to retail to the Collective's members are violating the CUA and the MMPA.

The City Attorney then offered guidance on Health & Safety Code Section 11379.6. That Section prohibits the use of chemical extraction or chemical synthesis in the manufacturing of marijuana. Accordingly, the manufacture of edibles, ointments and oils by way of a natural process – e.g., pressing the leaves to extract the oils from the plant or folding the leaves into food products to be consumed – would not be prohibited.

Taking Council's direction, the District Attorney's position and the Health and Safety Code's language into consideration, the Administration recommends the Regulatory Ordinance be updated to provide that the manufacture of medical marijuana into edibles, ointments, oils or any other product is not prohibited provided it is done in compliance with California's Health and Safety Code Section 11379.6. Additionally, the Administration recommends that the Regulatory Ordinance be updated to provide that the distribution of medical marijuana products not manufactured on-site by the Collective membership is prohibited. Finally, with regard to the on-site consumption of medical marijuana, the Regulatory Ordinance as originally approved by the Council prohibited the same, regardless of how or in what form the marijuana was consumed. Accordingly, the Administration recommends no change to this part of the Regulatory Ordinance.

Although not a land use issue, the Planning Commission recommended that alternative "delivery systems" such as "balms, salves, and lotions" be allowed uses at the Collective. Under the changes proposed to the Regulatory Ordinance, those delivery systems would not be prohibited.

Medical Marijuana Sales:

As approved by Council, the Regulatory Ordinance included a definition for "Medical Marijuana Sales" that, at the time, was consistent with the District Attorney's position regarding the sale of medical marijuana. The District Attorney has since amended its Draft Protocols so that there is no longer a provision for medical marijuana sales. Instead, the Draft Protocols now refer to medical marijuana transfers. The Administration recommends tracking the change and updating the Regulatory Ordinance to replace the definition of "Medical Marijuana Sales," with "Medical Marijuana Transfers." The Administration believes this change will help to clarify the type of transactions not prohibited under the Program so that Collectives can better comply with the Program requirements. Those requirements include, but are not limited to the Collective needing to engage in record keeping regarding the transactions that occur at the Collective. Specifically, under the Program, Collectives are required to keep an up-to-date log documenting each transfer of medical marijuana including the amount provided, the date provided, the time provided and the member to whom it was provided.

Personal Use Cultivation:

As approved by Council, the Regulatory Ordinance calls for the regulation of Collectives (defined as groups of 4 or more qualified patients and primary caregivers) and individuals (either a qualified patient or a primary caregiver) cultivating marijuana for medical purposes. In updating the original Regulatory Ordinance the Administration realized that there was a gap in the regulations such that only single individuals and groups of 4 or more were subject to regulation. The Regulatory Ordinance was completely silent as to groups of 2 and 3. To fill this gap, the Administration recommends expanding the definition of "Personal Use Cultivation" to include groups of 2 and 3. Accordingly, groups of 2 and 3 would now be subject to the same regulations as individuals. As "Personal Use Cultivation" was originally intended to serve a small number of individuals who are cultivating within their own homes, the Administration felt the provisions there under were sufficient to also regulate groups of 2 and 3.

Implementation of the Medical Marijuana Program:

In revisiting the Regulatory Ordinance to address the aforementioned issues, the Administration realized that one of the grounds for disqualifying a Collective from registering with the City was the Collective's failure to comply with all requirements of the San Jose Municipal Code. One of those requirements is that the Collective not operate unless and until it has successfully registered as a Collective. In practice, this requirement could effectively disqualify every Collective that is operating prior to Program implementation from subsequently registering with the City. The Administration believes it is not the Council's intent to disqualify Collectives from the registration process based solely on the Collective's failure to register with the City prior to the Program being operational. As such, the Administration recommends updating the Regulatory Ordinance to clarify that although compliance with all laws is required, a Collective will not be disqualified from the registration process solely on the basis that it was in operation prior to the Program's implementation. A Collective can, however, still be disqualified for its failure to comply with all other requirements prior to the implementation of the Program, including, but not limited to the Collective's failure to pay required fees and taxes to the City.

For the reasons set forth above, the Administration recommends adoption of the proposed environmental clearance and approval of the proposed ordinances, with the changes reflected in this memorandum. Together, the proposed Land Use Ordinance and Regulatory Ordinance create a complete Medical Marijuana Regulatory Program that is comprehensive and the result of over a year-long collaboration to address the concerns of the Council, City staff and the medical marijuana community.

EVALUATION AND FOLLOW-UP

As noted in previous reports from the Administration, Program evaluation is integrated into the proposals and any amendments to the ordinances that the Administration believes are necessary following Program evaluation will be formally presented to the City Council for review and approval.

At this time, the Administration is aware that some Collectives continue to believe that a cap on the number of Collectives that can locate within the City is not necessary. Some Collectives also disagree with the requirement that all cultivation of medical marijuana remain on-site. While the Administration will continue to work with the Collectives during Program implementation to address their concerns, in the event that any Collective remains dissatisfied with a component of the Program and challenges the legality of that component in a court of law, the Administration will work with the Council to explore other options available to the City. Those options will include, if necessary, a ban on Collectives while the Council determines whether it wants to continue to expend City resources on developing a Program that is ultimately acceptable to every Collective.

PUBLIC OUTREACH/INTEREST

As stated in the Administration's April 1, 2011 and December 13, 2010 memoranda, this issue falls under the Community Engagement Policy established by the City Council. Community outreach has been conducted to obtain input. At the February 2011 Rules and Open Government Committee meeting, the Administration noted that no additional outreach would be conducted. The proposed ordinances for the Program are posted on the Clerk's agenda webpage and a separate website has been developed that provides an inventory on all materials published by the City during the course of its consideration of this Program.

COORDINATION

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

CEQA

For the following reasons, the Director of Planning recommends that the City Council adopt a resolution adopting the Negative Declaration prepared for the Medical Marijuana Program (File No. PP11-039) as having been completed in compliance with the California Environmental

September 13, 2011

Subject: Medical Marijuana

Page 14 of 15

Quality Act (CEQA), reflecting the City's independent judgment, and finding that adoption of the proposed ordinances will not result in a significant effect on the environment.

On May 23, 2011, the Director of Planning, Building and Code Enforcement circulated an Initial Study/Draft Negative Declaration (available at <http://www.sanjoseca.gov/planning/eir/MND.asp>) for a 21-day public review and in conformance with the requirements of CEQA,. The original project covered by the study is the Council-initiated Land Use Ordinance setting forth land use and zoning regulations for Collectives. An Addendum to the Negative Declaration added the Regulatory Ordinance as also being a covered project under the Initial Study/Negative Declaration, filed under separate cover.

The Initial Study, Negative Declaration, and Addendum for the Land Use and Regulatory Ordinances were prepared and processed in compliance with the requirements of CEQA. Pursuant to the requirements of Title 21 of the San Jose Municipal Code, the Director of Planning reported that, to date, there is no substantial evidence in the public record to support that the project will have a significant effect on the environment. The Negative Declaration has been prepared and processed in a manner that reflects the City's independent judgment and analysis as the Lead Agency.

The Planning Division received one comment letter on the Initial Study/Negative Declaration and prepared a response for the Planning Commission's consideration. That response is available at <http://www.sanjoseca.gov/planning/hearings/PC/2011/Reports/0622/Ord.pdf>.

At the Planning Commission hearings discussed above, the Commission heard testimony from the Collectives' representatives that the combined limited number of Collectives and the requirement for on-site cultivation would result in enormous energy use in "Home Depot" size Collectives. However, as noted at the hearings, these allegations assume and speculate that the City is attempting to accommodate all activities occurring illegally in the City through a limited number of collectives, and the City has never indicated that as a goal with the proposed ordinances. Planning staff reiterated the information contained in the Initial Study that to successfully register with the City, Collectives will need to meet all City Codes and Policies, such as plumbing and electrical, as well as the State requirements around Title 24 for energy use. Such compliance would actually result in an improved environment for the City in terms of energy use and fire safety compared with the current illegal cultivation activities occurring at potentially 150 illegally operating sites without the benefit of building or fire inspections and approvals.

On July 27, 2011, based on the above, the Planning Commission recommended that the City Council adopt a resolution adopting the Negative Declaration for the Program as having been completed in compliance with CEQA and as reflecting the City's independent judgment and analysis.

HONORABLE MAYOR AND CITY COUNCIL

September 13, 2011

Subject: Medical Marijuana

Page 15 of 15

/s/

ANGELIQUE GAETA
Assistant to the City Manager

/s/

JOSEPH HORWEDEL
Director, Planning Building and Code Enforcement

/s/

CHRISTOPHER MOORE
Chief of Police

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

**“EXHIBIT A”
MEDICAL MARIJUANA PROGRAM
Land Use and Regulatory Ordinances**

COUNCIL-INITIATED LAND USE ORDINANCE	City Council Direction	Planning Commission Recommendations	Administration Recommendations
<p>Zoning Districts <i>(Collectives can be located in...)</i></p>	<ul style="list-style-type: none"> • CG-Commercial General • DC-Downtown Primary Commercial • LI-Light Industrial • CIC-Combined Industrial Commercial 	<ul style="list-style-type: none"> • CG-Commercial General • DC-Downtown Primary Commercial • LI-Light Industrial • CIC-Combined Industrial Commercial • CP-Commercial Pedestrian • CO-Commercial Office • CN-Commercial Neighborhood • HI-Heavy Industrial • IP-Industrial Park 	<p>No change from Council direction is recommended.</p>
<p>Distance Requirements <i>(Collectives shall not be located within...)</i></p>	<ul style="list-style-type: none"> • 600 feet of Public and Private Schools (AB2650) • 500 feet of child daycares, churches with child daycare, community/recreation centers, parks, libraries, substance abuse rehab. centers and other Collectives • 150 feet of residential uses 	<ul style="list-style-type: none"> • 1,000 feet from Public and Private Schools, child daycares, churches with child daycare, community/recreation centers, parks, libraries and other Collectives • 500 feet from substance abuse rehab. centers • 150 feet from residential uses 	<p>No change from Council direction is recommended.</p>

COUNCIL-INITIATED LAND USE ORDNANCE	City Council Direction	Planning Commission Recommendations	Administration Recommendations
<p>Pedestrian Area Restrictions <i>(Collectives shall not be located on...)</i></p>	<ul style="list-style-type: none"> Floors of buildings with active pedestrian use 	<ul style="list-style-type: none"> Ground floors of buildings within the CP-Commercial Pedestrian Ground floors of buildings within the DC-Downtown Primary Commercial 	<ul style="list-style-type: none"> Ground floors of buildings within the CP-Commercial Pedestrian Ground floors of buildings within the DC-Downtown Primary Commercial All floors of shopping centers located on a parcel or parcels totaling over 40 acres in size (e.g., Eastridge Mall, the Plant, etc.)
<p>Additional Criteria for Light Industrial Parcels</p>	<p>Administration to return to Council with recommendations</p>	<ul style="list-style-type: none"> No Collectives within the Enterprise Zone or other incentive zones No Collectives within 1,000 feet of businesses that use and/or store hazardous materials 	<ul style="list-style-type: none"> No Collectives within the Enterprise Zone or other incentive zones
<p>Zoning Verification Certificate</p>	<p>Yes</p>	<p>Yes</p>	<p>No change from Council direction is recommended.</p>

REGULATORY ORDINANCE	City Council Direction	Planning Commission Recommendations	Administration Recommendations
Maximum Number of Collectives	<ul style="list-style-type: none"> • 10 Citywide • No more than 2 per Council District 	<ul style="list-style-type: none"> • 25 Citywide • No more than 3 per Council District 	No change from Council direction is recommended.
Registration Process	<ul style="list-style-type: none"> • First-come, first-served • 30 days notice of when applications to register will be received • Order of review of applications determined by time-stamp • Rigorous review of qualifications 	<ul style="list-style-type: none"> • Upon adoption of Land Use Ordinance institute a moratorium to prevent new Collectives from opening • 30 days thereafter, Zoning Verification Certificate must be obtained • 60 days thereafter, City posts an application to register online • Only first 45 applications received will be reviewed • Applicants can operate while applications pending • City Manager conducts RFP process to select the best of the 45 	Administration provided its recommendation in April 1, 2011 report.
Off-Site Cultivation	<ul style="list-style-type: none"> • No off-site cultivation 	<ul style="list-style-type: none"> • Off-site cultivation okay if limited to the City of San Jose 	No change from Council direction is recommended.
Security	<ul style="list-style-type: none"> • Per proposed Regulatory Ordinance 	No recommendation	No change from Council direction is recommended.

REGULATORY ORDINANCE	City Council Direction	Planning Commission Recommendations	Administration Recommendations
Ownership, Management and Grow	<ul style="list-style-type: none"> No person with prior felony can be involved in ownership, management or grow of medical marijuana 	No recommendation	No change from Council direction is recommended.
Alternative Delivery Systems	<ul style="list-style-type: none"> Allow edibles, ointments and other non-smoke based medical marijuana products 	<ul style="list-style-type: none"> Allow balms, salves and lotions 	<ul style="list-style-type: none"> Allow all medical marijuana products provided manufactured on-site and in compliance with Health & Safety Code