



June 9, 2015

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Marin County Board of Supervisors  
3501 Civic Center Drive  
San Rafael, CA 94903

Re: Workshop on Potential Regulation of Medical Marijuana  
Businesses/Dispensaries

Dear Supervisors:

**RECOMMENDATION:** Conduct workshop and provide direction to your subcommittee and staff.

**SUMMARY:** As you are aware, your Board originally appointed a subcommittee of Supervisors Adams and Rice to work with staff in making recommendations on the potential regulation of medical marijuana businesses/dispensaries which are currently illegal in Marin County as a matter of County land use regulation. (See MCC Section 22.01.040H which provides that no use is legal unless it is legal under both state and federal law. Under federal law, marijuana remains a controlled substance that is illegal for any person to possess for any purpose.) More recently the membership of the subcommittee was changed to Supervisors Arnold and Connolly.

The subcommittee and/or staff have held several meetings as well as interviewed numerous potential providers of medical marijuana (and other advocates) and visited several existing dispensaries. In addition, staff has conducted substantial research into the various regulatory models that have evolved in different cities and counties. The current subcommittee determined that of the various ordinances examined, the one adopted in Santa Rosa provided the best "fit" as a model for Marin County. However, prior to making any final recommendations, the full Board should conduct a workshop and provide further direction to the subcommittee and staff.

Before proceeding to a discussion of the latest draft ordinance, a brief overview of the existing State and federal law on medical marijuana should assist in framing the discussion.

### COMPASSIONATE USE ACT

In 1996, California voters adopted Proposition 215 known as the Compassionate Use Act ("CUA"), codified as Health and Safety Code Section 11362.5. The stated purposes of the CUA are:

- To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed

appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief;

- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction; and
- To encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana.

The CUA exempts patients and their "primary caregivers" from criminal liability under state law for the possession and cultivation of marijuana for personal medical use. A qualified patient is an individual who has received a physician's recommendation for the use of marijuana for a medical purpose, and the primary caregiver is someone who has consistently assumed responsibility for the housing, health, or safety of a patient. This limited criminal defense does not extend to those who supply marijuana to qualified patients and their caregivers, and selling, giving away, transporting, and growing large quantities of marijuana remain criminal notwithstanding the adoption of the CUA. It also provides protection to physicians who "recommend" marijuana to qualified patients. Physicians, however, cannot issue a prescription because marijuana is illegal under federal law.

### **THE MEDICAL MARIJUANA PROGRAM**

In 2003, the Legislature adopted the Medical Marijuana Program ("MMP") to clarify the scope of lawful medical marijuana practices. The MMP was intended to:

- Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;
- Promote uniform and consistent application of the CUA among the counties within the state;
- Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
- Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act.

Additional terms were added to the MMP, including "qualified patient," defined as a "person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article." There is also an expanded definition of "primary caregiver," which retains the same language as

that in the CUA, but provides examples of individuals who may act as a primary caregiver, including owners and operators of clinics and care facilities. This definition also added the requirement that a primary caregiver must, with limited exceptions, be at least 18 years of age.

One of the more important aspects of the MMP was its creation of a statewide medical marijuana identification card program, administered by counties. As your board is aware, although participation in this program is voluntary, it allows those patients and primary caregivers to obtain an identification card thereby avoiding arrest for possession, transportation, delivery, or cultivation of medical marijuana. The "amount established pursuant to (the MMP)" is addressed in Section 11362.7 which authorizes possession of up to eight ounces of dried marijuana and no more than six mature or twelve immature marijuana plants per patient or primary caregiver.

The MMP also provided additional narrow immunities to specified individuals for specific conduct related to the provision of medical marijuana to qualified patients. As part of its effort to clarify and smooth implementation of the [Compassionate Use] Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§ 11362.765.) This "range of conduct" is carefully circumscribed, and includes transportation of marijuana by qualified patients for their own personal medical use under §11362.765, subdivision (b)(1). The MMP also immunizes from criminal liability a "designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver." On the "sole basis" of this immunized range of conduct under Section 11362.765, the specified individuals are not subject to criminal liability under the enumerated Health and Safety Code sections relating to marijuana.

A key aspect of the medical marijuana laws is that there is no criminal immunity for commercial or for-profit distribution. Section 11362.765(a) provides "nothing in this section shall authorize any individual or group to cultivate or distribute marijuana for profit." The MMP further provides that a primary caregiver who receives reasonable compensation for actual, out-of-pocket expenses incurred in providing services to a qualified patient "to enable that person to use marijuana under this article" shall not, "on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360."

Lastly –and critical for today's discussion- Section 11362.775 of the MMP provides additional immunities to specific individuals who associate to collectively or cooperatively cultivate medical marijuana: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." Like Section 11362.765, Section 11362.775 authorizes specific conduct

(associating to collectively or cooperatively cultivate marijuana) by specific individuals (qualified patients with or without identification cards and their designated primary caregivers) and provides that, "solely on the basis of that fact," such individuals are not subject to criminal sanction for violation of state marijuana laws. As we now know, the Legislature's use of the phrase "collectively or cooperatively" has led to a large number of medical marijuana collectives and cooperatives throughout the state. And as many commentators have noted, together, the CUA and MMP have set the stage for one of the most contentious, and evolving, areas in California law.

### **ATTORNEY GENERAL GUIDELINES**

In 2008, then Attorney General Jerry Brown published Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use ("Guidelines"). The Guidelines address various issues surrounding medical marijuana, including collective and cooperative operations. The Guidelines:

- Limit lawful distribution activities to true agricultural co-ops and collectives that provide crops to their members;
- Prohibit collectives and cooperatives from profiting from the sale of marijuana;
- Allow members to be reimbursed for certain services (including cultivation), provided that the reimbursement is limited to the amount to cover overhead costs and operating expenses;
- Allow members to reimburse the collective for marijuana that has been allocated to them (See Section 11362.765). Marijuana may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement only, or any combination of these; and
- Declare that distribution of medical marijuana is subject to sales tax and requires a seller's permit from the State Board of Equalization.

Unlike an agricultural cooperative, a "collective" is not defined under state law, but it similarly facilitates agricultural collaboration between members. A co-op, by definition, files articles of incorporation and must abide by certain rules for its organization, elections and distribution of earnings. A co-op's earnings must be used for the general welfare of its members or be distributed equally in the form of cash, property, services, or credit. Both co-ops and collectives are formed for the benefit of their members and must require membership applications and verification of status as a caregiver or qualified patient; they must also refuse membership to those who divert marijuana for non-medical use. Collectives and co-ops must acquire marijuana from and allocate it only to constituent members. The Guidelines state that storefront dispensaries that deviate from these Guidelines are likely outside the scope of state law.

The Guidelines have received mixed reviews from advocates and opponents. In 2011, Attorney General Kamala Harris released a draft revision to the Guidelines.

Of interest to the Attorney General's office were issues such as collective operations, edible products, profit making businesses, seizure of marijuana, cultivation, delivery/transportation and constitutional issues.

At the League of California Cities and other stakeholders' urgings however, the Attorney General has declined to amend the regulations until the Courts and the Legislature take some pointed action to establish clear rules governing access to medical marijuana. The consensus from most stakeholders is that the law needs to be reformed and simplified to define the scope of the cultivation right, whether dispensaries and edible marijuana products are permissible and how marijuana grown for medicinal use may be lawfully transported.

The current Attorney General, in her recent letter to the Legislature, acknowledged that the Guidelines are outdated and that California's medical marijuana laws have created considerable confusion and public safety issues. The Guidelines have been highly criticized by medical marijuana opponents, law enforcement, and others, yet courts have found that they are entitled to great weight and often rely on them to resolve medical marijuana issues.

Despite confusion created by the Guidelines, case law is clear that the voter-passed initiative did not authorize the sale of marijuana, even for medical purposes. Attempts to broaden the law's immunity so as to provide easier access through purely commercial distribution have, for the most part, been rejected. Although some suggest the CUA "must be interpreted to allow 'some manufacture and distribution of marijuana for medicinal purposes' lest the statutory immunity be made impractical," others claim the ballot materials "show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law." They further claim that access to marijuana under the CUA was limited to individual cultivation by qualified patients for their own medical purposes and by primary caregivers on behalf of the patient(s) they cared for.

However, after the passage of the MMP and in reliance upon the Guidelines, medical marijuana advocates began to argue that Section 11362.775 authorizes collective distribution of medical marijuana in the form of storefront facilities known as dispensaries, collectives, and cooperatives; however opponents continue to assert that the storefront sale of marijuana is illegal under federal law, not expressly authorized under state law, and should not be tolerated or permitted. As the courts worked to interpret the scope of the voters' intent in the CUA, and the scope of MMP cumulatively, two things happened. First, the medical marijuana industry learned to tailor its activities to what was arguably within the scope of legal conduct, and these activities quickly evolved into a statewide industry of sorts for growing, transporting and distributing medical marijuana. That is not to say that all medical marijuana activity is part of this larger "industry;" some medical marijuana is cultivated locally by local patients and their caregivers. But many authorities believe that the medical marijuana industry has gone far beyond what was originally envisioned under the CUA or MMP.

## FEDERAL LAW

Finally it bears repeating that under the federal Controlled Substances Act, marijuana possession and/or cultivation remains illegal for any purpose including medical use. This, of course raises potential and complex preemption issues for any state or local law recognizing any type of legitimate marijuana use. However, it is our understanding that your Board desires to investigate potential regulation in compliance with State law despite the potential federal issues. Similarly there has been a long and uneven record of federal “enforcement” of federal marijuana law in those States and localities where marijuana has become legal for medical (or “recreational”) use. To some extent this has been driven by “priorities” from the federal justice department as well as the individual United States Attorney’s offices. And as will be discussed later, this has led to many potential medical marijuana providers requesting that the County allow the use of County property for a “dispensary” since allegedly most private landlords are unwilling to face the prospect of potential federal forfeiture proceedings.

## MEDICAL MARIJUANA AND LOCAL LAND USE/ZONING LAW

This finally brings us to the topic specifically before your Board: i.e. whether and how to regulate potential medical marijuana businesses/dispensaries. Fortunately, this is the one issue in this entire area of the law that has been fairly well settled. Two years ago, in a case entitled, *City of Riverside v. Inland Empire Patients Health and Wellness Center*, the California Supreme Court unanimously ruled that California’s medical marijuana laws do not preempt local ordinances that ban medical marijuana facilities. The Court found that the local police power derived from Article XI, section 7, of the California Constitution includes broad authority to determine, for purposes of public health, safety and welfare, the appropriate uses of land within a local jurisdiction’s borders. And that “[n]othing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted within its borders.

With this background we will now discuss some of the important features of the subcommittee-proposed ordinance.

Initially it should be noted that our office has recommended –and the subcommittee agreed- that whatever approach a potential ordinance may take, it should be in the form of a regulatory license as opposed to a traditional zoning use permit. As your Board may be aware, use permits have been interpreted by the courts as “running with the land” giving the county very little control over the persons who actually operate a given permitted business. In addition, if problems arise and a permit needs to be modified or revoked, the use is essentially treated as a vested right, and extensive “due process” protections are afforded to the property owner/permittee. As a general rule, business and other special operating licenses are not endowed with as many protections and the county has more flexibility in controlling the identity of the operators as well responding to issues where the permit and/or regulations are being violated.

As you can see, the proposed ordinance under discussion today strictly follows that advice.

Another important feature is the limitation on the number, location and selection process for the "review authority" to grant licenses. As currently proposed, there would be a maximum of up to three (3) dispensaries allowed in the unincorporated County; one in each of three (3) defined geographic areas roughly representing northern, southern and western Marin County. And the selection process envisions a subsequent resolution to be adopted by this Board establishing a time limit for potential applicants to submit their application(s). This would be similar to an RFP process where the County would choose the application which is deemed to best meet the overall intent and criteria of the ordinance.

Finally, as noted previously, many of the advocates the subcommittee and/or staff has met with were concerned that –given the history of federal enforcement against landlords of medical marijuana dispensaries- it would not be possible to find a property owner willing to lease property to a dispensary. Therefore, another option would be for the county to allow a dispensary to lease county property and impose any conditions through the lease. However, it is our understanding that these concerns have waned somewhat in recent months as the federal government has apparently reduced its efforts to close down dispensaries via civil forfeiture proceedings. In this regard it is important to know that federal law provides enhanced penalties for any distribution of marijuana – medical or otherwise- within 1,000 feet of schools and playgrounds as opposed to the 600 foot prohibition in State law which is currently proposed in this ordinance.

**FISCAL/STAFFING IMPACT:** We expect that costs borne by the County in administering the medical marijuana dispensary ordinance and program will be covered by application review and monitoring fees, to be established separately by the Board of Supervisors.

**REVIEWED BY:**

- Auditor-Controller N/A
- County Counsel
- Human Resources N/A

Respectfully submitted,

STEVEN M. WOODSIDE, County Counsel

David L. Zaltsman  
Deputy County Counsel

- Attachments: (1) Draft ordinance  
(2) Comments received via email
- (a) Nick Monkhouse (5/24/15)
  - (b) Paul Garbarini (5/24/15)
  - (c) Sarah Cox (5/25/15)
  - (d) Karen Bert (5/27/15)
  - (e) Paul Roberts (5/28/15)
  - (f) William Campagna (5/28/15)
  - (g) Lisa Pelo (5/28/15)
  - (h) Steven Levine (5/28/15)
  - (i) Leslie K. Allen (5/28/15)
  - (j) Joanne Malik (5/28/15)
  - (k) Jeffrey Milum (5/28/15)
  - (l) Linda Ehlers (5/31/15)
  - (m) Ira Hirschfield (6/1/15)
  - (n) Tom Yurch (6/1/15)
  - (o) Ray McDevitt (6/1/15)
  - (p) Catherine Amatruda (6/1/15)
  - (q) Josephine Mosk (6/1/15)
  - (r) Ron Haedt (6/2/15)

cc: County Administrator

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