



# Memorandum

**TO: Honorable Mayor &  
City Council**

**FROM: Councilmember  
Pierluigi Oliverio**

**SUBJECT: City of San Jose Immediately Adopt  
A Moratorium on Marijuana Collectives and Create  
An Ordinance Allowing Medical Use of Cannabis in San Jose**

**DATE: March 29, 2010**

Approved:

Date:

3-29-10

## RECOMMENDATION

- 1). Direct the City Administration to enact a moratorium on medical cannabis collectives until the City of San Jose approves an ordinance for the cultivation and sale of Cannabis as a medical use in the City of San Jose using the Oakland Medical Cannabis Ordinance as the foundation for San Jose's ordinance which is based on Proposition 215 (1996), Senate Bill 420 (2004), and the August 2008 letter from Attorney General Jerry Brown, "Guidelines for the security and Non-Diversion of Marijuana Grown for Medical Use," which outlines the guiding principles for jurisdictions to provide and allow medical Cannabis establishments in California (CA) cities and counties with the following exceptions:
  - a). The City of San Jose will use industrial zoning as the primary area to be considered for medical Cannabis cultivation and sale and specify that no on-site consumption of medical cannabis shall be allowed.
  - b). The City of San Jose shall limit the number of dispensaries in the City.
  - c). The City of San Jose ordinance shall have a minimum Permit Application Fee of a minimum of \$10,000.
  - d). The City of San Jose will apply a special business sales tax named "cannabis business tax" with a minimum of 3% which equates to \$30 applied as the tax rate per \$1,000 of gross receipts of sale of medical cannabis and/or any medical cannabis products.
  - e). The City of San Jose will enact a minimum fine of \$1000.00 for any collective member or patient that unlawfully sells and/or distributes medical cannabis for any use other than for its intended medical purposes.
  - f). Direct the Administration to set up an earmarked account whereas all revenue, including, but not limited to taxes, fees, fines, etc., generated from medical cannabis collectives and/or cooperatives go to this account. The revenues beyond cost recovery collected from the collectives will only be used for the Police Department and Street Maintenance.
- 2). Direct the Administration to return to Council no later than April 27, 2010 with a draft ordinance following the directions above for council approval.
- 3). Direct the Administration to share the approved draft proposal with the community by doing outreach in the neighborhoods and return to council no later than the last City Council meeting in June to provide any additional updates and feedback to the approved draft proposal for finalization.
- 4). Place this issue on the November Ballot asking for citywide support for the restricted zoning of medical marijuana

collectives/cooperatives in San Jose according to state law by taxing them at 3% per \$1, 000 gross receipts including the allowance for indexing for inflation.

(Since staff did not provide a copy of the Oakland Ordinance, I have attached it to this memo as well as a mock-up version to show that San Jose could use the Oakland Ordinance as a starting point and modify that according to what San Jose would like to see in an ordinance).

## **BACKGROUND**

It is imperative that the City of San Jose immediately adopt an ordinance allowing the cultivation and medical use of Cannabis in San Jose. To date, San Jose has at least forty dispensaries operating in the City and that number is growing. Although I appreciate Mayor Reed, Vice Mayor Chirco and Councilmember Constants memo titled, "Medical Marijuana Cooperatives" it falls short of delineating a comprehensive, enforceable and sensible approach to an issue that has the ability of manifesting itself in ways that will be cumbersome and detrimental to our City if an ordinance is not passed quickly.

State law allows for cities to create, execute and enforce an ordinance dictating the rules of operating medical marijuana (cannabis) collective(s). As stated in my memo dated October 24, 2009 titled, "Adopt Ordinance Allowing Cultivation/Medical Use of Cannabis in San Jose," cities such as; San Francisco and Oakland have already adopted ordinances that allows their local governments to control, regulate and oversee collectives. For example, Oakland only has four collectives in its city. The reason Oakland has four and not forty is that they can enforce their ordinance accordingly because it mirrors state law, therefore, allowing the City to enforce strict regulations as well as collecting permit fees and taxes. Since rules must be obeyed per Oakland's ordinance, Oakland has done a superb job of raising the bar so that only qualified, reputable collectives operate within the City.

I specifically included a memorandum from David W. Ogden the Deputy Attorney General titled, "Investigations and Prosecutions in States-Authorizing the Medical Use of Marijuana," (dated October 19, 2009). I also attached an eleven page letter titled, "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use," (dated August 8, 2008) by Jerry Brown., the Attorney General for the State of California. The purpose of attaching these two documents to my memo was to inform my colleagues, city-staff and others about the in-direct allowance at the Federal level and direct allowance at the State level for the use of medical marijuana. Although I am sure the City Attorney has read my previous memo and the attachments I have mentioned above, I feel it is important that I restate parts of the two memorandums regarding the legality of cultivation and consumption of medical marijuana at this time.

Although Mr. Ogden confirms the Federal Government's commitment to prosecuting illegal drug trafficking and illegal use of drugs (etc.), he specifically makes a clear distinction for the use of medical marijuana under state law. Allow me to quote from Mr. Ogden's letter, "*As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state of local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.*"

Mr. Ogden summarizes his memorandum by stating, "*Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purpose not authorized by state law.*"

Further, Attorney General Brown shares the following on page one of his document. "*In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana.*

*In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statues requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, 11362.81(d).*

*To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.*

As I am sure the City Attorney has also read, Attorney General Browns' eleven page document that further describes the legal basis (including the states relationship with Federal law) regarding the legality of cooperatives and collectives. Whereas stated on page eight, "*Under California law, medical marijuana patients and primary caregivers may 'associate with the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes.'*" (11362.775) In addition, the document defines the business forms which include: Statutory Cooperatives and Collectives; Guidelines for the Lawful Operation of a Cooperative or Collective, which include; non-profit organizations, business licenses, sales tax, sellers permits, membership application and verification distribution, sales to non-members are prohibited, collectives should acquire, possess, and distributed only lawfully cultivated marijuana and distribution and sales to non-members are prohibited, permissible reimbursements and allocations, possession and cultivation guidelines, and security; Enforcement Guidelines include: storefront dispensaries, indicia of unlawful operation.

#### **Information Shared by Staff**

I am concerned that city staff did not share objective information with the council regarding this topic. The problem of staff appearing to be one-sided in sharing information with the council seems to be a continuous problem. The council is the decision making body of the City of San Jose, not city staff. It is the staffs' job to bring all information regarding any issue forward to the council in an objective manner. Then, the council will decide policy and direction for staff in a public setting.

Unfortunately, the only information brought back for this council meeting were seemingly biased notions based on "white papers" from the CA Police Chiefs Association and City of San Diego opinion in which San Diego does not have an ordinance. Further, the memos authored by city staff regarding their work load assessment exaggerate the time needed to prepare a draft ordinance for medical cannabis collectives/cooperatives. And lastly, the memo authored by the City Attorney and the Police Chief is somewhat flawed regarding their interpretation of state law.

For example, staff chose not to share a copy of Oakland or San Francisco's successful medical cannabis ordinance which would have provided another point of view regarding this issue. I specifically stated in my directive these two cities as two that San Jose could emulate. However, it appears staff chose to ignore the success of a medical marijuana ordinance and only share those who are not in favor.

#### **Memo titled "Medical Marijuana Activities without Council Action." (Richard Doyle, City Attorney and Rob Davis, Police Chief)**

As stated in the first bullet point of this memo, "*The fact that under both the California Uniform Controlled Substances Act and the Federal Controlled Substances Act, marijuana remains a controlled substance whose cultivation and sale generally remains a crime under both federal and state laws.*" This statement is untrue according to both documents that I referred to on page one of this memo. In fact, state law allows the cultivation and distribution of medical cannabis by collectives/cooperatives. Further, as stated in this memo, federal law has acknowledged state laws regulations regarding their specific oversight regarding medical marijuana/cannabis.

As stated in the second bullet point of this memo, "*While the State of CA has created some narrow defenses from state criminal prosecution for the possession, cultivation and use of marijuana for medical purposes for certain seriously ill medical patients and their primary caregivers, these state protections—as well as federal criminally prosecute those persons who possess, cultivate or use marijuana in compliance with state compassionate use laws—have in no way actually amended federal laws classifying marijuana as a classified drug whose cultivation, possession and use are unlawful. Commercial dispensaries that sell marijuana to qualified medical patients or their primary caregivers' for medicinal purposes would not comport with either state or federal laws and, so would constitute a public nuisance and not be allowed anywhere in the City.*" This statement is attempting to state that federal law overrules state law regarding this

issue, which again, is untrue. As I have already shared but it is worth repeating here, according to the memorandum authored by Mr. Ogden, he states, "*As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state of local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.*"

To further clarify, if federal law was going to mandate that collectives/cooperatives were illegal, wouldn't they let the State of CA. know? I am sure if the State of CA. was in error of its eleven page policy document, "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" the federal government would have apprehended CA by now.

If and when city-staff are not in favor of a topic or a possible direction that council may choose, that is okay, but to deliberately not share all information from both viewpoints disappoints me as an elected official who depends on professional staff to operate in a professional manner.

#### **Mayor Reed, Vice Mayor Chirco and Councilmember Constant Memo**

I appreciate my colleagues' memo regarding safeguarding allowances for collectives/cooperatives, however, the directive of the memo states that the City "should adopt the following principles in the regarding the medical marijuana collectives and cooperatives" which skirts the issue of oversight and regulation.

I am fearful if we adopt "principles" instead of an ordinance, whereas an ordinance would legally define the allowance of medical uses of marijuana in San Jose, that our City will experience an overabundance of collectives/cooperatives which is what "principles" only would open San Jose up to. I also fear that by not designating industrial land as the only location (at least for now) for these facilities, that the City will see collectives/cooperatives in our neighborhoods (including our neighborhood business districts) among other locations that may offend residents. Finally, the City is missing the mark by not taxing and requiring fees for collectives like other cities have done. For example, this year, the City of Oakland will receive over \$500,000 from just one of the four collectives. This money goes directly to their general fund to help offset costs for city services, etc.

#### **Summary**

In sum, it is imperative that San Jose adopt an ordinance immediately for the reasons that I have identified in this memo. By adopting an ordinance on or before the last council meeting in June, we avail ourselves to place the issue of allowing medical cannabis collectives/cooperatives with the approval of 3% taxation, restrictive zoning and indexing for inflation on the November ballot. Each time the issue of legalizing medical marijuana has been placed on the ballot, voters have overwhelmingly approved the measure. San Jose needs to be thoughtful and bold by moving forward in establishing a Medical Cannabis ordinance immediately. If we don't, then our code enforcement officers will become full-time "medical cannabis closers" which will take them away from responding to other city-wide responsibilities and San Jose will miss out on an opportunity to gain monies from taxation and fees.

#### **Attachments**

1. Copy of City of Oakland Cannabis Ordinance.
2. Copy of City of Oakland Cannabis Ordinance "marked up" to reflect my suggestions in this memo to showcase the ability to use an existing ordinance and modify it according to the City of San Jose recommendations.
3. Letter from Barbara B. Killey, Attorney At Law, and former administrator of Oakland's medical cannabis dispensary permit program from 2004-2006.
4. Letter from James Anthony; Law Offices of James Anthony.
5. Copy of City of Oakland Measure F increasing the tax on medical Cannabis which was approved by 80% of the voters in Oakland.

I respectfully request that you support this proposal. Thank you for your consideration.

**Chapter 5.80 - MEDICAL CANNABIS DISPENSARY PERMITS**

**Sections:**

5.80.010 - Definitions.

5.80.020 - Permit required.

5.80.030 - Regulations.

5.80.040 - Performance standards.

5.80.050 - Regulatory fees.

5.80.060 - Compensation.

5.80.070 - Appeals.

5.80.080 - Prohibited operations.

5.80.090 - Liability.

**5.80.010 - Definitions.**

The following words or phrases, whenever used in this chapter, shall be given the following definitions:

"Cannabis" or "Marijuana" shall be the same, and as may be amended, as is defined in OMC 8.46.020.

"Cannabis dispensary", hereinafter dispensary, shall be construed to include any association, Medical Cannabis Association, cooperative, affiliation, or collective of persons where four or more "qualified patients" and/or "primary care givers", in possession of an identification card, or written recommendation, issued by the county of Alameda, or the state of California, or another agency recognized by the city of Oakland pursuant to California Health and Safety Code Section 11362.7 et seq, to provide education, referral, or network services, and facilitation or assistance in the lawful production, acquisition, and distribution of medical cannabis.

"Excessive profits" means the receipt of consideration of a value substantially higher than the reasonable costs of operating the facility.

"Medical cannabis collective" means a cooperative affiliation, association or collective of persons comprised of no more than three "qualified patients" and/or their "primary caregivers" with valid identification cards or written recommendation, to provide education, referral, or network services and to facilitate/assist in the lawful production, acquisition, and provision of medical marijuana to their qualified patients.

"Primary caregiver" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which defines "Primary Caregiver" as a individual, or "medical cannabis collective" designated by a qualified patient or by a person with an identification card, or a written recommendation, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

1.

In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2 of the California Health and Safety Code, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the California Health and Safety Code, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2 of the California Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2 of the California Health and Safety Code, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2 of the California Health and Safety Code, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card.

2.

An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.

3.

An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

"Qualified patient" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which states a person suffering from a serious medical condition who obtains a written recommendation from a physician licensed to practice medicine in the state of California to use marijuana for personal medical purposes.

"Serious medical condition" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which states all of the following medical conditions:

1. Acquired immune deficiency syndrome (AIDS);
2. Anorexia;
3. Arthritis;
4. Cachexia;
5. Cancer;
6. Chronic pain;
7. Glaucoma;
8. Migraine;
9. Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis;
10. Seizures, including, but not limited to, seizures associated with epilepsy;
11. Severe nausea;
12. Any other chronic or persistent medical symptom that either:
  - a. Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).
  - b. If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

"Written recommendation" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which states a "written recommendation" is an accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of California Health and Safety Code Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.020 - Permit required.**

Except for hospitals, research facilities, or an entity authorized pursuant to OMC Section 8.46.030 and primary caregivers, as defined in Section 5.80.010 B (1), it is unlawful for any owner, operator, or association to own, conduct, operate or maintain, or to participate therein, or to cause or to permit to be conducted, operated, or maintained, any dispensary with four or more "qualified patients" and caregivers with valid ID pursuant to California Health and Safety Code Section 11362.7 et seq., in the city of Oakland unless there exists a valid permit therefore, granted and existing in compliance with the provisions of Chapter 5.02. The City Manager and/or his/her designee shall issue no more than four valid permits for the operation of dispensaries in the city of Oakland. The application for such permit shall set forth, in addition to the requirements specified in Section 5.02.020, the fact that the proposed location of such dispensary is not within one thousand (1,000) feet, unless the City Manager or his/her designee in their discretion determines that the location will not impact the peace and order and welfare of the public, of a public or private school or a public library or youth center (serving youth eighteen (18) and under), or parks and recreation facilities or residential zone or another dispensary. The proposed location must be located in a commercial or industrial zone, or their equivalent as may be amended, of the city. Public notice shall be given as provided in Section 5.02.050, and the investigating official referred to in Section 5.02.030 to whom the application shall be referred, shall be the City Manager. In recommending the granting or denying of such permit and in granting or denying the same, the City Manager, shall give particular consideration to the capacity, capitalization, complaint history of the applicant and any other factors that in their discretion she/he deems necessary to the peace and order and welfare of the public. All

Applicants shall pay an application fee and all inspections fees that may be required therewith.

*(Ord. 12585 § 1 (part), 2004)*

### **5.80.030 - Regulations.**

The dispensary shall meet all the operating criteria for the dispensing of medical marijuana as is required pursuant to California Health and Safety Code Section 11362.7 et seq. and by the Oakland City Manager or his/her designee's administrative regulations for the permitting and operation of medical marijuana dispensaries including security concerns. It is unlawful for any person or association operating a dispensary under the provisions of this chapter or any dispensary whatsoever, in the city, or any agent, employee or representative of such person to permit any breach of peace therein or any disturbance of public order or decorum by any tumultuous, riotous or disorderly conduct, or otherwise, or to permit such dispensary to remain open, or patrons to remain upon the premises, between the hours of eight p.m. and seven a.m. the next ensuing day.

*(Ord. 12585 § 1 (part), 2004)*

### **5.80.040 - Performance standards.**

Dispensaries, once permitted, shall meet the following operating standards for the duration of the use:

- A. Dispensaries may possess no more than eight ounces of dried marijuana per qualified patient or caregiver, and maintain no more than six mature and twelve (12) immature marijuana plants per qualified patient.
  - 1. If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.
  - 2. Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.
- B. The City Manager shall set forth in her/his administrative regulations the method and manner in which background checks of employees for dispensaries will be conducted, and which shall set forth standards for disqualification of an employee based on their criminal history.
- C. No cannabis shall be smoked, ingested or otherwise consumed on the premises.
- D. Dispensary shall not hold or maintain a license from the State Department of Alcohol Beverage Control to sell alcoholic beverages, or operate a business that sells alcoholic beverages.
- E. Dispensary shall maintain records of all patients and or patient caregivers using only the identification card number issued by the county, or its agent, pursuant to California Health and Safety Code Section 11362.7 et seq., as a protection of the confidentiality of the cardholders, or a copy of the written recommendation.
- F. Dispensary shall allow the City Manager or his/her designee to have access to the entities' books, records, accounts, and any and all data relevant to its permitted activities for the purpose of conducting an audit or examination. Books, records, accounts, and any and all relevant data will be produced no later than twenty-four (24) hours after City Manager or his/her designees request.
- G. The dispensary shall provide litter removal services twice each day of operation on and in front of the premises and, if necessary, on public sidewalks within hundred (100) feet of the premises.
- H. The dispensary shall provide adequate security on the premises, including lighting and alarms, to insure the safety of persons and to protect the premises from theft.
- I. Signage for the establishment shall be limited to one wall sign not to exceed ten square feet in area, and one identifying sign not to exceed two square feet in area; such signs shall not be directly illuminated.

J.

The dispensary shall provide City Manager or his/her designee, the chief of police and all neighbors located within fifty (50) feet of the establishment with the name, phone number and facsimile number of an on-site community relations staff person to whom one can provide notice if there are operating problems associated with the establishment. The dispensary shall make every good faith effort to encourage neighbors to call this person to try to solve operating problems, if any, before any calls or complaints are made to the police department or other city officials.

K.

The dispensary shall meet any specific, additional operating procedures and measures as may be imposed as conditions of approval by the City Manager or his/her designee in order to insure that the operation of the dispensary is consistent with protection of the health, safety and welfare of the community, qualified patients and caregivers, and will not adversely affect surrounding uses.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.050 - Regulatory fees.**

Every person conducting, managing or maintaining the business of a dispensary in the city shall, in addition to the application fees, pay a regulatory fee annually in advance, and shall keep a copy of the business tax certificate issued by the Business Tax Office, together with a copy of the dispensary permit issued pursuant to the provisions of Section 5.12.020, together with a copy of this chapter, including the regulations set forth in Section 5.80.030, posted in a conspicuous place in the premises maintained as such dispensary at all times during which such dispensary is being operated.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.060 - Compensation.**

Dispensary shall receive only compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card, or written recommendation, to enable that person to use marijuana pursuant to California Health and Safety Code Section 11362.7 et seq, or for payment for out-of-pocket expenses incurred in providing those services, or both.

Retail sales of medical cannabis for excessive profits are explicitly prohibited.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.070 - Appeals.**

Notwithstanding Section 5.02.100, any decision, except for suspension and or revocation, pursuant to this chapter by the City Manager or his/her designee shall be final and conclusive, with no appeal to the City Council or any other appellate body. For suspensions and/or revocations an independent hearing officer shall make an initial determination with an appeal to the City Manager, in accordance with procedures in set forth in Section 5.02.100. The decision of the City Manager shall be final and conclusive.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.080 - Prohibited operations.**

All owners, operators, collaborative, associations, and collectives operating in violation of California Health and Safety Code Section 11326.7 et seq and 11366.5, and this chapter are expressly prohibited. Except for uses established pursuant to OMC Chapter 8.46, no use which purports to have distributed marijuana prior to the enactment of this chapter shall be deemed to have been a legally established use under the provisions of the Oakland Planning Code, the Oakland Municipal Code, or any other local ordinance, rule or regulation, and such use shall not be entitled to claim legal nonconforming status.

*(Ord. 12585 § 1 (part), 2004)*

#### **5.80.090 - Liability.**

To the fullest extent permitted by law, any actions taken by a public officer or employee under the provisions of this chapter shall not become a personal liability of any public officer or employee of the city of Oakland.

*(Ord. 12585 § 1 (part), 2004)*





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**5.80.010 - Definitions.**

The following words or phrases, whenever used in this chapter, shall be given the following definitions:

"Cannabis" or "Marijuana" shall be the same, and as may be amended, as is defined in OMC 8.46.020.

"Cannabis dispensary", hereinafter dispensary, shall be construed to include any association, Medical Cannabis Association, cooperative, affiliation, or collective of persons where **ELEVEN** or more "qualified patients" and/or "primary care givers", in possession of an identification card, or written recommendation, issued by the county of Alameda, or the state of California, or another agency recognized by the city of San Jose pursuant to California Health and Safety Code Section 11362.7 et seq, to provide education, referral, or network services, and facilitation or assistance in the lawful production, acquisition, and distribution of medical cannabis.

"Excessive profits" means the receipt of consideration of a value substantially higher than the reasonable costs of operating the facility.

"Medical cannabis collective" means a cooperative affiliation, association or collective of persons comprised of no more than **TEN** "qualified patients" and/or their "primary caregivers" with valid identification cards or written recommendation, to provide education, referral, or network services and to facilitate/assist in the lawful production, acquisition, and provision of medical marijuana to their qualified patients.

"Primary caregiver" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which defines "Primary Caregiver" as a individual, or "medical cannabis collective" designated by a qualified patient or by a person with an identification card, or a written recommendation, who has consistently assumed responsibility for the housing, health, or safety of that patient or person, and may include any of the following:

1. In any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2 of the California Health and Safety Code, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the California Health and Safety Code, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2 of the California Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2 of the California Health and Safety Code, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2 of the California Health and Safety Code, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency; if designated as a primary caregiver by that qualified patient or person with an identification card.
2. An individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver.
3. An individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card.

"Qualified patient" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be

amended, and which states a person suffering from a serious medical condition who obtains a written recommendation from a physician licensed to practice medicine in the state of California to use marijuana for personal medical purposes.

"Serious medical condition" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which states all of the following medical conditions:

1. Acquired immune deficiency syndrome (AIDS);
2. Anorexia;
3. Arthritis;
4. Cachexia;
5. Cancer;
6. Chronic pain;
7. Glaucoma;
8. Migraine;
9. Persistent muscle spasms, including, but not limited to, spasms associated with multiple sclerosis;
10. Seizures, including, but not limited to, seizures associated with epilepsy;
11. Severe nausea;
12. Any other chronic or persistent medical symptom that either:
  - a. Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).
  - b. If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

"Written recommendation" shall have the same definition as California Health and Safety Code Section 11362.7 et seq, and as may be amended, and which states a "written recommendation" is an accurate reproductions of those portions of a patient's medical records that have been created by the attending physician, that contain the information required by paragraph (2) of subdivision (a) of California Health and Safety Code Section 11362.715, and that the patient may submit to a county health department or the county's designee as part of an application for an identification card.

*(Ord. 12585 § 1 (part), 2004)*

### **5.80.020 - Permit required.**

Except for hospitals, research facilities, or an entity authorized pursuant to SJMC Section 8.46.030 and primary caregivers, as defined in Section 5.80.010 B (1), it is unlawful for any owner, operator, or association to own, conduct, operate or maintain, or to participate therein, or to cause or to permit to be conducted, operated, or maintained, any dispensary with **ELEVEN** or more "qualified patients" and caregivers with valid ID pursuant to California Health and Safety Code Section 11362.7 et seq., in the city of San Jose unless there exists a valid permit therefore, granted and existing in compliance with the provisions of Chapter 5.02. The City Manager and/or his/her designee shall issue no more than \_\_\_\_\_ valid permits for the operation of dispensaries in the city of San Jose. The application for such permit shall set forth, in addition to the requirements specified in Section 5.02.020, the fact that the proposed location of such dispensary is not within one thousand (1,000) feet, unless the City Manager or his/her designee in their discretion determines that the location will not impact the peace and order and welfare of the public, of a public or private school or a public library or youth center (serving youth eighteen (18) and under), or parks and recreation facilities or residential zone or another dispensary. The proposed location must be located in an **industrial zone**, or their equivalent as may be amended, of the city.

Public notice shall be given as provided in Section 5.02.050, and the investigating official referred to in Section 5.02.030 to whom the application shall be referred, shall be the City Manager. In recommending the granting or denying of such permit and in granting or denying the same, the City Manager, shall give particular consideration to the capacity, capitalization, complaint history of the applicant and any other factors that in their discretion she/he deems necessary to the peace and order and welfare of the public. All Applicants shall pay an application fee OF **NO LESS THAN \$10,000**, and all inspections fees that may be required therewith.

*(Ord. 12585 § 1 (part), 2004)*

### **5.80.030 - Regulations.**

The dispensary shall meet all the operating criteria for the dispensing of medical marijuana as is required pursuant to California Health and Safety Code Section 11362.7 et seq. and by the San Jose City Manager or his/her designee's administrative regulations for the permitting and operation of medical marijuana dispensaries including security concerns. It is unlawful for any person or association operating a dispensary under the provisions of this chapter or any dispensary whatsoever, in the city, or any agent, employee or representative of such person to permit any breach of peace therein or any disturbance of public order or decorum by any tumultuous, riotous or disorderly conduct, or otherwise, or to permit such dispensary to remain open, or patrons to remain upon the premises, between the hours of eight p.m. and seven a.m. the next ensuing day.

*(Ord. 12585 § 1 (part), 2004)*

### **5.80.040 - Performance standards.**

Dispensaries, once permitted, shall meet the following operating standards for the duration of the use:

- A. Dispensaries may possess no more than eight ounces of dried marijuana per qualified patient or caregiver, and maintain no more than six mature and twelve (12) immature marijuana plants per qualified patient.
  - 1. If a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs.
  - 2. Only the dried mature processed flowers of female cannabis plant or the plant conversion shall be considered when determining allowable quantities of marijuana under this section.
- B. The City Manager shall set forth in her/his administrative regulations the method and manner in which background checks of employees for dispensaries will be conducted, and which shall set forth standards for disqualification of an employee based on their criminal history.
- C. No cannabis shall be smoked, ingested or otherwise consumed on the premises.
- D. Dispensary shall not hold or maintain a license from the State Department of Alcohol Beverage Control to sell alcoholic beverages, or operate a business that sells alcoholic beverages.
- E. Dispensary shall maintain records of all patients and or patient caregivers using only the identification card number issued by the county, or its agent, pursuant to California Health and Safety Code Section 11362.7 et seq., as a protection of the confidentiality of the cardholders, or a copy of the written recommendation.
- F. Dispensary shall allow the City Manager or his/her designee to have access to the entities' books, records, accounts, and any and all data relevant to its permitted activities for the purpose of conducting an audit or examination. Books, records, accounts, and any and all relevant data will be produced no later than twenty-four (24) hours after City Manager or his/her designees request.
- G. The dispensary shall provide litter removal services twice each day of operation on and in front of the premises and, if necessary, on public sidewalks within hundred (100) feet of the premises.
- H. The dispensary shall provide adequate security on the premises, including lighting and alarms, to insure the safety of persons and to protect the premises from theft.

- I. Signage for the establishment shall be limited to one wall sign not to exceed ten square feet in area, and one identifying sign not to exceed two square feet in area; such signs shall not be directly illuminated.
- J. The dispensary shall provide City Manager or his/her designee, the chief of police and all neighbors located within fifty (50) feet of the establishment with the name, phone number and facsimile number of an on-site community relations staff person to whom one can provide notice if there are operating problems associated with the establishment. The dispensary shall make every good faith effort to encourage neighbors to call this person to try to solve operating problems, if any, before any calls or complaints are made to the police department or other city officials.
- K. The dispensary shall meet any specific, additional operating procedures and measures as may be imposed as conditions of approval by the City Manager or his/her designee in order to insure that the operation of the dispensary is consistent with protection of the health, safety and welfare of the community, qualified patients and caregivers, and will not adversely affect surrounding uses.
- (Ord. 12585 § 1 (part), 2004)

#### **5.80.050 - Regulatory fees.**

Every person conducting, managing or maintaining the business of a dispensary in the city shall, in addition to the application fees, pay a regulatory fee annually in advance, and shall keep a copy of the business tax certificate issued by the Business Tax Office, together with a copy of the dispensary permit issued pursuant to the provisions of Section 5.12.020, together with a copy of this chapter, including the regulations set forth in Section 5.80.030, posted in a conspicuous place in the premises maintained as such dispensary at all times during which such dispensary is being operated.

(Ord. 12585 § 1 (part), 2004)

#### **5.80.060 - Compensation.**

Dispensary shall receive only compensation for actual expenses, including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card, or written recommendation, to enable that person to use marijuana pursuant to California Health and Safety Code Section 11362.7 et seq, or for payment for out-of-pocket expenses incurred in providing those services, or both.

Retail sales of medical cannabis for excessive profits are explicitly prohibited.

(Ord. 12585 § 1 (part), 2004)

#### **5.80.070 - Appeals.**

Notwithstanding Section 5.02.100, any decision, except for suspension and or revocation, pursuant to this chapter by the City Manager or his/her designee shall be final and conclusive, with no appeal to the City Council or any other appellate body. For suspensions and/or revocations an independent hearing officer shall make an initial determination with an appeal to the City Manager, in accordance with procedures in set forth in Section 5.02.100. The decision of the City Manager shall be final and conclusive.

(Ord. 12585 § 1 (part), 2004)

#### **5.80.080 - Prohibited operations.**

All owners, operators, collaborative, associations, and collectives operating in violation of California Health and Safety Code Section 11326.7 et seq and 11366.5, and this chapter are expressly prohibited. Except for uses established pursuant to OMC Chapter 8.46, no use which purports to have distributed marijuana prior to the enactment of this chapter shall be deemed to have been a legally established use under the provisions of the San Jose Planning Code, the San Jose Municipal Code, or any other local ordinance, rule or regulation, and such use shall not be entitled to claim legal nonconforming status. **Any prohibited actions shall face a minimum fine of \$1,000. Any revenue collected from MCD's shall be allocated for use by Police Department and Street Maintenance.**

(Ord. 12585 § 1 (part), 2004)

**5.80.090 - Liability.**

To the fullest extent permitted by law, any actions taken by a public officer or employee under the provisions of this chapter shall not become a personal liability of any public officer or employee of the city of San Jose.

*(Ord. 12585 § 1 (part), 2004)*

Barbara B. Killey  
Attorney At Law  
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San Rafael, CA 94901  
415-254-8234/killeyb@yahoo.com

Mayor Chuck Reed  
San Jose City Council Members  
San Jose City Hall  
200 East Santa Clara Street  
San Jose, CA 95113

Re: Perils of a do-nothing approach regarding medical cannabis dispensary permits  
and a code enforcement approach to controlling those that open

Dear Mayor Reed and City Council Members:

I am writing because, as the administrator of Oakland's medical cannabis dispensary permit program from 2004 through 2009, I am concerned that San Jose will be making a serious and costly mistake if you decide to do nothing until after the November elections regarding the issue of medical cannabis dispensaries. To prevent a potential explosion of additional unpermitted dispensaries in San Jose, I strongly advocate a regulatory ordinance be adopted as soon as possible and that an emergency moratorium be established in the meantime.

Oakland's Medical Cannabis Dispensary Permit Ordinance was adopted in 2004 in response to the problems created by a proliferation of unpermitted dispensaries that opened prior to the ordinance. These problems included:

- Blatantly open re-sales on the streets surrounding the dispensaries
- Armed robberies of both the dispensaries and exiting buyers
- Reduction in customers for businesses in the vicinity of the dispensaries

Adoption of the Medical Cannabis Dispensary Permit Ordinance eliminated all of these problems. Oakland's permitted dispensaries are now considered to be some of the safest areas of Oakland. Other businesses actually appreciate their presence, due to the high levels of security required of permittees. Additionally, the dispensaries have provided two revenue streams to the City:

1. Annual permit fees of \$30,000 per dispensary, a total of \$120,000 from the four dispensaries allowed by the ordinance
2. A business tax percentage that is 15 times higher than that of other retail businesses and that is estimated will generate over half a million dollars annually

I understand that over 40 medical cannabis dispensaries have opened in San Jose since last summer. Without either a moratorium or a regulatory ordinance that number could easily double. Oakland maintains a list of people who have expressed interest in opening a dispensary if permits become available – there are more than 100 names on the list. As the word spreads

that cannabis dispensaries are opening in San Jose, many of those parties may tire of waiting for permits in Oakland and pitch their tents in San Jose. I understand that some of San Jose's dispensaries relocated after being closed by Los Angeles, and that migration is likely to continue as well.

In his memo dated March 16, 2010, the City Attorney acknowledges that the Code Enforcement approach to closure of the unpermitted dispensaries will "create a demand on Code Enforcement." He also acknowledges the limited success that is achieved by such action, stating:

To date, Code Enforcement has received and investigated complaints of seven (7) medical marijuana dispensaries operating in violation of land use regulations. The property owners and businesses were issued compliance orders requiring that the dispensing of medical marijuana cease by the end of February 2010. **One of the businesses ceased operations due to a temporary injunction obtained by the property owner, although that business has simply moved to a different location in San Jose.** (emphasis added)

The City Attorney then outlines plans to bring the non-compliant dispensaries before the San Jose Appeals Hearing Board. Failure to close would result in administrative fines. He notes that 17 additional businesses that may be operating as medical cannabis dispensaries have been notified of possible land use violations.

A code enforcement process for eliminating and preventing medical cannabis dispensaries has several flaws:

1. Considering the budget crisis faced by California cities, including San Jose, and the resulting staffing constraints, committing the personnel that would be required to close the currently known dispensaries is a waste of precious resources. If conducted in a timely fashion, closing just the 24 dispensaries known to the City could create a crushing workload of confirmation activities, hearing preparation and follow-up enforcement.
2. Oakland's experience with closure attempts by Code Enforcement mirrors San Jose's. The dispensaries either didn't respond or they closed and moved to a new location in Oakland. Injunctions and criminal prosecution by the Oakland Police Department for violation of the ordinance were much more efficient and effective in closing dispensaries and preventing new ones from opening.
3. Unless the administrative fines are crippling, the dispensaries may continue doing business, deciding that the fines are the price of operating a cannabis dispensary.
4. The slowness and ineffectiveness of the Code Enforcement process, combined with the potential for money to be made by dispensaries during the process, will encourage the growth of additional dispensaries, even as the City is working on closing currently known ones.
5. It will be difficult for the City to know where all the unpermitted dispensaries are located. The City Attorney's letter indicates the City is aware of 24 possible medical cannabis dispensaries, while people in the medical cannabis



movement believe there are more than 40. If a permit ordinance is enacted, permitted dispensaries will become a vocal, reliable source of information regarding any dispensaries that attempt to operate illegally.

The real solution is a regulatory ordinance. Mayor Reed's memo dated March 25, 2010 states that "Regulation, control and taxation of medical marijuana will be reconsidered if the 'Regulate, Control and Tax Cannabis Act of 2010' is approved by the voters in November. Mayor Reed misunderstands the proposed Act. It will not affect the medical cannabis laws at all. Rather, it will allow for adult use of cannabis by anyone, not just those with a medical condition that can be helped by the use of cannabis. If the Act passes, the experience gained by the City and the structure created by having a regulatory scheme in place for medical cannabis would greatly facilitate the regulation and control of sales to adults in general.

Staff resources and cost should not be deterrents to the adoption of a regulatory ordinance. Existing ordinances provide templates upon which San Jose could build, reducing the cost of drafting. If staff resources are not available, an outside consultant could be used to draft the ordinance and staff report. Whether City staff or consultants are used, the costs incurred could be recouped through the application fees paid by permit applicants. A consultant may agree to postpone his billing until application fees are in the City's coffers.

However, if there are other reasons for delaying a regulatory ordinance, the City should at least establish a moratorium to prevent the proliferation of additional dispensaries prior to the adoption of the ordinance.

I am unable to attend the March 30 Council meeting at which this issue will be discussed. However, I would like to help San Jose avoid the pitfalls Oakland experienced, and I would be happy to discuss that experience, the competitive application process I developed, changes I would recommend if Oakland's ordinance is used as a template for San Jose, or any other questions the City may have regarding this issue. I am available by phone or email or could meet in person if that would be helpful.

Sincerely,

*Barbara B. Killey*

Barbara B. Killey

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March 25, 2010

Jose Salcido  
Senior Policy Advisor  
Office of the Mayor  
City of San José  
200 East Santa Clara Street  
San José, CA 95113

Re: City Attorney's 3/16/10 "No Action" Medical Cannabis Supplemental Memorandum

Dear Lt.. Salcido:

I am a former Oakland Deputy City Attorney where I served as a Code Enforcement prosecutor. For the last five years I have provided policy and legal advice to cities and to medical cannabis dispensing collectives, and have also directed zoning initiative campaigns. Currently, I am a policy consultant to MC3 (an organization consisting of 16 San José collectives) through my consulting firm, CanBe, where I serve as Vice President of Government Affairs.

The City Attorney's "No Action" position is legally flawed and will lead to poor public policy for the following reasons.

- I. The City Attorney Mistakenly Assumes that All Commercial Collectives are Illegal under State Law.
- II. The City Attorney's Reliance on the San José Municipal Code Provision that Any Federal Law Violation is an Unpermitted Use is Untested, Inconsistent with State Law, and Inconsistent with the City Attorney's Own Analysis.
- III. Storefront Medical Cannabis Dispensing Collectives are Legal Under State Law, and Sound Policy Considerations Compel the City Council to Direct Staff to Prepare an Ordinance Regulating Them.

**I. The City Attorney Mistakenly Assumes that All Commercial Collectives are Illegal under State Law.**

In his 3/16/10 "No Action" memo, the City Attorney asserts, without legal authority, that "commercial dispensaries" are illegal under state law. (Pages 2, 3, and 4 of the memo.) This is apparently in contrast to cultivation

collectives that do not engage in commercial distribution of cannabis, which the City Attorney implies are the only legal collective form under state law. But this over-simplified “distinction” is based on a false assumption that collectives cannot legally operate as “commercial dispensaries.”

The exact opposite is true: the California Attorney General has specifically opined that properly organized and operated “storefront dispensaries” are legal under state law, and that only those that “do not substantially comply” with state law are not legal.<sup>1</sup> Therefore, the City Attorney’s simplistic position that all storefront dispensing collectives are illegal and can therefore be disregarded is untenable and contrary to California law.

Thus, the policy task before the City is to ensure that storefront collectives are “properly organized and operated.” The City Council should therefore direct Staff to draft an ordinance to that end: sensibly regulating storefront collectives to enforce responsible operation in suitable locations, creating a cost-recovery regulatory fee, and possibly proposing a specific tax on storefront collectives for submission to the voters.

## **II. The City Attorney’s Reliance on the San José Municipal Code Provision that Any Federal Law Violation is an Unpermitted Use is Untested, Inconsistent with State Law, and Inconsistent with the City Attorney’s Own Analysis.**

The City Attorney notes that under Title 1 and Title 20 of the Municipal Code, use of property that violates Federal law is deemed a nuisance and is not allowed. (Pages 2 and 4 of the 3/16/10 “No Action” memo.) Such municipal code provisions that purport to ban medical cannabis dispensing collectives because of Federal law violations have never yet been tested in the courts. When they are so tested, they are likely to fail because the California Court of Appeal has already held that it is not the job of the State, its political subdivisions and its local agencies to enforce Federal law, but that rather they must uphold and implement State law.<sup>2</sup>

The City Attorney specifically recognizes this truth that the City must uphold the State medical cannabis laws over Federal law when he acknowledges that the San José Police Department must returned seized medical cannabis to patients entitled to possess it under State law. (3/16/10

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<sup>1</sup> “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, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law.” California Department of Justice, Office of the Attorney General, *Guidelines For The Security And Non-Diversion Of Marijuana Grown For Medical Use*, August 2008, p. 11.

<sup>2</sup> *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 391-92 (“But it must be remembered it is not the job of the local police to enforce the federal drug laws as such. For reasons we have explained, state courts can only reach conduct subject to federal law if such conduct also transcends state law, which in this case it does not.”)

“No Action” memo at p. 3.) He must take this State over Federal law position because of the case cited immediately above, *Garden Grove*. The California Court of Appeals is likewise likely to hold that the City cannot bar the establishment of storefront medical cannabis collectives, legal under State law, merely because they violate Federal law. The State (and the City) “cannot do indirectly what it cannot do directly.”<sup>3</sup>

Thus, the City Attorney’s position is logically inconsistent: he acknowledges that the City must follow State law, not Federal law, when it comes to returning seized medical cannabis to patients, but illogically he asserts that the City need not follow State law, and can instead follow Federal law, when it comes to allowing legal storefront collectives. That inconsistency is fatally flawed, it cannot be the basis for sound policy, and it is likely to make San José the next test case in the continuing line of cases holding that Cities and other State agencies cannot hide behind Federal law, but must follow State medical cannabis law.<sup>4</sup>

Again, the policy task before the City is to ensure that storefront collectives are “properly organized and operated.” The City Council should therefore direct Staff to draft an ordinance to that end. There is no other sound policy direction.

### **III. Storefront Medical Cannabis Dispensing Collectives are Legal Under State Law, and Sound Policy Considerations Compel the City Council to Direct Staff to Prepare an Ordinance Regulating Them.**

As I mentioned in our meeting yesterday, where there have been issues associated with storefront collectives, those issues have arisen from local government’s failure to promptly regulate. This is most noticeable in the City of Los Angeles where after almost three years, regulations are yet to be implemented. But where local government has promptly regulated, no such issues exist.<sup>5</sup> This clearly demonstrated in localities as diverse as San Francisco, Oakland, Berkeley, Santa Rosa, Sonoma County, and Sebastopol.

It will be tragic, because so predictable, if San Jose makes the same mistake as Los Angeles and fails to regulate—and then suffers the same unregulated growth of storefront collectives. San Jose is a smart City and it needs to do the smart thing: regulate and control storefront collectives now.

The City Attorney’s “No Action” position is fatally flawed—it has no legal basis, but rather is based on the notion that the City can somehow turn back the hands of time and put the genie back in the bottle. That option is not available. The City Attorney’s “No Action” position is cruel in its

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<sup>3</sup> *Ibid.* at 379.

<sup>4</sup> See again, *Garden Grove*, and also *People v. Tilehkooh*, cited therein.

<sup>5</sup> See 3/24/10 East Bay Express article:

<http://www.eastbayexpress.com/ebx/the-return-of-reefer-madness/Content?oid=1661015>

and See SF Chronicle post-regulation article:

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/14/BAS313G9VL.DTL>

assumption that medical cannabis patients can individually (or in small affinity groups) grow their own medicine—like “tomatoes and roses.” That is not a compassionate position. Rather it is a position calculated to inflict needless suffering on thousands of San Jose patients.

The only proven effective system of cultivation and distribution is one based on regulated storefront collectives. Despite the City Attorney’s baseless assertions, such collectives are legal under State law. All that remains is for San José to craft a workable set of sensible regulations. The City Council should direct staff to draft an ordinance for the Council’s action before the summer recess.

In the mean time, the City should reserve Code Enforcement resources for actual complaints of nuisance in fact, blight, or substantive code violations. Expending staff time on attempting to enforce an unenforceable “Federal law” policy is a misuse of a precious resource. As with all the Code Enforcement, inspection and action should be driven by actual complaints and demonstrated public safety concerns.

Thank you for all your good work.

Yours very truly,

James Anthony

**CITY OF OAKLAND MEASURE F**

<b>F</b> Shall City of Oakland's business tax, which currently imposes a tax rate of \$1.20 per \$1,000 on "cannabis business" gross receipts, be amended to establish a new tax rate of \$18 per \$1,000 of gross receipts?	<b>YES</b>
	<b>NO</b>

**CITY ATTORNEY'S IMPARTIAL LEGAL ANALYSIS OF MEASURE F**

Under the City of Oakland's current Business Tax, "Cannabis Businesses" are taxed as retail sales businesses. The tax rate for Retail Sales businesses is \$60.00 per year for the first \$50,000.00 of gross receipts, plus \$1.20 for each additional \$1,000.00. "Gross receipts" are a business's total revenue without deducting expenses. This measure would amend Oakland's Business Tax which is found at Chapter 5.04 of the Oakland Municipal Code to establish a new tax rate for "Cannabis Businesses" of \$18 for every \$1,000.00 of gross receipts from the businesses' activity in Oakland. The amendment will tax gross receipts from the planting, cultivation, harvesting, transporting, manufacturing, compounding, converting, processing, preparing, storing, packaging, wholesale, and retail sales of marijuana and its derivatives.

The Cannabis Business tax is a general tax because the City could use the tax revenue for any legal municipal purpose. The California Constitution, Article XIII(C), Section 2(b) requires that the electorate approve a general tax by a majority vote. Before the City can establish the new tax rate for "Cannabis Businesses," a majority of the electorate must approve the measure.

s/JOHN RUSSO  
City Attorney

**CITY ATTORNEY'S BALLOT TITLE AND SUMMARY OF MEASURE F**

**BALLOT TITLE**

**ORDINANCE AMENDING THE CITY OF OAKLAND'S BUSINESS TAX TO ESTABLISH A NEW TAX RATE FOR "CANNABIS BUSINESSES"**

**BALLOT SUMMARY**

The measure creates a new Business Tax rate for "Cannabis Businesses" of \$18 for each \$1,000 of gross receipts from business activity. Currently, Cannabis Businesses in Oakland are taxed at the rate for retail sales businesses, which is \$60.00 per year for the first \$50,000.00 of gross receipts, plus \$1.20 for each additional \$1,000.00. The City of Oakland may use the revenue from the tax for any legal municipal purpose, including but not limited to maintenance of vital services and facilities. The tax must be approved by a majority of Oakland voters who cast ballots.

s/JOHN RUSSO  
City Attorney

**CITY AUDITOR'S IMPARTIAL FINANCIAL  
ANALYSIS OF MEASURE F**

**SUMMARY**

Measure F authorizes the City of Oakland to modify the business tax, Chapter 5.04 of the Oakland Municipal Code by adding Section 5.04.480, which would create a new "Cannabis" business classification. Oakland's existing business tax category list does not contain a specific tax category for cannabis businesses, since permitted cannabis dispensaries did not exist at the time the business tax system was created.

Under the proposed cannabis business classification, cannabis businesses will be taxed at a rate of \$18 per \$1,000 of gross receipts. The amendment will tax cannabis business activity generating gross receipts from planting, cultivation, harvesting, transporting, manufacturing, compounding, converting, processing, preparing, storing, packaging, wholesale, and retail sales of marijuana and its derivatives.

Since 1996, when California voters authorized the use of cannabis for medical purposes, cannabis businesses have been paying the general retail business tax rate of \$1.20 per \$1,000 of gross receipts, rather than under a specific category.

If Measure F is approved by a majority of voters, the new cannabis business classification and tax rate will be effective beginning January 1, 2010.

**FINANCIAL IMPACT**

In Calendar Year (CY) 2007 and CY 2008, there were four cannabis dispensaries licensed with the City of Oakland. Gross receipts from the dispensaries for each fiscal year were \$17,918,000 and \$19,673,000 respectively. Under the general retail business tax rate of \$1.20 per \$1,000, business tax revenues from the dispensaries for each calendar year were \$21,500 and \$23,608 respectively.

For CY 2010, the City projects the same number of licensed cannabis dispensaries and estimated gross receipts of \$17,500,000. As a result, the new business tax classification and tax rate for cannabis facilities is estimated to generate \$294,000 in additional annual revenue, as shown in the table below.

Calendar Year	Projected Cannabis Business Gross Receipts	Annual Revenue based on \$1.20 per \$1,000 (A)	Annual Revenue based on \$18 per \$1,000 (B)	Estimated Increase in Revenue under Proposed Ordinance (B-A)
2010	\$17,500,000	\$21,000	\$315,000	\$294,000

The estimated increase in revenue will be deposited into the general fund for general fund purposes. The ballot measure does not earmark the increased revenue for any specific purpose.

Based on our analysis of the data provided by City staff, the projected revenues appear reasonable. We relied on the

best data available at this time, however actual results may vary from our estimates.

s/COURTNEY A. RUBY, CPA  
City Auditor

## **ARGUMENT IN FAVOR OF MEASURE F**

The voters of California authorized the use of medical cannabis in 1996 – in a ballot initiative which Oakland voters supported by over 79% of the vote. Therefore, the City of Oakland has worked to create regulations and a permitting system for medical cannabis dispensaries. Regulations are used to prevent nuisance while protecting patients, and keeping customers away from the criminal market. Oakland's business tax system does not yet have a category for medical cannabis dispensaries. As a result, they have been paying at the "general retail rate," of \$1.20 per \$1,000 of gross receipts. This ballot measure creates a new business tax classification and rate for cannabis dispensaries, with a new, increased rate of \$18.00 per \$1,000. This will provide revenue to help balance Oakland's budget and help with funding for essential public services. State law in California requires that any new business tax rate must be approved by the voters. Community organizations, city leaders and the medical cannabis dispensaries themselves all support this measure, which will help avoid cuts to services for the public. We ask for your yes vote. For more information, visit [www.Yes4Oakland.org](http://www.Yes4Oakland.org)

s/Dr. Frank H. Lucido

Family Practice Physician

s/Rebecca Kaplan

Oakland City Councilmember At-Large

s/Jan S. Rodolfo, RN

California Nurses Association

s/Richard Lee

President – Oaksterdam University

s/Nate Miley

Alameda County Supervisor

**NO ARGUMENT AGAINST MEASURE F WAS  
SUBMITTED.**



## FULL TEXT OF MEASURE F

### ORDINANCE AMENDING THE CITY OF OAKLAND'S BUSINESS TAX TO ESTABLISH A NEW TAX RATE FOR "CANNABIS BUSINESSES"

WHEREAS, through the passage of Proposition 215, the voters of California authorized the use of cannabis for medical purposes in 1996; and

WHEREAS, by a 79% vote in favor of the proposition, the voters of Oakland overwhelmingly approved Proposition 215; and

WHEREAS, the City Council of the City of Oakland has adopted medical cannabis permitting regulations to prevent nuisance, provide for effective controls, enable medical cannabis patients to obtain cannabis from safe sources, and provide appropriate licensing and revenues for the City in a manner consistent with state law; and

WHEREAS, every person engaged in business activity in the City of Oakland is required to obtain a business tax certificate and to pay the City's business tax; and

WHEREAS, the City of Oakland has a business tax system which applies to all businesses in the City, and which contains a list of categories of types of businesses, and provides for the collection of business taxes at specified rates based on the classifications of the businesses operating in the City; and

WHEREAS, because permitted medical cannabis dispensaries did not exist at the time the business tax system was created, Oakland's current business tax category list does not contain a specific tax category for cannabis businesses; and

WHEREAS, cannabis businesses are currently taxed under the business classification of general retail at a business tax rate of \$1.20 per \$1,000 of gross receipts, rather than under a specific category; and

WHEREAS, under the newly created business classification cannabis businesses will be taxed at a rate of \$18 per \$1,000; and

WHEREAS, accordingly, the City Council of the City of Oakland desires to amend Chapter 5.04, adding section 5.04.480 to the Oakland Municipal; and

WHEREAS, all revenues received from the tax will be deposited in the general fund of the City to be expended for general fund purposes; now, therefore, be it

**RESOLVED:** That the City Council of the City of Oakland does hereby request that the Board of Supervisors of Alameda County order the Special Municipal election, consistent with the provisions of state law; and be it

**FURTHER RESOLVED:** That the City Council of the City of Oakland does hereby submit to the voters at the special election, not more than 88 days and not more than 150 days from the date of passage of this resolution, the text of the proposed ordinance, which shall be as follows; and be it

**FURTHER RESOLVED:** That each ballot used at said municipal election shall have printed therein, in addition to any other matter required by law the following:

### ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO MODIFY THE BUSINESS TAX BY CREATING A NEW "CANNABIS" BUSINESS CLASSIFICATION

Be it ordained by the People of the City of Oakland:

**Section 1.** The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by ~~strike-through~~ type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed).

**Section 2. Code Amendment.** Chapter 5.04 of the Oakland Municipal Code is hereby amended adding Section 5.04.480 to read as follows:

#### **5.04.480 Cannabis.**

A. Every person engaged in a cannabis business not otherwise specifically taxed by other business tax provisions of this chapter, shall pay a business tax of eighteen dollars \$18 for each one thousand dollars (\$1,000.00) of gross receipts or fractional part thereof.

B. For the purpose of this section, "cannabis business" means business activity including, but not limited to, planting, cultivation, harvesting, transporting, manufacturing, compounding, converting, processing, preparing, storing, packaging, wholesale, and/or retail sales of marijuana, any part of the plant Cannabis sativa L, or its derivatives.

**Section 3. Severability.** Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

**Section 4. California Environmental Quality Act Requirements.** This Ordinance is exempt from the California Environmental Quality Act, Public Resources Code section 21000 et seq., including without limitation Public Resources Code section 21065, CEQA Guidelines 15378(b)(4) and 15061(b)(3), as it can be seen with certainty that there is no possibility that the activity authorized herein may have a significant effect on the environment.

**Section 5. Majority Approval; Effective Date.** This Ordinance shall be effective only if approved by a majority of the voters voting thereon and after the vote is declared by the City Council. The effective date of this Ordinance shall be January 1, 2010.

**Section 6. Council Amendments.** The City Council of the City of Oakland is hereby authorized to amend Section 5.04.480 of the Oakland Municipal Code as adopted by this Ordinance in any manner that does not increase the tax rate, otherwise constitute a tax increase for which voter approval is required by Article XIII C of the California Constitution or entirely dis-

pense with the requirement for independent audits stated in Section 4.28.190.

**FURTHER RESOLVED:** That the City Council of the City of Oakland does hereby find and determine that pursuant to Article XIII C, section 2(b) of the California Constitution the City Council of the City of Oakland has adopted a resolution declaring the existence of a fiscal emergency in the City of Oakland that necessitates asking the voters to approve the proposed medical cannabis tax before the next regular election of the Oakland City Council;