



STAFF REPORT

TO: Mayor and Members of the City Council

FROM: Roger C. Peters, City Attorney

MEETING DATE: August 22, 2007

SUBJECT: Medical Marijuana Dispensaries

RECOMMENDATION.

Staff recommends that the City Council of the Town of Colma introduce and adopt an ordinance banning Medical Marijuana Dispensaries.

EXECUTIVE SUMMARY.

The proposed ordinance would prohibit the establishment of medical marijuana dispensaries within the Town of Colma.

Section 5.01.080 would be amended to define a medical marijuana dispensary. That section makes clear that certain state-licensed clinics and healthcare facilities that serve the needs of individuals with serious and terminal illnesses would not fall within the definition of medical marijuana dispensaries and therefore would not be prohibited by this ordinance.

The ordinance recites that it is not intended to preempt California law governing medical marijuana (see below) and would not impact qualified patients' and caregivers' rights to cultivate and possess medical marijuana for their own medical use, provided it is done in compliance with the law.

FISCAL IMPACT

There would be no direct fiscal impact arising from adoption of this ordinance.

BACKGROUND.

(a) Medical Marijuana under State Law

In November of 1996, California voters enacted Proposition 215, "The Compassionate Use Act of 1996" (now codified at Health and Safety Code section 11362.5 *et seq.*) ("Act"). The proposition was designed to allow "seriously ill" residents of the State to

have access to medical marijuana for medical purposes. The Act creates an exemption from criminal prosecution or sanction for physicians, as well as for patients and “primary caregivers” who possess or cultivate marijuana for medical purposes with the recommendation or approval of a physician. A “primary caregiver” is defined as “the individual, designated by a qualified patient or person with an identification card, who has consistently assumed responsibility for the housing health, or safety of that patient or person....” (Section 11362.7(d))

The Act does not legalize marijuana *per se*; it is merely intended to allow an individual with serious and terminal illnesses to possess and cultivate marijuana for his/her own medical needs upon a doctor’s recommendation. Although one of the Act’s stated purposes is “To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana”, to date, this plan has not been forthcoming. This vacuum and lack of direction from the Legislature has left communities to guess at how the Act is intended to be implemented, particularly as it concerns the distribution of medical marijuana through dispensaries – facilities which are not explicitly authorized by the Act.

In October 2003, the State Legislature adopted SB 420 (Vasconcellos) “Medical Marijuana Program,” which established further regulations related to medical marijuana. While SB 420 provides additional statutory guidance for medical marijuana use, including a clarification of the amounts of marijuana a patient or caregiver may keep (i.e. no more than 8 ounces of dried marijuana and no more than 6 mature or immature plants), a voluntary program for identification cards for qualified patients and primary caregivers and confidentiality and privacy restrictions, it gives no clear direction regarding the role of dispensaries in implementing the Act. It does allow for the collective or cooperative cultivation of medical marijuana, provided that those who collectively or cooperatively cultivate are (1) qualified patients, (2) persons with valid identification cards, or (3) primary caregivers of the aforementioned groups (Section 11362.775). However, the Act does not require communities to establish or provide medical marijuana dispensaries.

(b) Medical Marijuana under Federal Law

Federal law has long prohibited cultivation, possession or distribution of marijuana. The main governing federal statute is the Comprehensive Drug Use Prevention and Control Act (“CSA”). Congress enacted the CSA in 1970 after the declaration of the national “war on drugs,” and in an attempt to enhance federal drug enforcement power. The main objectives of the CSA were to conquer drug abuse and to control both illegitimate and legitimate traffic in controlled substances. To effectuate the statutory goal, the CSA categorizes all controlled substances into five schedules based on their accepted medical uses, the potential for abuse, and the psychological effects on the body. In the CSA Congress classified marijuana as a “Schedule I” drug which means it has a high potential for abuse, lacks any accepted medical use has not been accepted for safe use in medically supervised treatment. (Controlled Substances Act, 21 USC § 812(c)). As a result of this classification, the manufacture, distribution, or possession of marijuana is a criminal offense with the sole exception being use of the drug as part of an FDA pre-approved research study. (CSA §§ 823, 841, 844)

In 2001, the United States Supreme Court held that there is no "medical necessity defense" to the CSA's prohibition on manufacturing and distributing marijuana. The Supreme Court reasoned that by classifying marijuana as a Schedule I drug, Congress already determined that marijuana has no medical benefits thereby precluding the use of this defense. This means that if a person violates the Controlled Substance Act in order to avoid a greater harm, a claim of "medical necessity" to defend his/her actions will not prevent the person from being guilty of committing a crime under federal law.

(c) The Conflict between State and Federal Law governing Medical Marijuana Dispensaries

As the differences between state and federal approaches to medical marijuana described above make clear, there is a conflict between state and federal law on this subject. This conflict has created a dilemma for local governments and their law enforcement agencies, particularly with regard to medical marijuana dispensaries.

A "dispensary" is a facility where the primary purpose is to dispense medical marijuana to specific individuals (i.e. qualified patients) when ingestion has been prescribed or recommended for medical purposes by a physician. For the reasons set forth above, these dispensaries violate Federal law. They are also not explicitly authorized by the Act. Nonetheless, the original adoption of Proposition 215 and the subsequent enactment of SB 420 have created increased interest in the establishment of medical marijuana dispensaries throughout the State. Although Prop 215 has been in effect for almost nine years, there is no indication of any imminent resolution of the clear conflict between state and federal law. This situation forces local governments in California to consider adopting local ordinances either to regulate or prohibit medical marijuana dispensaries.

Staff also notes that the National Organization for the Reform of Marijuana Law (NORML), which is an organization that seeks "to achieve the repeal of marijuana prohibition so that the responsible use of cannabis by adults is no longer subject to penalty," recognizes in its "Advice for Medical Marijuana Providers" that neither the Act nor SB 420 "provides a green light for sales of cannabis. Those dispensaries that are selling marijuana over the counter accordingly do so at the tolerance of local authorities." NORML's advice further states that "SB 420 encourages access to medical marijuana through collective, cooperative cultivation projects. Unfortunately, it provides no guidelines or explanation as to how these should operate." (From the NORML website at www.norml.org)

(d) Survey of Other Cities' Experiences

Local governments have approached the issue of medical marijuana dispensaries in several ways.

Some jurisdictions have adopted ordinances which establish regulations governing the number, location or operating standards for these businesses. The City of Oakland permits the establishment of medical marijuana dispensaries, but limits the total number to four within that City. Similarly, the City of Berkeley recently amended its ordinance to limit the number of permitted dispensaries to three. The City of Martinez has an ordinance that permits and regulates medical marijuana dispensaries within identified

commercial districts. The City of Elk Grove recently adopted an ordinance which contains not only zoning regulations, but also regulates the operators and employees of these facilities. Alameda County recently approved a plan to permit three new medical marijuana facilities in specific locations within the County. The plan includes background checks and restricts the permissible location of these facilities.

We are aware of at least six cities that prohibit the establishment of medical marijuana dispensaries: the cities of Fresno, Lincoln, Rocklin, Susanville, Concord, and Rhonert Park. Fresno has been sued by Americans for Safe Access and other named plaintiff who contend that the Fresno ordinance violates Proposition 215.

Several cities have adopted zoning moratoria which prevent establishment of these facilities pending further study. El Cerrito, Fremont, Pinole and Pleasant Hill have adopted temporary moratoriums in order to determine whether and how they will regulate these facilities.

Except for South San Francisco, the cities in San Mateo County appear to be waiting for the County to take the lead. South San Francisco severely restricts the location of dispensaries and puts tight restrictions on residents that grow their own in accordance with California law. The SSF staff report clearly indicates that dispensaries are not allowed under California law.

Finally, some jurisdictions in California have allowed these businesses to proliferate with no attempt at regulation.

ANALYSIS.

(a) Authority to adopt Ordinance Regulating Medical Marijuana Dispensaries

The Town has the broad authority to impose zoning regulations under its "police power." "Police power" regulations are those designed to protect and promote the public's health, safety and welfare. Regulations aimed at medical marijuana dispensaries certainly fall within this category.

(b) Secondary Impacts

Law enforcement agencies have documented that the establishment of medical marijuana dispensaries can cause adverse secondary effects such as increased crime. Local agencies in cities where dispensaries exist have reported increase of illegal drug activity, illegal drug sales, robbery of persons leaving dispensaries, loitering around dispensaries, falsely obtained identification cards, and other increases in criminal activity. There is also a concern that the operation of a medical marijuana dispensary within the Town would result in increased demands for police response, thereby negatively impacting Colma Police Department's ability to respond to other calls for service.

The experience of other California cities' as well as studies evaluating the same make clear that the establishment of medical marijuana dispensaries could negatively impact the health, safety, and welfare of the community and compromise our working

relationship with the Federal Drug Enforcement Agency (DEA), which is the federal agency responsible for enforcing the nation's drug laws.

Attached to this Staff Report is a report from the Chief of Police describing the secondary impacts that will occur by allowing medical marijuana dispensaries to operate within the Town of Colma. Staff recommends adoption of the proposed ordinance to avoid these secondary impacts.

(c) Loss of Sales Taxes

Some advocates argue that permitting medical marijuana dispensaries to locate in Colma could raise revenues for the Town in the way of sales taxes because, according to the State Board of Equalization, the sale of marijuana is taxable. However, these revenues would probably be offset by the increased costs in regulating, licensing and processing background checks on operators and employees of medical marijuana dispensaries. Moreover, the collection of sales taxes is somewhat problematic in light of recent activities by the U.S. Drug Enforcement Agency. In southern California, the DEA has seized bank accounts of medical marijuana dispensaries, which included money intended to be paid as sales taxes.

(d) Reasons for Staff Recommendation

As noted above, there is a conflict between State and federal law regarding the medical use of marijuana. Given this potential conflict, the lack of State direction on a community's role in regulating the dispensing of marijuana, and most importantly, concerns regarding the secondary impacts of dispensaries in communities, Staff believes the best course of action would be to prohibit Town-permitted dispensaries.

In Staff's view, a prohibition of Town-permitted medical marijuana dispensaries would be in keeping with the intent of the Act, as it would not restrict a qualified patient's right to use medical marijuana for the purposes stated in the Act, which concern personal cultivation and possession where needed for medical purposes. It would also not restrict the collective, cooperative cultivation projects envisioned by SB 420 nor prohibit state-licensed clinics and healthcare facilities that address the needs of individuals with serious and terminal illnesses. Lastly, it should be noted that State Health and Safety Code Section 11362.83 states that "Nothing in this article (which codified SB 420) shall prevent a Town or other local governing body from adopting and enforcing laws consistent with this article." The prohibition of Town-permitted medical marijuana dispensaries would be consistent with the Act, as again, it would not interfere with a qualified patient's right to use medical marijuana in compliance with the Act. Staff further hopes that this prohibition would be a placeholder until such time as the state provides the guidance regarding medical marijuana distribution that is promised in the Act.

(e) Alternatives

The City Council may consider two alternatives.

First, the City Council could choose to stay silent on the issue – i.e. adopt no ordinance or governing regulations for these establishments. In the absence of a local ordinance, these facilities may presumably be established and operated, subject to discretionary enforcement efforts by Federal authorities which may or may not occur. One risk in this approach is a claim, which we believe unlikely, by the federal government that the Town is aiding and abetting the commission of a federal crime. The greater risk is that medical marijuana dispensaries will flourish in Town, bringing with them all the secondary impacts described in the Chief's report.

Second, the Council could adopt an ordinance that regulates, but does not prohibit the establishment of medical marijuana businesses. However, this alternative would put the Town in the position of approving an activity which violates Federal Law. If the City Council decides to go this direction, then staff recommends examining measures such as designating the zoning districts where the facilities are allowed, requiring discretionary review of proposed facilities through a use permit process, prohibiting establishment within a specified distance from sensitive uses such as schools, and requiring background checks for operators. Referral to a Council sub-committee for further discussion would also be appropriate if the Council wishes to consider this alternative.

CONCLUSION.

Staff recommends that the City Council adopt the attached ordinance to amend the Municipal Code to define and prohibit Medical Marijuana Dispensaries within the Town of Colma.

Attachments

1. Report from the Colma Chief of Police, with attachments
2. Ordinance ____ Amending Chapter ____ of the CMC to Prohibit the Establishment of Medical Marijuana Dispensaries within the Town of Colma

ORDINANCE NO. _____
OF THE CITY COUNCIL OF THE TOWN OF COLMA

**AN ORDINANCE AMENDING SECTIONS 5.01.080 AND 5.03.350 OF THE
COLMA MUNICIPAL CODE TO PROHIBIT THE ESTABLISHMENT OF MEDICAL
MARIJUANA DISPENSARIES WITHIN THE TOWN OF COLMA**

The City Council of the Town of Colma does hereby ordain as follows:

ARTICLE 1. BACKGROUND.

(a) In November, 1996, the Voters of the State of California approved Proposition 215 (codified as Health & Safety Code 11352.5 *et seq.* and entitled the Compassionate Use Act of 1996 ("Act")).

(b) The State enacted SB-240 in 2003 to clarify the scope of the Compassionate Use Act of 1996 and to allow cities and other governing bodies to adopt and forge rules and regulations consistent with SB-240.

(c) The Compassionate Use Act of 1996 does not expressly authorize medical marijuana dispensaries, and the State has not given direction as to how cities are to implement the Act, particularly with regards to the distribution of medical marijuana through medical marijuana dispensaries.

(d) In May, 2001, the United States Supreme Court issued its decision in *United States v. Oakland Buyers' Cooperative and Jeffery Jones* holding that distribution of medical marijuana is illegal under the Federal Controlled Substances Act, 21 U.S.C Section 841 ("CSA"), and there is no medical necessity defense allowed under federal law.

(e) On June 6, 2005, the United States Supreme Court held, in *Gonzales v. Raich*, that Congress has the authority under the Commerce Clause of the United States Constitution, and has the power under the CSA, to prohibit local cultivation and use of marijuana even though it would be in compliance with California law.

(f) In light of these decisions, the City Council finds that there is an inconsistency between federal law and state law regarding the establishment of medical marijuana dispensaries, as defined herein, and that, until such inconsistency is resolved between the federal and state laws the City Council intends to prohibit medical marijuana dispensaries within the Town of Colma.

(g) A duly noticed public hearing regarding the proposed amendments to the Municipal Code was held by the Council on August 22, 2007.

ARTICLE 2. FINDINGS. The City Council finds that:

- (a) Medical marijuana dispensaries should be prohibited in the Town of Colma because the presence of such dispensaries causes adverse secondary impacts that are detrimental to the health, safety, and welfare of the community. The adverse secondary impacts associated with medical marijuana dispensaries are described in a report from the Chief of Police which is incorporated herein by reference as though set forth verbatim. Those adverse secondary impacts include, but are not limited to the substantial likelihood for increases in criminal activity, illegal drug activity, robbery of persons leaving dispensaries, loitering around dispensaries, falsely obtained identification cards, and burglaries at dispensaries. For these reasons, the City Council deems it necessary to prohibit medical marijuana dispensaries in the Town.
- (b) This ordinance is consistent with state law because the prohibition of medical marijuana dispensaries does not affect an individual's right to cultivate and possess medical marijuana and does not prevent certain healthcare facilities from dispensing medical marijuana.
- (c) This ordinance is consistent with federal law because federal law prohibits the cultivation, possession, or distribution of marijuana.

ARTICLE 3. COLMA MUNICIPAL CODE § 5.01.080 Amended.

Section 5.01.080 of the Colma Municipal Code is hereby amended by adding thereto the following paragraph after the paragraph defining "Lot Width":

Medical Marijuana Dispensary means any facility or location, whether fixed or mobile, where medical marijuana is made available to or distributed by or distributed to one (1) or more of the following: a primary caregiver, a qualified patient, or a patient with an identification card, as those terms are defined in California Health and Safety Code Section 11362.5 et seq. A "Medical Marijuana Dispensary" shall not include the following uses, as long as the location of such uses is otherwise regulated by this Code or applicable law: a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code; a healthcare facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code; a facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code; a residential care facility for persons with chronic life threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code; a residential care facility for elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code; a residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health & Safety Code, as long as such use complies strictly with applicable law, including but not limited to, Health & Safety Code Section 11362.5 et seq.

ARTICLE 4. COLMA MUNICIPAL CODE § 5.03.350(c) Amended.

Section 5.03.350(c) of the Colma Municipal Code shall be and hereby is amended to read as follows:

(a) The following uses are prohibited in all districts: amusement parks or centers, circuses, carnivals, outdoor theaters, race tracks, commercial recreation centers, stockyards, the slaughtering of animals, and medical marijuana dispensaries.

ARTICLE 5. SEVERABILITY. Each of the provisions of this ordinance is severable from all other provisions. If any article, section, subsection, paragraph, sentence, clause or phrase of this ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance.

ARTICLE 6. NOT A CEQA PROJECT. The City Council finds that adoption of this Ordinance is not a "project," as defined in the California Environmental Quality Act because it does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment and concerns general policy and procedure making.

ARTICLE 7. EFFECTIVE DATE. This ordinance, or a summary thereof prepared by the City Attorney, shall be posted on the three (3) official bulletin boards of the Town of Colma within 15 days of its passage and is to take force and effect thirty (30) days after its passage.

* * * * *

I certify that the foregoing Ordinance No. ____ was duly introduced at an adjourned regular meeting of the City Council held on August 22, 2007 and duly adopted at a regular meeting of said City Council held on _____, 2007 by the following vote:

Name	Voting		Present, Not Voting		Absent
	Aye	No	Abstain	Not Participating	
Frossanna Vallergera, Mayor					
C. R. "Larry" Formalejo					
Joseph Silva					
Helen Fisicaro					
Joanne F. del Rosario					
Voting Tally:					

Dated _____

Frossanna Vallergera, Mayor

Attest: _____
Diane McGrath, City Clerk