



TO THE HONORABLE MAYOR AND COUNCIL:

DATE: September 6, 2005

SUBJECT: AN ORDINANCE AMENDING CHAPTER 18 (BUSINESS AND BUSINESS REGULATIONS) OF THE CONCORD MUNICIPAL CODE BY ADDING ARTICLE XI (MEDICAL MARIJUANA DISPENSARIES) PROHIBITING THE ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES WITHIN THE CITY OF CONCORD

Report in Brief

In 1996, the California voters enacted Proposition 215, which protects patients and their primary caregivers from prosecution under California law if they possess or cultivate marijuana to treat serious illnesses pursuant to a doctor's recommendation. The State Legislature has enacted implementing legislation which allows qualified patients and caregivers to obtain identification cards that insulate them from arrest for violations of State laws pertaining to marijuana. Although not expressly authorized under these laws, some businesses have established medical marijuana dispensaries where qualified patients and caregivers can purchase marijuana for medical use. One such facility has been opened in Concord, and several individuals have contacted the City to inquire about establishing additional dispensaries.

Federal law, however, has long prohibited cultivation, possession or distribution of marijuana. Congress has not changed this prohibition despite the passage of medical marijuana laws in several states. The conflict between Federal and State law on this subject has created a dilemma for local governments and their law enforcement agencies, particularly with regard to medical marijuana dispensaries. Some cities have allowed these businesses to proliferate with no attempt at regulation. Several cities have adopted zoning moratoria which prevent establishment of these facilities pending further study. Others have adopted ordinances which either establish regulations governing the number, location and operation standards for these businesses or prohibit them altogether.

Although Proposition 215 has been in effect for almost nine years, there is no indication of an imminent resolution of the clear conflict between State and Federal law. This situation forces local governments in California to consider adopting local ordinances either regulating or prohibiting medical marijuana dispensaries. City staff recommends that the Council enact an ordinance prohibiting the establishment of any medical marijuana dispensaries within the City, consistent with Federal law.

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Background

Under the Controlled Substances Act, enacted by Congress in 1970, marijuana is classified as a Schedule I controlled substance. This classification is based on a determination that marijuana: (1) has a high potential for abuse, (2) has no currently accepted use for medical treatment, and (3) is not accepted as safe, even when used under medical supervision. This Federal law makes it illegal to import, manufacture, distribute, possess, or use marijuana in the United States.

In 1996, the people of the State of California passed Proposition 215, the Compassionate Use Act, with the stated intent of ensuring that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. This voter initiative exempts patients and their primary caregivers from prosecution under State laws that otherwise prohibit the cultivation or possession of marijuana.

Shortly after the passage of Proposition 215, the City Council adopted a moratorium ordinance prohibiting the establishment of medical marijuana dispensaries pending consideration of zoning regulations to address this land use. (Ordinance Nos. 97-8 and 97-11.) This moratorium ordinance expired on July 17, 1998. The State Planning and Zoning Law allows a zoning moratorium to remain in effect for up to two years, but prohibits the City from enacting a subsequent moratorium ordinance governing the same subject matter. (Government Code §65858.)

When medical marijuana dispensaries started appearing in Oakland, San Francisco, and Santa Cruz, the Federal Drug Enforcement Administration (DEA) took an aggressive role to close these businesses as being in violation of federal law. This enforcement activity resulted in a number of significant court decisions. The first of these decisions was *United States v. Oakland Cannabis Buyers Cooperative, et al.* (2001) 532 U.S. 483. In that case, the United States Supreme Court held that there is no medical necessity exception to the prohibition against possession and use of marijuana under federal law even when the patient is "seriously ill" and lacks alternate sources of relief. In *People v. Mower* (2002) 28 Cal.4th 457, the California Supreme Court held that although Proposition 215 exempts qualified individuals from certain State marijuana laws, it does not grant an absolute immunity from arrest. Instead, it provides a limited immunity from prosecution and may provide a basis for a pretrial motion to set aside an indictment or a defense at trial.

In 2003, the State Legislature passed SB 420, which established the Medical Marijuana Program. This legislation creates a voluntary system for qualified patients and their caregivers to obtain identification cards that will insulate them from arrest for violations of State law relating to marijuana. It does not expressly authorize establishment of medical marijuana dispensaries.

More recently, the conflict between the Federal Controlled Substances Act and California's Compassionate Use Act led to the United States Supreme Court decision in *Gonzales v. Raich* (2005) 125 S. Ct. 2201. In the *Raich* case, federal agents seized and destroyed marijuana plants that were being grown for personal medical use. The plaintiffs sued to prohibit enforcement of the Controlled Substances Act (CSA) to the extent that it interfered with their medical use of marijuana as permitted under California law. The Ninth Circuit Court of Appeals held that federal law enforcement authorities could not enforce the Controlled

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Substances Act against these individuals because it exceeded the scope of Congressional authority under the Commerce Clause of the U.S. Constitution.

The Supreme Court reversed, holding that the Commerce Clause does empower Congress to prohibit cultivation or use of marijuana for medical purposes authorized by California law. Although the Supreme Court's analysis focused narrowly on the scope of Congressional authority under the Commerce Clause, the practical significance of this decision is that Federal law enforcement officers may continue to enforce Federal drug laws against Californians who cultivate or use medical marijuana. However, the case did not expressly rule on the question whether Proposition 215 and SB 480 are preempted by Federal law.

Shortly after the *Raich* decision came down, the State Department of Health Services briefly stopped issuing medical marijuana identification cards due to concern that issuing such cards might subject its employees to prosecution for aiding and abetting the possession or cultivation of marijuana in violation of Federal law. DHS requested the State Attorney General to provide legal advice on this issue. The Attorney General responded with a letter advising DHS that its employees were not in danger of federal prosecution and were still obligated to continue carrying out their statutory duties related to implementation of the medical marijuana identification card program

Notwithstanding the DEA's enforcement efforts, medical marijuana dispensaries have continued to be established, particularly within the cities of San Francisco, Oakland and Berkeley. There is at least one business operating in Concord in the downtown. There have been several informal inquiries about establishing additional medical marijuana dispensaries within the City. This increasing interest may in part be a result of regulatory efforts here and in other local jurisdictions.

Discussion

Based on an informal survey, it appears that several local governments in Northern California are taking action to address medical marijuana dispensaries. 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. Other cities including El Cerrito, Fremont, Pinole and Pleasant Hill have adopted temporary moratoriums in order to determine whether and how they will regulate these facilities.

The City of Martinez has an ordinance that permits and regulates medical marijuana dispensaries within identified commercial districts. Other cities also regulate the establishment of medical marijuana distribution facilities. 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 specified locations within the County. The plan includes background checks and locational restrictions.

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The City of Roseville recently repealed its ordinance which allowed medical marijuana dispensaries to operate within some parts of the city. On June 22, the City introduced an ordinance prohibiting the establishment of medical marijuana dispensaries and declaring it a misdemeanor to violate the ordinance. The Modesto City Council will consider a proposed ordinance prohibiting medical marijuana dispensaries at its September 6th meeting.

We are aware of four other cities that prohibit the establishment of medical marijuana dispensaries: the cities of Fresno, Lincoln, Rocklin, and Susanville. Fresno has been sued by Americans for Safe Access and another named plaintiff who contend that the Fresno ordinance violates Proposition 215. In light of the *Raich* and *Cannibis Buyers' Cooperative* decisions, we believe that the City of Fresno will be in a strong legal position to successfully defend its ordinance.

Law enforcement agencies have documented that the establishment of medical marijuana dispensaries can cause adverse secondary effects in the community such as increased crime. Recently a medical marijuana dispensary located in unincorporated San Leandro was robbed at gunpoint. One of the alleged perpetrators of the crime was shot by an employee and later died.

In City staff's view, the most appropriate response to the proliferation of medical marijuana dispensaries is to adopt an ordinance prohibiting these facilities entirely within Concord. The possession and distribution of marijuana, even for medical purposes, plainly is unlawful under the Federal Controlled Substances Act. In the absence of a local ordinance, these facilities may continue to be established and operated, subject to discretionary enforcement efforts by Federal authorities which may or may not occur. The alternative of establishing land use and operational regulations for medical marijuana dispensaries would put the City in the position of approving an activity which violates Federal law.

If the City Council decides to pursue the alternative of adopting regulations limiting, but not prohibiting, establishment of medical marijuana businesses, 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 Committee for further discussion would be appropriate if Council wishes to consider this alternative.

Fiscal Impact

By permitting medical marijuana businesses to locate in Concord, the City could generate some minimal revenue in the form of business license and sales taxes. The sale of marijuana is taxable according to the State Board of Equalization. There would be increased costs in regulating, licensing and processing background checks on operators and employees of medical marijuana dispensaries. These costs could potentially be offset by fees.

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Public Contact

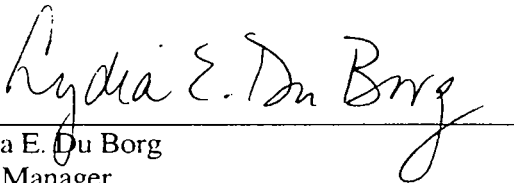
The agenda has been posted as required by law. Individuals requesting special notice of this meeting have been given a copy of the agenda and this report.

Alternative Courses of Action

1. Introduce Ordinance 05-9 prohibiting the establishment of medical marijuana dispensaries within the City of Concord.
2. Refer the matter to a Council Committee for the formulation of an ordinance that regulates medical marijuana dispensaries through land use controls and operational restrictions.
3. Take no action and give further direction to City staff.

Recommendation for Action

Introduce Ordinance 05-9 prohibiting the establishment of medical marijuana dispensaries within the City of Concord by reading of the title only and waiving further reading thereof.



Lydia E. Du Borg
City Manager

Prepared by: Mark T. Boehme
Assistant City Attorney

Reviewed by: Craig Labadie
City Attorney

Enclosure: Attachment 1 – Ordinance 05-9

1 **NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF CONCORD DOES**
2 **HEREBY ORDAIN AS FOLLOWS:**

3 **Section 1.** Chapter 18 (Businesses and Business Regulations), Article XI (Medical Marijuana
4 Dispensaries), is hereby added to read as follows:

5 **Section 18-330. Definitions.**

6 “Medical Marijuana Dispensary” or “Dispensary” means any facility or location, whether
7 fixed or mobile, where medical marijuana is made available to or distributed by or distributed to one
8 (1) or more of the following: a primary caregiver, a qualified patient, or a patient with an
9 identification card. All three of these terms are identified in strict accordance with California Health
10 and Safety Code Section 11362.5 et seq. A “medical marijuana dispensary” shall not include the
11 following uses, as long as the location of such uses is otherwise regulated by this code or applicable
12 law: a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code, a healthcare
13 facility licensed pursuant to Chapter 2 of Divisions 2 of the Health and Safety Code, a facility licensed
14 pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a residential care facility for
15 persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the
16 Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 of
17 Division 2 of the Health and Safety Code, a residential hospice, or a home health agency licensed
18 pursuant to Chapter 8 of Division 2 of the Health and Safety Code, as long as such use complies
19 strictly with applicable law, including but not limited to, Health and Safety Code Section 11362.5 et
20 seq.

21 **Section 18-331. Medical Marijuana Dispensary as a Prohibited Use.**

22 A medical marijuana dispensary as defined in Section 18-330 is prohibited in all zones and no
23 conditional use permit shall be issued therefore.

24 **Section 2.** Any action or proceeding to attack, review, set aside, void or annul this ordinance
25 must be commenced and service made on the City no later than 90 days after its effective date.

26 **Section 3.** This Ordinance No. 05-9 shall become effective thirty (30) days following its
27 passage and adoption. In the event a summary of said Ordinance is published in lieu of the entire
28 Ordinance, a certified copy of the full text of this Ordinance shall be posted in the office of the City

1 Clerk at least five (5) days prior to its adoption and within fifteen (15) days after its adoption,
2 including the vote of the Councilmembers. Additionally, a summary prepared by the City Attorney's
3 Office shall be published once at least five (5) days prior to the date of adoption of this Ordinance and
4 once within fifteen (15) days after its passage and adoption, including the vote of the
5 Councilmembers, in the Contra Costa Times, a newspaper of general circulation in the City of
6 Concord.

7
8 Laura M. Hoffmeister
Mayor

9 ATTEST:

10 Mary Rae Lehman
11 City Clerk

12
13 (Seal)

14
15 Ordinance No. 05-9 was duly and regularly introduced at a regular joint meeting of the City
16 Council and Redevelopment Agency held on September 6, 2005, and was thereafter duly and
17 regularly passed and adopted at a regular joint meeting of the City Council and Redevelopment
18 Agency held on September 6, 2005 by the following vote:

19 **AYES:** Councilmembers -

20 **NOES:** Councilmembers -

21 **ABSTAIN:** Councilmembers -

22 **ABSENT:** Councilmembers -

23 **I HEREBY CERTIFY** that the foregoing is a true and correct copy of an ordinance duly and
24 regularly introduced, passed, and adopted by the City Council of the City of Concord, California.

25
26 Mary Rae Lehman
27 City Clerk