

**AGENDA ITEM
PLANNING COMMISSION SPECIAL MEETING: JANUARY 26, 2011
ACTION ITEM**

DATE : January 20, 2011

TO : Planning Commission

FROM : City Attorney

SUBJECT : **MEDICAL MARIJUANA DISPENSARY BAN**

RECOMMENDATION:

Recommend, by motion, the City Council the adoption of the ordinance to prohibit medical marijuana dispensaries except in limited, specified licensed facilities.

EXECUTIVE SUMMARY:

In 2009, the City Council adopted a moratorium on the establishment of medical marijuana dispensaries and hookah lounges. This was in response to an inquiry regarding opening a medical marijuana dispensary. Like many cities, Benicia has a “permissive” zoning system, under which any use—including medical marijuana dispensaries—that is not expressly enumerated as a permitted use is deemed to be prohibited. Thus, although the Benicia Municipal Code does not specifically regulate such dispensaries, the City’s practice has always been to deem dispensaries prohibited. Nevertheless, the City adopted the previous moratorium to make this policy explicit. Since the moratorium is due to expire, permanent rules should be enacted.

ENVIRONMENTAL REVIEW:

Pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3) this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

GENERAL PLAN:

Relevant General Plan Goals and Policies include:

- Goal 2.1: Preserve Benicia as a small-sized city
 - POLICY 2.1.1: Ensure that new development is compatible with adjacent existing development and does not detract from Benicia’s small town qualities and historic heritage, (and to the extent possible, contributes to the applicable quality of life factors noted above.)

- POLICY 2.1.2: Make efficient use of land in new development areas consistent with the surrounding neighborhood.
- ❑ Goal 2.3: Ensure orderly and sensitive site planning and design for large undeveloped areas of the City, consistent with the land use designations and other policies in this General Plan
- ❑ Goal 2.5: Facilitate and encourage new uses and development which provides substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life.

STRATEGIC PLAN:

Relevant Strategic Plan Goals and Strategies:

None.

BUDGET INFORMATION:

If Council introduces the ordinance to prohibit most medical marijuana dispensaries “MMD” in the City, the costs to the City to implement this would be minimal.

If Council were to direct staff to introduce an ordinance to permit MMDs in the City, it is estimated that staff time for the audits and inspections could cost up to \$60,000 annually (this estimate is based on a fee study used by the City of Oakland to implement charges for auditing and inspecting operating MMDs). Some cities require significant fees paid by MMD operators for the review of plans and operations, as well as to enforce specific regulations.

In either case, of course, the ordinance may be challenged by people acting contrary to the ordinance or in court. The City would then incur code enforcement and court costs.

BACKGROUND:

The City enacted a moratorium on medical marijuana facilities in 2009 in order to allow the City more time to study the issue. The moratorium prohibited all medical marijuana facilities except in specific limited circumstances. Specifically, the City was waiting for court decisions such as *Qualified Patients Assoc. v. City of Anaheim* to address whether, as asserted by some marijuana advocacy groups, local ordinances regulating or prohibiting marijuana dispensaries were preempted by the State’s laws on medical marijuana, namely the Compassionate Use Act (“CUA”) and the Medical Marijuana Program Act (“MMPA”). Unfortunately, the Court in that case did not answer that question.

As noted above, while medical marijuana dispensaries are not uses defined in the Benicia Municipal Code. The passage of Proposition 215 (“The

Compassionate Use Act of 1996" or "CUA") and the adoption of SB 420 ("the Medical marijuana Program Act" or "MMPA") in 2003 has increased the interest in opening medical marijuana dispensaries. The CUA allows a person to use marijuana for medicinal purposes without criminal liability as long as a doctor so recommends. The MMPA established regulations related to medical marijuana. The regulations include a voluntary program for identification cards for qualified patients and primary care givers, limits on the amount of marijuana per qualified patient, and confidentiality and privacy restrictions. Neither the CUA nor the MMPA, however, addresses the issue of whether cities may use their zoning/land use authority to prohibit or regulate dispensaries. The only Court that has been presented the question, *City of Claremont v. Kruse*, has held that neither the CUA nor the MMPA preempts cities from doing so. Again, the Court in the Anaheim case expressly declined to rule on that issue.

Under federal law (the Controlled Substances Act ("CSA")), the cultivation, possession and/or use of marijuana is illegal. It is still unlawful to possess, transfer, or use marijuana under California law, unless one can prove that he or she is a qualified patient or caregiver, under the CUA. Although the CUA appears to conflict with Federal law which clearly states that possession, use and sale of marijuana is illegal, California courts such as the Court in the Anaheim case, have ruled that the federal CSA does not preempt either the CUA or the MMPA.

Medical marijuana dispensaries ("MMDs") are not specifically defined under the Municipal Code. In the zoning ordinance, Section 17.16.010 allows the Community Development Director to determine how an undefined use is classified.¹ Again, under the City's "permissive" zoning system, uses that are not expressly enumerated as permitted are deemed to be prohibited. Two appellate cases have upheld cities' right to prohibit medical marijuana dispensaries on this basis. (*City of Corona v. Naulls*; *City of Claremont v. Kruse*.) Nevertheless, since a medical marijuana dispensary is not specifically defined in the zoning provisions of the Benicia Municipal Code, potential applicants for a MMD may wish to claim the use is similar to a pharmacy, medical office, or miscellaneous retail use and might assert that operation of a medical marijuana dispensary should be allowed in a variety of zoning locations including near schools or day care facilities. This is clearly not the law. However, to prevent disputes about whether a medical marijuana facility is an allowed use, it is

¹ 17.16.010 Purpose and applicability.

Use classifications describe one or more uses having similar characteristics, but do not list every use or activity that may appropriately be within the classification. The community development director shall determine whether a specific use shall be deemed to be within one or more use classifications or not within any classification in this title. The community development director may determine that a specific use shall not be deemed to be within a classification, whether or not named within the classification, if its characteristics are substantially incompatible with those typical of uses named within the classification.

recommended that the zoning ordinance be amended to prohibit specifically the establishment of medical marijuana facilities in all zoning of the City.

In addition to amending the zoning ordinance, it is recommended that Title 9 of the Benicia Municipal Code (Public Peace, Morals and Welfare) be amended to prohibit medical marijuana establishments. Medical marijuana advocates have argued that the MMPA and CUA implicitly prohibit cities from imposing any criminal penalty (even an infraction is deemed to be quasi-criminal) for violating the medical marijuana provisions. While no appellate court has accepted that argument, Staff recommends, out of an abundance of caution, the ordinance should specifically provide that violations of the ordinance are not crimes. Enforcement of the ordinance will be done via nuisance action or other methods. The proposed ordinance is included as Attachment A.

Medical marijuana dispensaries include cooperatives, collectives and dispensaries. They are not regulated by state or federal agencies. Currently in Solano County, Fairfield bans medical marijuana facilities. Dixon, Rio Vista and Vacaville currently have moratoria on medical marijuana facilities. According to an internet search, medical marijuana is available at two facilities in Vallejo and one facility in Martinez. There are also facilities in Berkeley, Oakland and Richmond. (Richmond does not have any legal dispensaries; they are in the process of accepting applications.) Albany also has an ordinance that will likely allow a dispensary soon. An El Cerrito location offers delivery. Thus there appears to be sufficient ways for Benicians qualifying under the Compassionate Use Act to obtain medical marijuana.

A ban (with limited exceptions for specified State-licensed facilities) would allow the City to avoid some of the problems that have been associated with medical marijuana dispensaries. Other bay area cities that have medical marijuana dispensaries have reported increases in illegal drug activity and sales, robberies of patrons of the dispensaries, loitering, and other criminal activity. Because of these problems, it is expected that a medical marijuana dispensary will increase the calls for police services as well as public works services for clean up of the streets and sidewalks. In addition, land use issues such as traffic, odors and neighborhood compatibility could arise if medical marijuana dispensaries are allowed. Any regulations to allow this use would require significant staff time and costs to enforce. The oversight of medical marijuana dispensaries should include the following at a minimum:

- Ensuring the collectives/cooperatives are non-profit organizations;
- Tracking the marijuana to make sure it is supplied only from members of the collective/cooperative;
- Ensuring the product is laboratory-tested to ensure it is free from molds, pesticides, or harmful additives; and
- Assuring the marijuana is dispensed legally.

A permit fee could cover some of the costs but it is unlikely it would cover all of the planning, police and city attorney time required. Given the City's reduced staffing, this work does not seem essential since there are other ways, as noted above, for Compassionate Use users to obtain the marijuana. Finally, the state of the law on medical marijuana is in doubt.

The issue of medical marijuana facilities is complex and not without controversy. Questions on both sides of the issue include:

- Do current laws allow the use and how are the laws enforced?
- What was the intent of the State Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA)?
- What is the role of the City in implementing the CUA and MMPA?
- What are the impact of marijuana on the community, and the possible increase of those impacts if MMDs are allowed to locate in the City?
- What is the impact on public safety, including a possible increase in violent crime?
- What are the land use compatibility concerns regarding MMDs in the city?
- How should the concerns that easier access to marijuana could increase usage in undesirable ways versus the desire to provide this compassionate care alternative to Benicia residents be balanced?
- What sort of regulations and procedures should be considered, should the decision be made to allow MMDs in the City?

Of course, the advantage of allowing MMDs in Benicia is that patients could more easily obtain marijuana in legally-operating facilities in the city. Disadvantages include the problems with regulating them. In addition to regulation issues related to land use (appropriate zones, traffic, and noise), it appears the profit or non-profit status of the facility is hard to enforce and the criminal element is hard to avoid. There is a widespread perception that MMDs sell to recreational users.

Factors to Consider

The City of Sunnyvale recently adopted a medical marijuana ban. The following factors are taken substantially from the staff report for the Sunnyvale City Council meeting on December 16, 2010.

Federal Laws and Enforcement

In general, the Federal Drug Enforcement Agency sets the guidelines and standards for drug policy in the country and the U.S. Attorney General decides what laws to enforce. The following is a brief description of those federal parameters (more detail is shown in Attachment B):

- The Federal Controlled Substance Act (CSA) was adopted in 1970. It states that it is unlawful to manufacture, distribute, dispense, or possess any controlled

substance. The Federal Government's view is that marijuana is a Schedule I substance, which is classified as having a high potential for abuse. Further, the federal view is that use of marijuana for medicinal purposes is not an accepted treatment method in the United States, and it has not been accepted that marijuana is safe to prescribe as a drug or other substance under medical supervision. Because of this position, marijuana cannot be prescribed or dispensed in the same way as legal drugs, which is why marijuana is not available from doctors or pharmacies.

- In March 2009, U.S. Attorney General Eric Holder Jr. announced it would no longer enforce the federal laws prohibiting distribution or possession of marijuana for medicinal purposes, allowing states to have the final say in the matter. It was also stated that dispensaries that use medical marijuana as a storefront for dealers of illegal drugs would be prosecuted. In a more recent announcement, Attorney General Holder's office stated they will prosecute people for growing, selling, and possessing marijuana in California if they are not in compliance with State law.

State Laws

California has passed laws and general regulations allowing the cultivation, distribution, possession, and use of marijuana for specific medical purposes, as detailed below:

- In 1996, the voters of California passed Proposition 215, known as the Compassionate Use Act (CUA). The purpose of the CUA was to give individuals the right to obtain and use medical marijuana as deemed appropriate and as recommended by a physician (Attachment C).
- The CUA ensures patients and primary caregivers will not be subject to state or local criminal prosecution for the possession or cultivation of marijuana for medical purposes.
- In 2003, the State Senate passed and the Governor signed into law SB 420, the Medical Marijuana Program Act (MMPA), which codified the regulations for the possession, distribution, and use of marijuana for medical purposes, as described in the CUA (Attachment D).
- In 2008, the California Attorney General published guidelines for the security and non-diversion of marijuana grown for medical use. These guidelines are a helpful tool for law enforcement to perform duties effectively and in accordance with California law. It assists patients and caregivers on how they may cultivate, transport, possess, and use medical marijuana under California law. In addition, it provides the framework for "collective/cooperatives" and provides greater direction to ensure marijuana used for medical purposes is secure and does not find its way to non-patients or illicit markets. (Attachment E).

AB 2650 was signed into law in September of 2010. This law amends the California Health and Safety Code to provide that no medical marijuana

dispensary authorized by law to possess, cultivate, or distribute medical cannabis that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. (Attachment F).

Frequently Asked Questions Relating to the MMPA and AG Guidelines

Attachment G lists several frequently asked questions (FAQ's) to address this issue, including:

- What medical conditions can marijuana relieve?
- How much marijuana can an individual have?
- How does a patient get a recommendation from a doctor?
- Who is a primary caregiver?
- What is a medical marijuana ID card and how are they issued?
- Can the sale of medical marijuana be taxed?
- How can medical marijuana be distributed?
- What is a cooperative, collective or dispensary?
- Who can cultivate marijuana for medical purposes?

Effect of Recent Court Cases on City Consideration

There have been several important court cases regarding medical marijuana that have bearing for the City. A recent court case, *Qualified Patients Ass'n. v. City of Anaheim*, was closely watched by Benicia and other cities and proponents: it is summarized in Attachment H. Unfortunately, the clear answer cities hoped for on the issue of whether the CUA and the MMPA preempted local ordinances was not provided. Accordingly, the state of the law is that provided by the Court in *City of Claremont v. Kruse*, which held that the CUA and the MMPA do not preempt cities from enforcing their land use controls to prohibit medical marijuana dispensaries.

In general, the *Anaheim* case involved a legal challenge to the City of Anaheim's ordinance banning MMDs. The plaintiffs, Qualified Patients Association, sought to overturn the ordinance on the ground that it was preempted by the CUA and MMPA. The City of Anaheim filed a motion to dismiss the complaint arguing, among other things, that the plaintiffs had no standing to bring a suit to overturn the ordinance because their planned activities would be illegal under federal law.

With regard to the first question, the court ruled that the CUA and MMPA are not preempted by federal law. In the matter of interest to cities hoping to know the state of the law on MMDs, the court concluded that it was too early in the litigation to decide on the plaintiff's challenge whether state law precludes cities from banning MMDs. It is important to emphasize that the court did not

decide this issue, and that question will probably not be finally resolved by the courts for at least another 2 to 3 years, if not longer. Again, however, the state of the law is that provided by the Court in *City of Claremont v. Kruse*, which held that the CUA and MMPA do not preempt cities from enforcing their land use controls to prohibit medical marijuana dispensaries.

Other Cities

Medical Marijuana cooperatives, collectives and dispensaries have recently been a hot topic for California cities. For years after Proposition 215 was passed, only a few cities in the state allowed these facilities, while others followed the federal rules that made cultivation, possession and distribution illegal. This changed in the past couple years, most likely in response to the current Presidential administration's decision regarding enforcement of marijuana offenses. As a result, most cities in the state have taken specific action to either prohibit the distribution facilities, adopt moratoriums to allow time to study the issue; or pass ordinances that allow them under specific conditions.

Attachment I also lists other cities throughout the state that have passed ordinances regulating MMDs. In reviewing all the cities listed, some cities have reversed their policies from allowing MMDs to either banning them, or to place a moratorium while they restudy the issue. In December 2010, a number of Southern California counties proposed bans on MMDs including Riverside, Orange and Los Angeles counties.

Medical Marijuana Availability

Making medical marijuana easier to obtain by city residents with serious medical conditions is a goal for some medical marijuana activists. As noted above, there are several options near Benicia for medical marijuana. It should also be noted that residents currently have to travel outside of the City for traditional hospitals and more extensive medical care. Attachment J is a map that shows locations for several MMDs near by. At least one MMD, in El Cerrito, is reported to provide delivery service.

Cultivation

While nothing in State law addresses whether there is a right to cultivate or distribute marijuana in violation of local zoning/land use controls, State law allows individuals with a physician's recommendation to cultivate marijuana for their personal use without criminal liability. The law allows each person with a doctor's recommendation to maintain no more than six mature or 12 immature plants. A person cannot sell the marijuana they grow, but can provide it to their cooperative or collective. Currently, although the zoning ordinance is deemed to prohibit cultivation and distribution alike, no permit is expressly required for medical marijuana cultivation in Benicia.

Cultivation is a greater concern when marijuana is grown in large quantities in residential homes in what are known as “grow houses.” There are many safety issues associated with grow houses. These include: dangerous electrical wiring, unsafe changes to the structure, and the possible safety concerns on the surrounding residents from having a large amount of an illegal substance grown in residential locations.

MMDs are required by State law to obtain their marijuana from their members, which could mean allowing homeowners to cultivate the plant. Cultivation is also possible in larger commercial operations, such as those recently allowed in Oakland. If the City Council desires to allow MMD's, staff would suggest that cultivation requirements and restrictions be included in an ordinance. At this point, however, State law minimums allowed for plant cultivation would be the standard.

Legal Alternatives to Marijuana

The ingredient in marijuana that provides relief for those with serious medical conditions is tetrahydrocannabinol (THC). According to the U.S. Drug Enforcement Administration, a pharmaceutically-available, FDA approved product called “Marinol” is available, which contains synthetic THC as the active ingredient. Marinol comes in the form of a pill, and is available at pharmacies.

Although proponents of medical marijuana claim that Marinol does not help all medical conditions, and may not be as effective as marijuana, it does have value in that it can be distributed through existing, legally operating pharmacies, meaning separate MMDs would not be necessary for its distribution. This is important because pharmacies are located throughout the city and are required to store, distribute and track what is dispensed.

Criminal Activity Concerns

The secondary effects and adverse impacts related to medical marijuana have been well documented. These impacts have been documented in a report written by the California Police Chiefs Association, White Paper (Attachment K). The Benicia Police Department took enforcement action on 67 separate marijuana investigations in 2010. These actions included arrests, citations or requested warrants on 67 separate individuals for possessing, selling, transporting, furnishing and cultivating marijuana. Although Benicia has not seen the explosion of indoor marijuana grows like many other communities have, these statistics clearly show that marijuana is readily available in our community. The statistics are broken down further as follows:

- Fifty-four (54) individuals were issued citations for possessing marijuana
- Nine (9) individuals were arrested for selling marijuana
- Two (2) individuals were arrested for cultivating marijuana

- Two (2) individuals were arrested for furnishing marijuana.

The Benicia Police Department participates in a Solano County narcotics taskforce. In 2010 they investigated a marijuana dispensary in the unincorporated area of Fairfield. This case is currently being litigated, but three arrests were made for a variety of criminal offenses, including violating tax laws, and illegally selling marijuana. Prior to investigating the dispensary the Solano County Sheriff's Office responded to several disturbances at the dispensary and reported an increase in crime in the area during the time the dispensary was being operated. In addition, Solano County has seen other violent crime associated with the marijuana industry. The crimes include home invasion robberies, assaults, murders and burglaries.

The Benicia statistics are not yet of the magnitude of those reported in the Sunnyvale Council report. They reported:

“Recent negative impacts in Santa Clara County have been directly linked to marijuana dispensaries and marijuana growers. There have been three armed takeover style robberies at San Jose marijuana dispensaries this year. These violent crimes are similarly patterned after the robberies Southern California marijuana dispensaries have experienced over the past few years; several robberies resulted in the homicide of dispensary employees.

Recently in Santa Clara County, Superior Court Judges issued warrants established by probable cause based upon illegal sales and distribution of marijuana for profit. These warrants were served by officers from the Santa Clara County Special Enforcement Team (SCCSET), the Attorney General's Bureau of Narcotic Enforcement (BNE), along with several other law enforcement agencies. These warrants were served and resulted in numerous arrests, seizures of marijuana (possession and cultivation), weapons, and money.”

The U.S. Drug Enforcement Agency and other federal, state, and local law enforcement agencies enforcement efforts have shown medical marijuana dispensaries routinely underreport revenues, resulting in the need to aggressively regulate their businesses. It is anticipated that public safety will be asked to provide assistance to regulatory agencies to investigate marijuana dispensaries. In order to provide minimum regulation, it will be necessary to make regular unscheduled inspections of its facilities to ensure compliance with the city's municipal code, the state's Penal Code, fire code, and the health and safety code. Regulation should include random audits to ensure accurate record keeping and compliance.

Adverse Secondary Effects

Several secondary effects are associated with the distribution and use of marijuana. These include criminal acts, driving under the influence, white collar crimes, and negative impacts on our youth. This issue is discussed in greater detail in Attachment L and Attachment M.

Public Health

All medicines distributed by pharmacies are regulated by the United States Food and Drug Administration (FDA). FDA approval is required in order for a specific, finished medication to be marketed and distributed to patients. Scientific testing of marijuana for medical use is not performed at professionally recognized and regulated laboratories. The FDA is responsible for protecting and promoting public health. They have a safety protocol in place to alert and protect consumers of possible product contamination. This program results in the ability to recall products should they present health or safety concerns for the consumer. Marijuana growers and dispensary operators have no oversight and cannot validate the safety of their product.

Land Use Concerns

Land use comparisons for MMDs range from a facility similar to a retail outlet with frequent customer turnaround, to facilities similar to a place of assembly where people go to socialize, take classes, etc. The land use considerations vary depending on the characteristics of the use. Benicia has no experience with MMDs, but the December 16, 2010 Sunnyvale staff report recently reported their staff visited 15 MMD locations and was given a tour of a large MMD in order to understand how they fit into an area, and to better understand their operations. An excerpt of their report is included as Attachment N.

APPROACHES

There are two broad options that can be chosen with this issue: either prohibit MMDs in the city (with limited exceptions for specified State-licensed facilities) or allow them with clear criteria, regulations and conditions.

Option A: Prohibit MMDs in Benicia

This option would require the Council to introduce and adopt an ordinance that specifically prohibits MMDs in the city. The zoning code would need to be changed to specify that MMDs are a prohibited use.

Positive Effects

- Removes the possibility of illegal activity at MMDs, including profit oriented dispensaries.
- Reduces secondary negative social impacts that could arise by restricting the ability to obtain marijuana in the City.

- Avoids land use compatibility issues between MMDs and surrounding uses and businesses.
- Avoids complicated and potentially-expensive enforcement efforts.

Negative Effects

- Does not respond to the “compassionate care” concerns of Proposition 215.
- Removes the ability for Benicia patients to obtain medical marijuana from collectives or cooperatives in their own city.
- Prevents cooperatives or collectives that could meet State laws from operating in city and providing assistance to those in need.
- Is a possible loss of revenue to the City.

The proposed ordinance to prohibit MMDs defines a MMD as a facility with two or more qualified patients. This would allow a patient to receive medical marijuana from a primary caregiver in the patient’s home, but would prohibit the distribution to any other person. In addition, the proposed ordinance would allow patients to receive medical marijuana at a State-licensed medical clinic, hospice, or similar facility.

Option B: Allow MMDs in Benicia, subject to regulations and controls

This option would allow MMDs in the city at limited or defined locations with conditions and restrictions. There are various approaches and issues that should be evaluated and resolved if this option is chosen. Whereas Option A to prohibit MMDs requires a relatively straightforward ordinance, Option B is more complex and requires decisions on the appropriate location, necessary use restrictions, public review process, and degree of oversight by the City in the operations of a MMD.

The effects of allowing MMDs in Benicia could include:

Positive Effects

- Allows local, legal access to medical marijuana for authorized patients in the community.
- Accommodates alternative approaches to the treatment of illnesses, including the use of medical marijuana.
- Responds to an expressed desire for such facilities by some people.

Negative Effects

- Possible rise in crime activity with possibly easier access to marijuana by unauthorized users such as youths.
- Secondary negative social impacts and costs associated with more prevalent marijuana use.

- Potentially expensive enforcement required by the city and school districts to ensure the community does not experience a rise in crime from MMDs in the City.
- Difficult to apply conditions on approved MMDs because of the intrusive nature of the options necessary to ensure adherence to State laws.
- Possibility of profit-oriented MMDs in the City.

Cities have addressed the issue of permitting MMDs in different ways. Most cities have amended their zoning code to require the equivalent of a Use Permit with a public hearing. Other cities allow MMDs with a staff level approval, City Manager approval, or Public Safety permit. The option of a competitive Request for Proposals approach has also been adopted to allow one or several MMDs in a community when several applications are received (to ensure the best-run MMD is allowed to make application, not just the first to make application). There are also different approaches to the type and extent of information necessary for a MMD application, regulations to control land use aspects, and conditions of approval and operating standards to ensure a MMD meets the goals and requirements of the City.

Draft Ordinance

Staff recommends adopting the draft ordinance included with this report (Attachment A) if Council chooses to *prohibit* MMDs in the City.

If Council decides to *allow* MMDs, staff would proceed to prepare a draft ordinance for the City Council to review and possibly adopt by the end of January. The list shown in Attachment O provides a suggested outline for Council to give staff direction on how to regulate these uses.

FISCAL IMPACT

As noted above, assuming there are no challenges to the implementation or adoption of the ordinance, there will be minimal budget impact to implement this ordinance. If Council were to direct staff to introduce an ordinance to permit MMDs in the City, it is estimated that staff time for the audits and inspections could cost up to \$60,000 annually (this estimate is based on a fee study used by the City of Oakland to implement charges for auditing and inspecting operating MMDs). Some cities require significant fees paid by MMD operators for the review of plans and operations, as well as to enforce specific regulations. Attachment P shows how a few cities approach application and on-going fees for MMDs. With Council direction, staff could also investigate regulatory fees for MMDs. Although fees could possibly cover the costs for regulating MMDs, secondary costs associated with regulating marijuana sale, cultivation, and use would be difficult to capture, such as legal and enforcement costs related to criminal activity and business violations.

RECOMMENDATION

For the reasons noted in this staff report and the attachments, Staff recommends adoption of the attached ordinance to prohibit medical marijuana distribution facilities in the City (subject to exceptions for specified State-licensed facilities). The attached ordinance would prohibit distribution of medical marijuana to two or more people, thereby allowing patients to receive assistance from a primary caregiver. The ordinance would also allow patients to receive medical marijuana at a licensed medical clinic, hospice, or other state licensed medical facility. This recommendation is supported by the Benicia Youth Action Coalition.

List below are a few key reasons staff recommends prohibiting MMDs (see Attachment Q for additional staff concerns):

- Although the City has the right to consider whether or not to allow MMDs in the city, it would be difficult and expensive to ensure that these facilities comply with all laws, including those imposed by the City. The uncertainty between state and federal laws would further complicate and impede the effectiveness of local regulation.
- Time consuming and intrusive controls and regulations would be required to ensure that MMDs operate as non-profit “compassionate care” facilities as anticipated in Proposition 215.
- Allowing MMDs in Benicia could raise the possibility of criminal activity in the city.
- There are social and public safety concerns associated with allowing the sale of a substance that is only legal when used for medical purposes, but are otherwise illegal to possess, grow or use.

The original intent of the CUA was to allow individuals to grow marijuana individually and collectively for medical purposes, and to ensure they are safe from prosecution. In 2003, SB 420 expanded that by allowing distribution outlets of marijuana. By doing so, the State placed the entire burden on each city to ensure these facilities meet all aspects of State law.

A suggested outline of the contents of an ordinance that can be used if Council decides to allow MMDs is included in Attachment O. This approach is not recommended.

It should be noted that this ordinance does not address the hookah lounges. They are addressed in the smoking ordinance that is being reviewed by the Chamber and Main Street.

Attachments:

- A. Draft Ordinance prohibiting medical marijuana distribution facilities
- B. Federal laws and Federal enforcement summary
- C. Proposition 215, the Compassionate Use Act (CUA)
- D. SB 420, the Medical Marijuana Program Act (MMPA)
- E. Attorney General Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Purposes
- F. AB 2650
- G. Frequently Asked Questions (FAQ's)
- H. Recent court case review
- I. Review of approaches of other cities
- J. Map of nearby medical marijuana distribution facilities
- K. California Police Chief's Association research
- L. Summary of adverse secondary effects
- M. January 5, 2011 Press Release from Coalition for a Drug Free California
- N. Excerpt of December 16, 2010 Sunnyvale City Council report
- O. Potential regulatory outline and options
- P. List of fees from other cities