



# CITY OF SANTA BARBARA

## ORDINANCE COMMITTEE AGENDA REPORT

**AGENDA DATE:** January 11, 2011

**TO:** City Council Ordinance Committee

**FROM:** City Attorney's Office

**SUBJECT:** Medical Marijuana Dispensary Ordinance – Dispensaries Permitted Under The City's March 2008 Dispensary Ordinance

### RECOMMENDATION:

That the Council Ordinance Committee review a draft uncodified revision to the City's "Medical Marijuana Storefront Dispensary Ordinance" and make a recommendation to City Council for the possible introduction and adoption of the proposed draft Ordinance relating to those dispensaries previously permitted under the City's March 2008 ordinance.

### DISCUSSION:

On March 25, 2008, the City Council adopted City Ordinance No. 5449 to enact and codify Santa Barbara Municipal Code Chapter 28.80 as the City's first comprehensive zoning scheme to regulate the location and permitting of storefront medical marijuana dispensaries. The City's enactment of SBMC Chapter 28.80 was in response to the statewide voter approval of Prop 215 in November 1996 (now state Health & Safety Code §11362.5 – the "Compassionate Use Act") along with the state Legislature's adoption of the state Medical Marijuana Program Act (Health & Safety Code §§11362.7 -11362.83 – the "MMPA") in the fall of 2003 - both of which have been interpreted by the State Attorney General's office to allow the operation of local storefront dispensaries by "primary caregivers" to provide medical marijuana to "qualified patients" under certain very limited circumstances.

Specifically, in written Guidelines promulgated in August 2008, the state Attorney General's office interpreted Prop 215 and the MMPA as follows:

"Under California law, medical marijuana patients and primary caregivers may 'associate within the state of California in order to collectively or cooperatively to cultivate marijuana for medical purposes.' (§11362.775) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana."

Later in the August 2008 Guidelines, the Attorney General's office states that the use of storefront dispensaries by a collective or cooperative may, under some circumstances, be lawful as follows:

**“Storefront Dispensaries.** Although medical marijuana “dispensaries” have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§11362.775.) [However] It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law ...”

Given the state law context, the Attorney General's 2008 express recognition that some medical marijuana dispensaries may be lawful, and with the appearance of several storefront dispensaries within the City in late 2007 and 2008, the City elected to enact local zoning regulations to limit the non-residential locations where medical marijuana dispensaries would be allowed and to establish day-to-day operational and security requirements for such dispensaries – all in an effort to minimize some of the potentially negative collateral impacts which are often associated with these dispensaries. Ultimately, under the City's initial March 2008 Ordinance, three collective/cooperative entities obtained City land use permits to open and operate storefront dispensaries – provided that they operate in accordance with the state MMPA and Prop 215. These City permitted storefront dispensaries are as follows: 1. the Santa Barbara Patients' Collective Health Cooperative (500 N. Milpas), 2. the Greenlight Dispensary (631 Olive Street), and 3. Pacific Coast Collective (300 N. Milpas.)

However, in late 2009 and early 2010, it became apparent there was a public concern that, among other things, the City's March 2008 dispensary ordinance did not limit the number of local collectives/cooperatives which could obtain a City dispensary permit. In response, the Council requested the Council Ordinance Committee to hold public hearings to consider amendments to the March 2008 ordinance. Ultimately, SBMC Chapter 28.80 was revised by the City Council in June 2010 to impose a maximum limit of three permitted dispensary locations within the entire City, including those existing dispensary locations which had been permitted under the 2008 ordinance.

In addition, the June 2010 ordinance extensively revised the locations within the City where dispensaries could be permitted by establishing five separate and geographically dispersed areas for allowed dispensaries and by expressly limiting dispensaries to certain block faces within each of those five areas and by not allowing more than one dispensary in each area. These limitations had the effect of making two of the dispensaries permitted under the March 2008 Ordinance (500 N. Milpas and 631 Olive Street) non-conforming locations. Finally, the June 2010 ordinance required any nonconforming dispensary to either move to a permitted location (by obtaining a new permit for that location) or to shut down the previously permitted dispensary within six months of the adoption of the June 2010 ordinance.

This final requirement – that certain permitted dispensaries now be required to close within six months - resulted in federal court litigation against the City claiming that the June 2010 ordinance provision violates the federal constitutional rights of the two permitted dispensary operators directly impacted by this closure requirement; that is, by virtue of the Fifth and Fourteenth Amendments to the U.S. Constitution, these operators have claimed that, having made a substantial investment in obtaining a City dispensary permit and having undertaken the extensive property improvements required by the City in order to open a dispensary, they have acquired a fundamental vested property right to continue in operation as a pre-existing legal nonconforming use. In effect, they claim that any City mandate that they cease operation would now constitute a “taking” of their property rights without just compensation and, as well, would constitute a violation of their substantive “due process” and “equal protection” rights under the federal constitution.

Recently, in ruling on a motion for a preliminary injunction filed by one of the nonconforming dispensary operators (500 N. Milpas), the federal district court judge assigned to hear both lawsuits against the City made it clear that he, at least preliminarily, is inclined to agree with the plaintiffs that the City's June 2010 ordinance requirement that these two dispensaries close within six months is an apparent violation of due process rights. At one point in his written ruling on the motion for a preliminary injunction against the City, the judge states as follows:

“Along such lines, California courts have recognized that the “hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.” *San Diego County v. McClurken*, 234 P.2d 972, 975 (Cal. 1951). For this reason, zoning ordinances “customarily exempt existing land uses (or amortize them over time) to avoid questions as to the constitutionality of their application to those uses.” *Calvert v. County of Yuba*, 145 Cal.App.4<sup>th</sup> 613, 625 (2006). “A zoning ordinance which requires the discontinuance forthwith of a nonconforming use existing when the ordinance was adopted is a deprivation of property without due process of law unless the use is a public nuisance.” *McCaslin v. City of Monterey Park*, 163 Cal.App.2d 339 (1958).”

Later in his decision, the District Court judge also makes it clear that his conclusion that the City's six month closure requirement is an apparent “due process” violation is closely related to the fact that the June 2010 ordinance establishes such a limited number of permissible dispensary locations within the City (i.e., no more than three) and that this number includes existing nonconforming dispensaries which were previously permitted but not forced to move to a new location. In ruling in favor of the plaintiffs on their motion, the District Court issued a preliminary injunction which orders the City to refrain from any effort to shut the 500 N. Milpas dispensary down, at least pending a full trial of their lawsuit and the City prevailing in the litigation.

In conclusion, it is the recommendation of the City Attorney's office that the City acknowledge the District Judge's ruling on this motion and accept that he is not likely to change his conclusions regarding the constitutional precedents applicable to the June

2010 ordinance's application to these two previously permitted dispensaries. As a result, in our view, it would be appropriate for the Committee to forward this draft ordinance to the full Council and for the City Council to duly consider amending the City's present dispensary ordinance to acknowledge that the two dispensaries permitted under the March 2008 ordinance (but which are located at locations not now allowed) may continue as pre-existing nonconforming uses.

Nothing in this change, however, would allow these dispensaries (or any dispensary within the City) to operate in a manner contrary to Prop 215 or the state Medical Marijuana Program Act or allow the distribution of marijuana to persons not entitled to its use under state law or allow the for-profit distribution of medical marijuana. Further, as a nonconforming use, these dispensaries would still be subject to the City's existing Municipal Code requirement that any nonconforming use which ceases operation for a continuous period of more than thirty days would lose its legal nonconforming status.

**ATTACHMENT:** Draft Ordinance – Dated as of January 11, 2011

**PREPARED/SUBMITTED BY:** Stephen P. Wiley, City Attorney

**APPROVED BY:** City Administrator's Office

**ORDINANCE COMMITTEE DRAFT  
JANUARY 11, 2011  
SPW**

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE COUNCIL OF THE  
CITY OF SANTA BARBARA AMENDING THE  
MUNICIPAL CODE TO ESTABLISH REVISED  
REGULATIONS FOR THOSE STOREFRONT  
MEDICAL MARIJUANA DISPENSARIES  
PERMITTED UNDER CITY ORDINANCE NO.  
5449 AS ADOPTED ON MARCH 25, 2008.**

THE CITY COUNCIL OF THE CITY OF SANTA BARBARA DOES ORDAIN  
AS FOLLOWS:

**SECTION ONE. Dispensaries Permitted Under City Ordinance No.**

**5449.** Notwithstanding Section Two of City Ordinance No. 5526, as adopted on June 29, 2010 and Santa Barbara Municipal Code section 28.80.050, those dispensaries which are being operated in a manner consistent with state law and which were permitted by the City under City Ordinance No. 5449 (as adopted by the City Council on March 25, 2008) may, despite a non-conforming location, remain as a legal non-conforming use at such permitted locations provided that:

1. the day-to-day operation of the dispensary is consistent with dispensary operational requirements of Chapter 28.80, as such requirements were enacted by City Ordinance No. 5449, and;
2. the operation of the dispensary is not discontinued for a period of time in excess of thirty (30) consecutive days.

**SECTION TWO.** To the extent applicable, those portions of Santa Barbara Municipal Code Chapter 28.80 not inconsistent with this ordinance shall remain in full force and effect with respect to those dispensaries permitted and allowed by Santa Barbara Municipal Chapter 28.80 (as presently codified) and City Ordinance No. 5526.