

MEMORANDUM

To: California Police Chiefs Association

From: Martin J. Mayer, Esq.
Paul R. Coble, Esq.

Date: February 2007

Subject: Regulating/Prohibiting Medical Marijuana Dispensaries

Pursuant to Proposition 215, the Compassionate Use Act, a vast majority of voters in California in 1996 approved the use of marijuana for certain medical purposes. The legitimacy of this new law was challenged and the California Supreme Court ultimately decided in favor of Proposition 215 in the case of *People v. Mower*, (2002) 28 Cal.4th 457. The Court ruled that not only was the possession of marijuana for medical purposes a defense to the charge that one was in possession of an illegal drug, but it could also be used pre-trial in the motion to dismiss the underlying prosecution. The Court stated, in part, that the Act "...operates to render non-criminal certain conduct which would otherwise be criminal." In light of *Mower*, most California cities that were addressing the issue of medical marijuana clinics were doing so through regulatory ordinances related to land use.

There has more recently, however, been a significant development in the law at the federal level. On June 6, 2005, the United States Supreme Court issued its ruling in *Gonzales v. Raich*, (June 6, 2005) 125 S.Ct. 2195. The Court held that the regulation of marijuana under the federal Controlled Substances Act (CSA) was squarely within Congress' commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market. This decision thus overturned the earlier ruling by the Ninth Circuit, determining that marijuana possessed, cultivated and/or sold within the purported scope of California's Compassionate Use Act remained a felony under federal law.

This ruling may serve to alter the landscape of options available to cities in dealing with these issues. California cities *may no longer be constrained simply to address this issue through land use regulation*. In light of these recent developments, here are some options available to cities in addressing this issue:

1. Enact an ordinance expressly forbidding the issuance of licenses or permits, and disapproving land uses, for the purpose of operating a medical marijuana clinic.

Notwithstanding *Raich*, this would run directly contrary to state law as embodied in the Compassionate Use Act, would serve to “red flag” the issue for marijuana proponents, and would almost certainly lead to a legal challenge which the city, in light of current state law, may well lose.

2. Enact an ordinance putting in place specific regulatory measures concerning business licensing and land use permits to govern medical marijuana clinics.

Assuming that such regulatory measures were reasonable, the end result would be that a city could become home to one or more medical marijuana clinics, though subject to regulation as specified. Reasonable regulations would likely include issues such as proximity to schools or residential areas, hours of operation, site security, criminal background checks on operators and “clinic” Staff, etc. There are, of course, limits on the nature and extent of such regulations lest a city face the legal challenge that the purported “regulations” are in operative effect a de facto prohibition on such clinics.

3. Opt to regulate medical marijuana clinics through existing business licensing and land use regulations.

This approach is probably inadequate to address genuine issues related to the operation of medical marijuana clinics as, for example, existing definitions for clinics, pharmacies and such, probably would not be sufficient to embrace a marijuana clinic. Similarly, the “adult entertainment” ordinances do not, as written, embrace activities such as marijuana clinics either.

4. Enact a moratorium through an interim ordinance pursuant to Government Code §65858, thereby giving the city at least the initial 45 day period (and conceivably for several months longer) or breathing room within which to further explore and contemplate the ultimate position to be taken vis-a-vis medical marijuana clinics.

In our view, this is a perfectly legal option under existing law. However, one must be aware that a Los Angeles Superior Court judge issued a recent ruling forbidding the County of Los Angeles from doing this very thing as to its ordinances governing business and land use in unincorporated areas.

That judge's reasoning was that the county could not have a "moratorium" on issuing further licenses or permits to marijuana clinics inasmuch as the County had no ordinances already in place governing such clinics. While we disagree with that judge's reasoning and ruling, and believe that an appellate court would overturn such a ruling, we have to caution that this judge has already ruled in this fashion, and he is one of only two judges in Los Angeles County before whom a legal challenge to such a moratorium by a city would be heard.

If a city is attracted to the notion of a moratorium in order to have further time to contemplate these issues, a "skeleton" ordinance might be enacted setting forth rudimentary regulations for marijuana clinics, followed immediately by an ordinance enacting a moratorium pursuant to §65858, in order to avoid a ruling such as that received by the County.

5. Enact an ordinance specifying that the city will not approve business licenses nor land uses for enterprises or purposes that are contrary to federal, state or local laws or ordinances.

In light of *Raich*, the activities associated with medical marijuana clinics are still felony violations of federal controlled substances statutes. Thus, such an ordinance would effectively preclude the lawful operation of a medical marijuana clinic in any city. In doing so, however, there would be no specific reference to such clinics. Rather, there would simply be the adoption by the City of a policy position that it will not approve licenses and uses that violate the law, whether such law be a local ordinance, a state statute or a federal statute.

Indeed, this finds support in Government Code §37100, which Provides that the legislative body of a city may enact ordinances "Not in conflict with the Constitution and laws of the State *or the United States.*" (Emphasis added.) Granted, this statute sees its greatest application in proscribing municipal regulation that contravenes state law, or regulation of areas preempted by the state. However, the argument could be made that cities not only *may* take the policy position of not approving uses that violate federal law, but that cities are *precluded* from enacting ordinances that have, as their operative effect, enabling violations of federal law.

Of course, this approach would also likely trigger one or more legal challenges, with associated litigation costs for a city. This is a novel approach, and there is no precedent to which we can point for a forecast of the likely outcome of litigation in this area of the law. That said, however, we believe that an approach founded in the legal principle and policy of a city not passing enactments or approving actions known to be in violation of federal law ought to be highly defensible.

18.45.03 – Permitted Uses

A. In addition to any other uses permitted in the C.O. zone, Medical Marijuana Clinics shall be permitted on any such lots if:

1. Such lot is not within 500 feet of any public or private school for grades Kindergarten through 12th, any preschool or licensed child care facility.
2. Such lot is not within 500 feet of any residential zone.
3. Such lot is not within 500 feet of any park or recreational area commonly used by minor children.

18.45.04 – Restrictions On Use

The following restrictions shall apply to the conduct of all Medical Marijuana Clinics:

- A. Hours of operation for Medical Marijuana Clinics shall be restricted to between 6:00 a.m. and 10:00 p.m.
- B. No operator and/or employee of a Medical Marijuana Clinic shall have been convicted of any felony under state or federal law, conviction of a crime in any other jurisdiction the commission of which would be a felony under California law, nor conviction of any crime of moral turpitude.
 1. All operators and/or employees of a Medical Marijuana Clinic shall be subject to verification by the Whittier Police Department of the absence of any disqualifying conviction under this subsection prior to commencement of any such operation and/or employment and annually thereafter, pursuant to reasonable regulations pertaining thereto as established and promulgated by the Chief of Police.
- C. Medical Marijuana Clinics shall be equipped with, and the operators of such Clinics shall maintain both burglary and robbery alarms in a manner compliant with the provisions of Chapter 5.20 – Communication Devices – of the Whittier Municipal Code.
- D. During all hours of operation, there shall, for each 1,000 square feet of occupied building space or portion thereof, be at least one uniformed security guard present and visible on the premises, i.e., one guard for zero to and including 1,000 square feet, two guards for 1,001 to and including 2,000 square feet, etc.

1. Such guard(s) shall be duly licensed by the State of California, Department of Consumer Affairs in a manner compliant with all applicable state and local laws.

2. The presence and licensing of such guards shall be subject to proof thereof by the operator(s) of such Clinics upon reasonable demand by any state or federal peace officer.

E. Use or consumption in any manner of marijuana or any illegal controlled substance is not permitted on the premises of any Medical Marijuana Clinic.

F. Persons under the age of eighteen (18) years of age are not permitted to be on the premises of any Medical Marijuana Clinic.

G. No alcoholic beverage shall be sold, conveyed or consumed on the premises of any Medical Marijuana Clinic.

H. No person shall be present on the premises of a Medical Marijuana Clinic while intoxicated and/or under the influence of alcohol or any controlled substance.

Any provision of the Whittier Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, are hereby repealed or modified to that extent necessary to effect the provisions of this Ordinance.

Section 3. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Whittier hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions be declared invalid or unconstitutional.

Section 4. The Mayor shall sign and the City Clerk-Treasurer shall attest to the passage of this Ordinance. The City Clerk-Treasurer shall cause the same to be published once in the official newspaper within 15 days after its adoption. This Ordinance shall become effective 30 days from its adoption.

APPROVED AND ADOPTED this _____ day of September 2005.

GREG NORDBAK, Mayor

ATTEST:

Kathryn Marshall, City Clerk-Treasurer
CITY OF WHITTIER