



CITY OF SANTA BARBARA

COUNCIL AGENDA REPORT

AGENDA DATE: January 25, 2011

TO: Mayor and Councilmembers

FROM: City Attorney's Office

SUBJECT: Introduction Of Medical Marijuana Dispensary Ordinance – Amendment For Dispensaries Permitted Under The March 2008 Dispensary Ordinance

RECOMMENDATION:

That Council introduce and subsequently adopt, by reading of title only, 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.

DISCUSSION:

On March 25, 2008, the City Council adopted City Ordinance No. 5449 which enacted and codified Santa Barbara Municipal Code Chapter 28.80 as the City's first comprehensive zoning regulations on 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 – and known as the "Compassionate Use Act") along with the state Legislature's enactment of the state Medical Marijuana Program Act (Health & Safety Code §§11362.7 -11362.83 – the "MMPA") which became effective on January 1, 2004.

Both the Compassionate Use Act and the MMPA have now been interpreted by the State Attorney General's office to allow the operation of local storefront dispensaries by "primary caregivers" in order 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.”

These August 2008 state Attorney General Guidelines also state 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 medical marijuana law provisions, the Attorney General’s 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 Council elected to enact local City zoning regulations to limit the non-residential locations where these 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 dispensaries. Ultimately, under the City’s initial March 2008 Ordinance, three collective/cooperative entities obtained City land use permits to open and operate – provided that they operate in accordance with the state MMPA and the Compassionate Use Act. 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 significant public concern that, among other things, the City’s March 2008 dispensary ordinance did not expressly limit the number of local collectives/cooperatives which might be allowed to 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, after a large number of public hearings and significant public input, 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 City, including those dispensaries which had been permitted under the original 2008 dispensary ordinance.

In addition, the June 2010 ordinance amendment extensively revised the locations within the City where dispensaries could be permitted by establishing five separate and geographically dispersed areas for dispensaries and by expressly limiting dispensaries to certain block faces within each of those 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 close 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 180 days of the effective date of the June 2010 ordinance - resulted in federal litigation against the City – based on legal claims that the June 2010 ordinance 180 day “amortization” provision violates the federal constitutional rights of the two permitted dispensary operators directly impacted by this requirement; that is, by virtue of the Fifth and Fourteenth Amendments to the U.S. Constitution, these two operators have claimed that, having made a substantial investment in obtaining a City dispensary permit and having undertaken the extensive tenant improvements required by the City in order to open their dispensaries, they 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 the 180 day closure requirement constitutes 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 these two dispensaries that the City’s June 2010 ordinance closure requirement is an apparent violation of their due process rights.

Further, later in his decision, the District Court judge also makes it clear that his conclusion that the City’s 180 day closure requirement is an apparent “due process” violation is also 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.

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 the judge in this case 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.

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As a result, in our view, it would be appropriate 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. We recommend the adoption of this ordinance and we believe that it will result in a successful settlement of the pending federal court litigation.

We should be clear, however, that nothing in this ordinance will allow these two dispensaries (or any dispensary within the City) to operate in a manner contrary to the Compassionate Use Act or the state Medical Marijuana Program Act or allow the distribution of marijuana to persons not entitled to its use under state law. In addition, nothing in this ordinance will allow the for-profit distribution of medical marijuana by collectives or cooperatives or persons. Finally, 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 may lose its legal nonconforming status.

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

APPROVED BY: City Administrator's Office