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OPINION NUMBER 2007-3

DATE: June 21, 2007

SUBJECT: Medical Marijuana "Dispensaries"

REQUESTED BY: Council President Peters and Councilmember Atkins

PREPARED BY: City Attorney

INTRODUCTION

In response to recent arrests and prosecutions of individuals engaged in selling "medical marijuana" through "dispensaries," medical marijuana advocates have addressed City Council and asked the Council to take action with respect to the establishment of medical marijuana "dispensaries."

QUESTION PRESENTED

You asked whether medical marijuana dispensaries are legal under California's medical marijuana laws, and for advice on operating guidelines for dispensaries.

SHORT ANSWER

California state law protects qualified patients and primary caregivers who collectively or cooperatively cultivate medical marijuana from state prosecution for those activities, which would otherwise be illegal. Cal. Health & Safety Code § 11362.775. Any sale or distribution by anyone other than qualified patients and primary caregivers remains illegal under state law.

The word "dispensary" does not appear in the state laws governing medical marijuana. In cities around the state, "dispensary" can mean both the cooperative/collective model, pursuant to the Health and Safety Code and/or the retail model. In San Diego, the businesses that have operated as "dispensaries" are illegal under state (and federal) law.

"Medical marijuana" is not recognized under federal law. Federal law prohibits the manufacture, sale, and distribution of marijuana. 21 U.S.C. 841(a).

BACKGROUND

In the last two years, the City has had a number of establishments open up in various parts of the City which purport to provide medical marijuana to patients. By May of 2006, according to the San Diego Police Department, there were approximately 40 such operations. Most were fixed locations, some were mobile delivery services.

These establishments drew police attention because of the rapid appearance of the dispensaries, which had previously not existed in San Diego even though medical marijuana use was established in 1996; there were citizen complaints about both the presence of the establishments and the behavior of customers; several were the subject of armed robberies; other cities were observing criminal behavior in and around such establishments. Citizen complaints included persons smoking marijuana in and around the outside of the establishments, persons appearing to resell what they just purchased inside on the outside of the establishment, and their proximity to schools and other places where children gather.

After investigations into several establishments revealed that the persons operating the establishments did not appear to be primary caregivers and appeared to be making a profit, search warrants were served in December 2005 and July 2006, and arrests were made in July 2006. The investigations revealed that the persons operating the establishments were not primary caregivers, were making a profit, and were accepting doctors' recommendations from doctors who did not appear to treat the patients under accepted standards of care. The San Diego Police Department worked with both the District Attorney and United States Attorney during the investigations. Subsequently, nine persons were charged with violating state laws against the sales and distribution of marijuana, and six persons were charged with violating federal marijuana laws. One person has since pled guilty in state court, six persons pled guilty in federal court and there are ongoing investigations into others at the state and federal level. The District Attorney sent formal complaint letters to the State Board of Medical Quality Assurance about the doctors, asking the Board to investigate the practices of the doctors, which included providing medical marijuana recommendations without reviewing any medical records or conducting a physical exam.

Police department personnel, along with District Attorney and United States Attorney personnel, visited all the sites not targeted in the July 2006 raids. Owners and employees were warned to immediately cease and desist or face state and/or federal charges. The police department believes all such establishments have closed except for some mobile van delivery services.

Since the arrests and prosecutions, medical marijuana advocates have appeared at City Council requesting that the City take action to assist them in establishing some type of "dispensary" model in the City. They believe patients are being harmed in the absence of dispensaries.

ANALYSIS

In 1996, Proposition 215, also known as the "Compassionate Use Act of 1996" was approved by California voters. Cal. Health & Safety Code § 11362.5. Proposition 215 was intended to provide seriously ill Californians the right to obtain and use marijuana for medical purposes when the use is recommended by a physician. The recommendation can be oral or written. Proposition 215 further provided that both the patient and the patient's "primary caregiver" were exempt from prosecution for violating state laws against the possession and cultivation of marijuana. "Primary caregiver" is defined as the individual designated by the patient who has consistently assumed responsibility for the housing, health, or safety of that person.

Effective January 1, 2004, the Legislature enacted the "Article 2.5 Medical Marijuana Program." Cal. Health & Safety Code §§ 11362.7-11362.83. The legislation expanded the state law exemptions for qualified patients and primary caregivers to include possession for sale; transportation, distribution, and importation; maintaining a place for unlawfully selling, distributing, or using; knowingly making available a place for unlawful manufacturing, storage, and distribution; and using such a place. The legislation also allows marijuana to be collectively or cooperatively cultivated for medical purposes by qualified patients and primary caregivers. Cal. Health & Safety Code § 11362.775. Cultivating or distributing marijuana for profit is expressly disallowed. Cal. Health & Safety Code § 11362.765(a). Primary caregivers may recover reasonable compensation for services and for out-of- pocket expenses. Cal. Health & Safety Code § 11362.765(c).

The Marijuana Program also established a voluntary identification card system to by run by the State Department of Health Services. Cal. Health & Safety Code §§ 11362.71-11362.76. The cards are to be issued to qualified patients and primary caregivers by the county. Participation is voluntary, and possession of a card is not required to qualify for the protections of Proposition 215 and the Marijuana Program. Cities may enact their own identification card programs if the county in which they sit has not enacted the program, so long as the program is not contrary to state law. 88 Op. Cal. Att'y Gen. 113 (2005).

State law does not authorize the smoking of marijuana in places where smoking is otherwise prohibited, nor does it authorize smoking on a school bus, in a motor vehicle that is being operated, or within 1,000 feet of a school, recreation center, or youth center, unless the medical use occurs within a residence. Cal. Health & Safety Code § 11362.79. State law does not require workplaces or jails to allow medical marijuana use. Cal. Health & Safety Code § 11362.785.

Under federal law, the distribution and cultivation of marijuana is unlawful. 21 U.S.C. 841(a). Possession is also illegal. 21 U.S.C. 844(a). There is no "medical necessity" defense to federal criminal violations. *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 494 (2001). More recently, in a challenge brought by California medical marijuana users to federal law, the United States Supreme Court held that the application of the federal Controlled Substances Act, which, *inter alia*, criminalizes the manufacture, distribution, and possession of marijuana, to medical marijuana does not violate the Commerce Clause.

As to the issue of "dispensaries" there is no model of cultivation, sales, or distribution of marijuana that is legal in California other than the model described in the Health and Safety Code. Specifically, there is no authorization for a "third party" to distribute, cultivate or sell marijuana. A person cannot simply call themselves a "primary caregiver," nor can a patient designate as a primary caregiver a person that does not meet the qualifications set forth in the Code. Cal. Health & Safety section 11362.7(d) says a primary caregiver is "… the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health or safety of that patient or person…" The section then goes on to identify persons who may be included as primary caregivers: a state licensed health clinic, health care facility, residential care facility for persons with chronic illnesses or the elderly, hospice, home health agency, and the owner or operator and up to three employees designated by the owner or operator. Nothing in the definition or elsewhere in the Code contemplates a retail or pharmacy-like model of distribution.

Americans for Safe Access believe that dispensaries are legal. See Attachment 1. However, the authority cited essentially reports what is already known: Qualified patients and designated primary caregivers are not subject to state criminal prosecution for collectively or cooperatively cultivating medical marijuana, and may recover the costs associated with that endeavor. The California Chapter of the National Organization for the Reform of Marijuana Laws (CaNORML) acknowledges that dispensaries exist at the tolerance of local governments. http://www.canorml.org/news/cbcegulations.htm

Any affirmative action on the part of a local government to establish or regulate the distribution of marijuana beyond what is allowed under state law is risky. Marijuana distribution is illegal under federal law. "Aiding and abetting" a violation of federal law is also in and of itself a violation of federal law. 18 U.S.C. § 2. The elements are:" (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." *Conant v. Walters* 309 F. 3d 629, 635 (9th Cir. 2002), citations omitted. It is clear that marijuana distribution is illegal under federal law, thus any act by a local government to move beyond implementing state law in facilitating access to marijuana may be construed as aiding and abetting a violation of federal law.

The federal government has not thus far directly taken action against any of the states[1] that have passed "medical marijuana" legislation. Local government officials implementing state law likely lack the "specific intent" to violate federal law, since no court has ruled that state law

[1] At least eleven other states (Alaska, Colorado, Maine, Maryland, Montana, Oregon, Rhode Island, Vermont, Washington, and Hawaii) have passed medical marijuana legislation. *See* Alaska Stat. §§ 11.71.090, 17.37.010 to 17.37.080; Colo. Const. art. XVIII, § 14; Me. Rev. Stat. Ann. tit. 22 § 2383-B(5); Md. Code Ann., Criminal Law §§ 5-601(c), 5-619(c); Mont. Code. Ann. §§ 50-46-101 to 50-46-210; Nev. Const. art. 4, § 38; Or. Rev. Stat. §§ 475.300 to 475.346; R.I. Gen. Laws §§ 21-28.6-1 to 21-28.6-11; Vt. Stat. Ann. tit.18 §§ 4472-4474d; Wash. Rev. Code §§ 69.51A.005 to 69.51A.902; and Haw. Rev. Stat. §§ 329-121 to 329-128.

is preempted by federal law, leaving state law intact.[2] However, even if the federal government chooses not to seek criminal sanctions against local government officials for such actions, the federal government could withhold federal funds, such as grants for narcotic enforcement. *See South Dakota v. Dole,* 483 U.S. 203, 206 (1987). That said, we are unaware of any such withholding of funds thus far.

POTENTIAL GUIDELINES

To the extent the City Council wants to regulate or address those locations which meet the criteria under the California Health and Safety Code, zoning regulations or conditional use permits would be the most legally defensible way to address them. Any such regulations would have to be consistent with state law. For purposes of this discussion, the term "collective" is used to describe these locations.

Zoning regulations could range from declaring collectives a permitted use, requiring collectives to obtain a conditional use permit, capping the number of collectives, or placing distance requirements from sensitive uses such as schools. Other regulations could include hours of operation, amounts allowed on the premises, requiring a security plan and security guards, and background checks. Any decision to regulate collectives would need a factual record to be developed in an appropriate forum, such as a Council committee.

Currently, any collectives operating in the City are not "publicly" known, and have not been brought to the attention of law enforcement as problem locations. Regulation would require them to be known, which may create the same type of problems the dispensaries created, including the attraction of criminals to locations where marijuana is readily available. Additionally, these types of regulations may move beyond what voters and legislature envisioned in allowing patients and providers to collectively cultivate marijuana and create a more dispensary oriented model of distribution.

While evaluating and considering such regulations, other cities and counties have enacted moratoriums. California Government Code section 65858 allows local governments to adopt an interim ordinance prohibiting any use while that use is studied, so long as certain findings can be made. See Attachment 2, describing the requirements for imposing a moratorium. According to Safe Access, 78 cities and 6 counties have enacted moratoriums, and 24 cities and 7 counties have some type of regulatory and/or zoning ordinance, and 34 cities and 2 counties have bans on dispensaries. http://www.safeaccessnow.org/article.php?id=3165. Some of the bans include a ban on both the retail model and the collective/cooperative model. Conversely, San Francisco allows dispensaries, but recently enacted new restrictions and requirements. (For a discussion of San Francisco's experience, see "Fuming Over Pot Clubs" in the June 2006 publication of the California Lawyer magazine, www.californialawyermagazine.com).

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[2] See letter to Robert Tousignant, July 15, 2005, by deputy attorney general Jonathan K. Renner, wherein Mr. Renner opines that the establishment and maintenance of the voluntary identification program by the Department and Health Services does not violate federal law.

Those cities with total bans cite the negative effects of such establishments, and rely on their land use power to control what businesses are allowed in their cities. While medical marijuana advocates argue that such bans are not lawful, no court case has decided that issue.

A total ban may result in a lawsuit from medical marijuana advocates. The City of Concord was sued by Safe Access after it enacted a ban, but the lawsuit was subsequently dropped. Advocates argue that bans are preempted by state law. There is language in one appellate court case suggesting that the legislature intended to allow "the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided…" *People v. Urziceanu*, 132 Cal. App. 4th 747, 785 (2005). However, nothing in the *Urziceanu* case expanded the definition of who may participate in cooperating as service providers. The case arose out of a criminal prosecution, and thus did not address the issue of the power of local governments to enact such bans. None of the establishments previously in existence in San Diego qualified as "an collective."

As stated earlier, tolerating any other model of marijuana distribution that does not strictly comply with state law is illegal. The City Attorney thus declines to propose any guidelines for such an endeavor. To the extent the Council moves beyond implementation of state law, it is in risky territory with respect to aiding and abetting violations of federal law. A decision to regulate collectives is not risk free, but to the extent the City is implementing state law, we think that it may be defensible.

Although the City requires police permits in certain industries, such a requirement in this instance is problematic. Placing the regulatory burden on the Police Department may be a particularly sensitive decision. Because of the proximity to the border, the Police Department participates and works closely with federal narcotics agents on task forces and on specific cases.

In short, a total ban may lead to litigation by pro-medical marijuana advocates. Allowing "dispensaries" is outside state law and runs the risk of violating federal law. Regulating "collectives" may be defensible, and less likely to violate federal law, but an adequate record would need to be established. If the Council wants to consider a ban or consider regulating collectives, the matter should be taken up at a public hearing with a view toward establishing a legislative record. The Council may wish to consider a moratorium while staff works on particular recommendations. The Council may also wish to consider convening a task force, as it did with the marijuana identification card program, to make recommendations. We do not advise tolerating or regulating any model of distribution not in strict compliance with the California Health and Safety Code.

CONCLUSION

Any model of distribution of marijuana not meeting the California Health and Safety Code requirements is illegal under state law, and all models are illegal under federal law. Although it is understandably more convenient for patients to have a place to go to buy marijuana, the State Legislature must act to either create that model, or to expressly allow local governments to do so.

Any decision to ban, regulate, or otherwise enact legislation relating to "collectives" as described in the Health and Safety Code needs to be supported by a well developed legislative record, including making it clear that the City is implementing state law, and not intending to violate federal law.

There are currently cases pending in the appellate courts that may provide further guidance in this area.[3] Additionally, the Office of the Attorney General has been asked to provide a legal opinion on dispensaries.[4] We will update you if there are changes to this opinion based on new cases, legislation, or attorney general opinions.

MICHAEL J. AGUIRRE, City Attorney

By
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Deputy City Attorney

MTN:aml:lb
cc: Honorable Mayor and City Councilmembers
Police Chief William Lansdowne
District Attorney Bonnie Dumanis
LO-2007-3

[3] For example, *People v. Mentch*, S 148204, pending before the California Supreme Court, may further clarify the role of "primary caregiver."
[4] Opinion No. 07-306