



CITY OF SANTA BARBARA

COUNCIL AGENDA REPORT

AGENDA DATE: November 10, 2015

TO: Mayor and Councilmembers

FROM: City Attorney's Office

SUBJECT: Newly Adopted Medical Marijuana Legislation

RECOMMENDATION: That Council:

- A. Receive an update on the potential impacts to the City of Santa Barbara resulting from new legislation regulating cultivation, sale, and licensing of medical marijuana; and
- B. Provide direction to the Community Development Department and the City Attorney's Office related to mobile marijuana delivery services and the cultivation of marijuana for medicinal purposes within the City.

EXECUTIVE SUMMARY:

Governor Jerry Brown recently signed legislation implementing the Medical Marijuana Regulation and Safety Act (MMRSA) creating a dual licensing system for the cultivation, transportation, and sale of medical marijuana between the state and local governments. Under this new legislation, if the city does not have an ordinance in place on March 1, 2016 prohibiting or regulating cultivation of marijuana it will lose the authority to regulate or ban cultivation within the City limits, and the State will become the sole licensing authority. Additionally, if the City does not have an ordinance in place prohibiting or regulating marijuana delivery services when the State's medical marijuana licensing scheme becomes operational, mobile delivery of marijuana will be permitted within the City limits by any state licensed dispensary, including delivery by dispensaries existing outside of the City limits. The City Attorney's Office and the Community Development Department are seeking direction regarding whether or not Council would like to adopt an ordinance regulating cultivation and/or delivery of marijuana within the City.

DISCUSSION:

On October 9, 2015, MRRSA, comprising three discrete pieces of legislation, was signed into law. The purpose of the new legislation is to provide clarity to existing law pertaining to medical marijuana, namely the Compassionate use Act and the Medical Marijuana Program Act, which provide a defense against prosecution for possession

and use of marijuana by individuals possessing a medical marijuana identification card, and allows individuals or their primary caregivers to collectively cultivate marijuana for personal consumption of its collective members. MMRSA, made up of Assembly Bills 243 and 266, and Senate Bill 643, governs the licensing and control of all medical marijuana businesses in the state, including cultivation, transportation, testing, and sale of marijuana, and provides criminal immunity for licensees. In general, the package of bills increases and reinforces local control.

Assembly Bill 266

Assembly Bill 266 establishes the Bureau of Medical Marijuana Regulation (BMMR) within the Department of Consumer Affairs to oversee the permitting and licensing of medical marijuana. The Bill creates a dual licensing structure between the state and local governments. Under the new law, both a state license, and a local permit or license, will be required to operate a dispensary in a local jurisdiction that has an ordinance setting forth permitting requirements and has not banned medical marijuana dispensaries. In the event a permit is revoked by the local agency, the local agency must notify the State, and the dispensary may not continue to operate in the jurisdiction, even if it holds a current state license. Delivery of marijuana (i.e. mobile delivery service) will be permitted by state licensed dispensaries unless a local ordinance is in place regulating or prohibiting delivery. Separate state licensing categories have been created for cultivation, manufacture, dispensary operation, distribution, and cannabis testing. Generally, with the exception of testing, a licensee may only hold one other license in a separate licensing category. Testing of all marijuana is required before distribution, and testing operators are not permitted to hold a license or have a financial interest in any other licensing category. The State anticipates that it will be ready to issue licenses through BMMR for dispensary operation, manufacture, and transportation in January 2018. Until then, dispensaries permitted under local ordinance can continue to operate absent a State license.

Assembly Bill 243

Assembly Bill 243 places the Department of Food and Agriculture in charge of licensing and regulating indoor and outdoor cultivation sites. It also creates various licensing types based on location and size of proposed cultivation site. Unless a local agency has a land use ordinance in place either banning or regulating the cultivation of marijuana prior to March 1, 2016, the State will be the sole licensing authority for medical marijuana cultivation applicants, and a local jurisdiction may neither ban nor regulate cultivation within its limits.

Senate Bill 643

Senate Bill 643 places restrictions on advertising physician recommendations and provides that recommendation of medical marijuana without prior examination by a physician would constitute unprofessional conduct. Also, importantly, this bill upholds local power to levy fees and taxes.

MMRSA's Impact on the City of Santa Barbara

The City's Medical Marijuana Dispensary Ordinance ("Dispensary Ordinance"), codified in Chapter 28.80 of the Santa Barbara Municipal Code, establishes land use restrictions through permitting regulations on medical marijuana dispensaries within the City. The Dispensary Ordinance presently allows up to three dispensaries for storefront operation. The City has issued one permit for an operation on upper State Street, however, this dispensary is not yet operating. Two other applications are being processed for locations on Milpas and De La Vina.

The City's Dispensary Ordinance is not in conflict with the newly adopted legislation, however, the new legislation does specifically regulate cultivation and mobile delivery of marijuana. Because the City does not have an ordinance that regulates or prohibits cultivation or delivery of medical marijuana, unless a new ordinance is adopted, the City will be subject to State jurisdiction and licensing regulations.

Cultivation

Of the most immediate concern, is the City's present lack of an ordinance relating to cultivation of medical marijuana. Unless the City has an ordinance in place before March 1, 2016, the State Department of Food and Agriculture will be the sole licensing authority for cultivation, and the City will be subject to State regulation. In other words, local marijuana cultivation will be allowed in Santa Barbara to the extent it is now permitted by the Zoning Ordinance. Because the City's Dispensary Ordinance does not address local cultivation, and because cultivation presents a host of difficult land use impacts, we believe Council may wish to consider whether local cultivation is in the best interest of Santa Barbara.

If Council wishes to retain jurisdiction over cultivation of medical marijuana, either through prohibition or regulation, immediate action must be taken. In order to have an ordinance in place before March 1, 2016, the proposed ordinance must first be presented to the Planning Commission, and introduced for its first reading at City Council on or before January 19, 2016. The second reading before Council will need to occur on or before January 26, 2016. Due to the constrained timeframe between the enactment of this new legislation, its potential impact to the health, safety, and welfare of the community, and the pending March 1st deadline, if necessary the Council may declare this an emergency measure under Section 511 of the City Charter, and the ordinance would become effective upon adoption.

Alternatively, the Council could, upon the finding that the implementation of State legislation would potentially allow for cultivation of marijuana in zones not compatible with the City's presently zoned uses or its General Plan, which could jeopardize public, health, safety, and welfare, adopt an interim ordinance for up to one year establishing a moratorium on cultivation under Government Code section 65858. This alternative would allow the Council time to consider more fully the impacts on cultivation within certain areas of the City. There is some risk that the State may argue, on a technicality, that because Government Code section 65858 only provides for the "temporary" prohibition of a proposed land use (in order to consider its impacts to health and safety), it does not qualify as a land use ordinance that actually "prohibits" cultivation, and the City is therefore preempted by state law from enacting any subsequent legislation regulating or banning cultivation.

Delivery

While the City does not presently have an ordinance regulating or prohibiting mobile delivery of medical marijuana, the need to enact an ordinance to retain City control over mobile delivery does not have the same time constraints as the cultivation issue. Since the State has indicated that it will not be ready to implement licensing of medical marijuana dispensaries, which also includes mobile delivery of marijuana, until around January 2018, the Council has a broader window of time to consider whether regulation of mobile delivery of medical marijuana is in the best interest of the City. Under the new legislation, any State licensed medical marijuana dispensary may engage in mobile delivery of marijuana in jurisdictions that do not specifically prohibit delivery. This means that unless the City enacts an ordinance that bans or restricts delivery of medical marijuana, dispensaries from other jurisdictions (e.g. Goleta, Ventura, or unincorporated areas of the County) could engage in delivery of marijuana within the City. If the City wishes to regulate delivery it has the option of either enacting a complete prohibition or limiting delivery in the City to only dispensaries permitted under the City's dispensary ordinance. Again, we believe there are substantial local land use and law enforcement impacts associated with marijuana delivery that the Council should consider.

BUDGET/FINANCIAL INFORMATION:

The City does not presently impose any tax on the sale of Medical Marijuana through its permitted dispensaries, however, Senate Bill 643 upholds the City's right to levy taxes should it so choose.

SUMMARY:

The City Attorney's Office and the Community Development Department require immediate direction with respect to City Council's desire to regulate or prohibit the cultivation of medical marijuana within the City through enactment of a permanent zoning ordinance, or an interim ordinance establishing a moratorium. Additionally, the City Attorney's Office requests that Council provide direction on whether or not the City would like to consider regulating the mobile delivery of marijuana so that an ordinance can be prepared for review and consideration.

ATTACHMENT: League of Cities Summary on MMRSA Impacts to Cities

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SUBMITTED BY: Ariel Calonne, City Attorney

APPROVED BY: City Administrator's Office

Medical Marijuana Regulation and Safety Act¹ What Cities Need to Know About the New Law

Overview -- Here's what you need to know:

- **Local prohibition or regulation:** Cities may prohibit or regulate medical marijuana businesses within their jurisdictions. **Local authority remains intact under the new law.**
- **State license required:** All medical marijuana businesses – dispensary sales, delivery service, cultivation, or transport – must have a State license².
- **State license not enough:** A medical marijuana business in any city may only operate if it has permission from the State **and** permission from the city (“dual licensing”).
- **Enforcement:** Revocation of local permission to operate means a medical marijuana business must terminate operation because the new law requires dual licensing. Upon approval of the State, a city may enforce State law.
- **State law penalties for unlicensed activity:** There are civil penalties and criminal penalties for operating without a State license.

Cultivation -- Here's what you need to know:

If your city does **not** have a land use ordinance in place regulating or prohibiting the cultivation of marijuana, *either expressly or otherwise under the principles of permissive zoning*, or chooses not to administer a conditional permit program, then commencing **March 1, 2016**, the State Department of Food and Agriculture will be the sole licensing authority for medical marijuana cultivation applicants.

Cultivation -- Here's what you need to do:

Determine if your city fits within City #1 or City #2 as described below:

- **City #1:** Municipal Code that does not expressly prohibit nor expressly regulate cultivation of medical marijuana and is not a “permissive zoning” code. ***Need to take action.***

ACTION REQUIRED: Adopt a land use ordinance regulating or prohibiting the cultivation of medical marijuana. The ordinance must be effective by February 28, 2016. The ordinance may be adopted as an “urgency ordinance,” or second reading must occur on or before January 29, 2016.

¹ AB 266 (Bonta, Cooley, Jones-Sawyer, Lack, Wood); AB 243 (Wood); and SB 643 (McGuire). Effective 1/1/2016.

² The Department of Consumer Affairs estimates it will begin issuing State licenses in January 2018. The Department of Food and Agriculture and the Department of Public Health also have licensing authority under the new law. Businesses operating in compliance with local ordinances will get priority in the State licensing application process.

- City #2: Municipal Code that is a “permissive zoning” code and does not enumerate cultivation of medical marijuana as a permitted or conditional use. **Need to take action.**

ACTION REQUIRED: (1) Check and confirm that your city’s zoning code is adopted and implemented under the principles of permissive zoning. If not, take action recommended for City #1. (2) If confirmed, adopt a resolution that includes the following provisions:

- States that Health & Safety Code section 11362.777(b)(3) provides that the Department of Food and Agriculture may not issue a State license to cultivate medical marijuana within a city that prohibits cultivation under principles of permissive zoning;
- Re-affirms and confirms that the Zoning Code is adopted and operates under the principles of permissive zoning;
- States this means that cultivation of marijuana is not allowed within City #2 because it is not expressly permitted; and
- Therefore, the State is not allowed to issue a license for the cultivation of medical marijuana within City #2.

Delivery -- Here’s what you need to know:

If a city does not expressly prohibit the delivery of medical marijuana within its jurisdiction, delivery will be allowed (with a State dispensary license). This means that if your city wishes to prohibit the delivery of medical marijuana within its jurisdiction, the city must adopt an ordinance expressly prohibiting delivery services and mobile dispensaries.

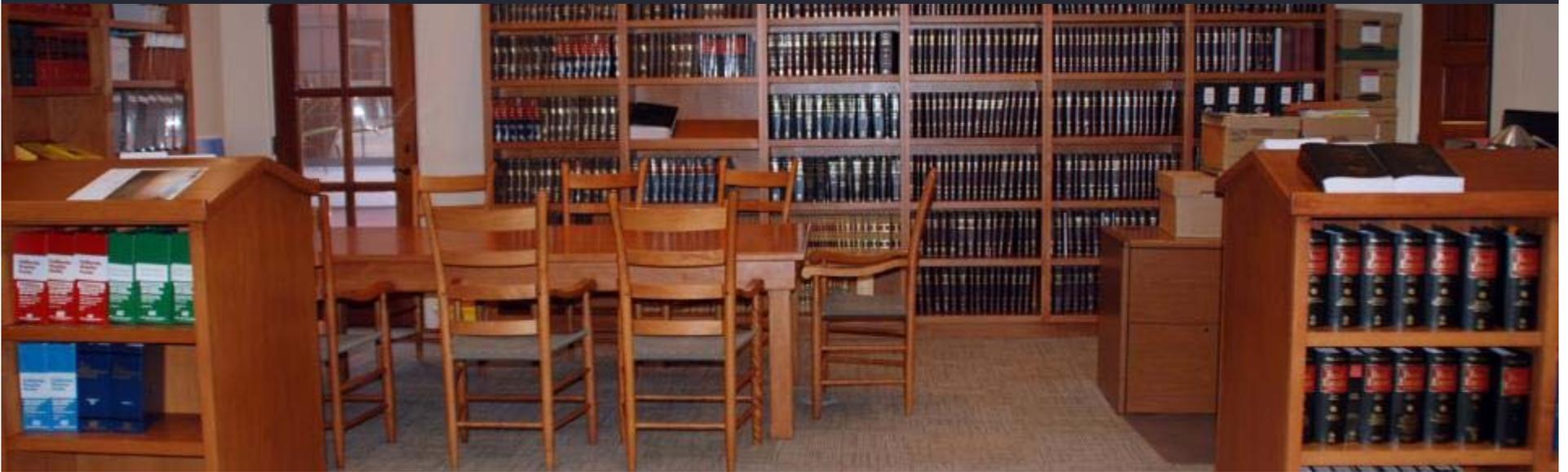
Delivery -- Here’s what you need to do:

- Determine whether your city currently bans delivery services for medical marijuana.
- If you have a ban, determine whether it is an affirmative ban, or a ban enacted via permissive zoning (i.e., it is not listed in your zoning or other codes as a permitted activity within the city limits).
- If you have an affirmative ban specifically identifying marijuana deliveries as a prohibited activity, you do not need to take further action.
- If you wish to prohibit delivery services but do not have an express ban, **you need to take further action.**

ACTION REQUIRED: Adopt an ordinance expressly banning deliveries within your jurisdiction. If you do not adopt an express ban ordinance before the State begins issuing any State licenses, a State-licensed dispensary will be able to deliver medical marijuana within your jurisdiction. Therefore, any ordinance must be in place before the State begins issuing State licenses. The State currently estimates that it will begin issuing dispensary licenses in January 2018, but that could certainly happen sooner.

Be sure to consult with your city attorney before taking any of the actions recommended in this document.

League of California Cities®
October 27, 2015



OFFICE OF THE CITY ATTORNEY

MEDICAL MARIJUANA REGULATION AND SAFETY ACT

(MMRSA)



MMRSA

- Three distinct pieces of legislation: AB 266, AB 243, & SB 643 (Effective 1/1/2016)
- To provide clarity to the prior existing law that was silent as to the extent and manner in which cities could enact local land use regulation to regulate or ban marijuana dispensaries.
- Increases and reinforces local control to regulate distribution of medical marijuana



AB 266

- Bureau of Medical Marijuana Regulation
- Dual Licensing Structure
- Imposes minimum testing requirements
- Mobile delivery by permitted dispensaries
- State Permitting: January 2018



AB 243

- Dept. of Food and Agriculture in charge of licensing of indoor & outdoor cultivation
- Unless a local ordinance is in place regulating or banning cultivation before March 1, 2016, the State will be the sole licensing authority.
 - ❖ *Cities will not be able to make local land use decisions pertaining to cultivation*



SB 643

- Physician recommendation of medical marijuana without prior examination constitutes unprofessional conduct
- Upholds local power to levy fees and taxes



IMPACT ON THE CITY

- The City's dispensary ordinance (SBMC Chap. 28.80) is not in conflict with the new legislation, **BUT**, the City ordinance does not regulate cultivation or mobile delivery.
- **Unless a new ordinance is adopted the City will lose its right to permit and regulate.**



CULTIVATION

- Unless the City has an ordinance in place on **March 1, 2016** it will be subject to State licensing and regulation of indoor and outdoor cultivation.
- **State will determine type, size, and location of cultivation subject to it's own licensing scheme.**



WHAT ARE THE CITY'S OPTIONS

Council may adopt an ordinance as late as Jan. 19, 2015 regulating or banning cultivation within the City.

- ❖ Pro: City will have unquestionably reserved local control over where and how cultivation occurs in the City.
- ❖ Con: Compressed time frame to draft and introduce the ordinance.



ALTERNATIVELY....

The City could adopt an emergency interim ordinance for up to one year establishing a moratorium on cultivation.

- ❖ Pro: Will allow the City more time to consider where and how it wants to regulate cultivation.
- ❖ Con: State may argue the interim ordinance is a temporary measure that does not qualify as an ordinance “prohibiting” sole regulation by the state.



MOBILE DELIVERY

- Unless a city has an ordinance banning or regulating mobile delivery, any state licensed dispensary may deliver within that city.
 - ❖ *e.g. Dispensaries from Ventura, Goleta, etc. could deliver marijuana in Santa Barbara.*
- Implemented with State dispensary licensing in approximately January 2018



WHAT ARE THE CITY'S OPTIONS

- City can do nothing and allow delivery by any State permitted dispensary.
- City can adopt an ordinance limiting delivery to only City permitted dispensaries.
- City can adopt an ordinance prohibiting mobile delivery.



SUMMARY

- 1) Immediate direction required with respect to Council's decision to adopt a permanent or interim ordinance pertaining to medical marijuana cultivation.
- 2) Direction on whether or not Council would like to regulate mobile delivery of medical marijuana and to what extent.



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