

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: October 6, 2015

TO: Robert Vacchi, Director, Development Services Department

FROM: City Attorney

SUBJECT: Land Use Regulation of Medical Marijuana Storage Facilities

INTRODUCTION

On March 24, 2014, the City of San Diego adopted land use regulations amending the Land Development Code portion of the San Diego Municipal Code to allow medical marijuana consumer cooperatives (MMCC), defined as a facility where marijuana is transferred to qualified patients or primary caregivers, to operate in certain zones, under certain conditions.¹ The question has arisen whether any current land use regulations specifically address the storage of medical marijuana. As noted by this Office previously, the current land use regulations only provide a way for MMCCs, as defined, to be sited and operate in compliance with the City's zoning laws, and a City land use permit will not provide for a defense to state or federal prosecution for narcotics violations. 2010 City Att'y Report 673 (2010-20; May 27, 2010). The Medical Marijuana Program Act allows a criminal defense to be presented by qualified patients and caregivers for many marijuana offences, such as possession; cultivation and related husbandry activities; possession for sale; transportation, importation, or the provision of

¹Various issues associated with medical marijuana have been the subject of numerous memoranda and reports from this Office. *See* 1999 City Att'y Report 169 (99-8; Aug. 31, 1999); 2001 City Att'y Report 627 (2001-17; May 18, 2001); 2001 City Att'y MOL 156 (2001-11; July 2, 2001); 2002 City Att'y MOL 79 (2002-5; Sept. 19, 2002); 2007 Op. City Att'y 381 (2007-3; June 21, 2007); 2009 City Att'y Report 496 (2009-18; July 24, 2009); 2010 City Att'y Report 660 (2010-19; May 21, 2010); 2010 City Att'y Report 673 (2010-20; May 27, 2010); 2011 City Att'y Report 314 (2011-14; Mar. 15, 2011); City Att'y MOL 2011-9 (July 21, 2011); 2013 City Att'y MOL 55 (2013-6; Apr. 17, 2013); City Att'y Report 2014-5 (Feb. 10, 2014); City Att'y MS 2015-1 (Jan. 8, 2015); City Att'y MOL 2015-2 (Jan. 30, 2015).

marijuana; opening or maintaining a place for providing marijuana; or managing or controlling a place for manufacturing, storing or distributing marijuana. Cal. Health & Safety Code § 11362.765(a). These criminal defenses are unrelated to compliance with the City's zoning laws for MMCCs; whatever may be illegal under state and federal narcotics laws remains illegal, regardless of compliance with the City's zoning laws.

QUESTION PRESENTED

Does the City of San Diego have any land use regulations specifically governing medical marijuana storage?

SHORT ANSWER

No. The only medical marijuana-specific land use regulations are those requiring a Conditional Use Permit for medical marijuana consumer cooperatives, as those are defined in the Land Development Code. The Land Development Code also regulates many other use categories, such as distribution and storage; under those regulations, what is being stored or distributed is irrelevant. In addition, the Land Development Code contains processes for determining which use categories apply, and for creating new use categories, if necessary.

ANALYSIS

I. THE CITY'S MEDICAL MARIJUANA LAND USE REGULATIONS

The only land use regulations specifically pertaining to medical marijuana relate to the zones and conditions of approval for MMCCs. *See generally* San Diego Municipal Code (SDMC) §§ 126.0303, 131.0222, 131.0322, 131.0422, 131.0522, 131.0622, 141.0614. An MMCC is defined as follows:

Medical marijuana consumer cooperative means a facility where marijuana is transferred to qualified patients or primary caregivers in accordance with the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, set forth in California Health and Safety Code sections 11362.5 through 11362.83. A *medical marijuana consumer cooperative* shall not include clinics licensed by the State of California pursuant to Chapters 1, 2, 3.01, 3.2, or 8 of Division 2 of the California Health and Safety Code.

SDMC § 113.0103.

The City Council enacted the MMCC regulations for the purpose of “exercis[ing] its police powers solely to provide for the zoning of medical marijuana consumer cooperatives in such a manner as to limit the impact on the City generally and residential neighborhoods in particular” San Diego Ordinance O-20356 (Mar. 25, 2014). In addition, the City Council stated that “these regulations are intended to apply to commercial retail facilities” *Id.*

Therefore, the current City land use regulations regarding medical marijuana facilities apply to commercial retail-type facilities, where marijuana is transferred to qualified patients and caregivers. There is no evidence that the legislative intent was to regulate all types of medical marijuana-related activities, and the current regulations do not specifically regulate zoning for the storage of medical marijuana or the numerous other medical marijuana-related activities. In addition, accessory uses, defined as “a use of land or building, or portion thereof, that is customarily incidental to, related to, and clearly subordinate to a *primary use* of the land or building located on the same *premises*,” are generally allowed. SDMC §§ 113.0103; 131.0125. Therefore, an MMCC would be allowed accessory uses, such as storage, in addition to its primary use.² The storage of medical marijuana, as well as other medical marijuana-related land uses, may be regulated by other, more general provisions of the Land Development Code.

II. THE CITY’S REGULATION OF STORAGE FACILITIES

The base land use zones and subcategories are generally regulated in Chapter 13 of the San Diego Municipal Code. A use is to be identified as belonging in a use category and subcategory, based on the descriptions in Chapter 13, as well as the facility needs and operational characteristics such as type, intensity, and development characteristics of the use. SDMC § 131.0110(a). The tables in Chapter 13 are used to determine in which base zones a use is permitted, however if more than one subcategory of use could apply, the subcategory with the most direct relationship to the specific use applies. *Id.*

As a type of land use, distribution and storage is already a use category governed by the Land Development Code. SDMC § 131.0112(a)(9). Subcategories that may be applicable to the storage of medical marijuana are moving and storage facilities and distribution facilities. Moving and storage facilities are uses “engaged in the moving and storage of office or household furniture, personal items, appliances, and equipment.” SDMC § 131.0112(a)(9)(B). Distribution facilities are uses “engaged in the commercial storage and distribution of goods.” SDMC § 131.0112(a)(9)(C). These regulations do not distinguish between the various types of materials that could be stored or distributed, and a medical marijuana storage facility would be treated like any type of storage facility.

Further, if a use determination is needed, the Land Development Code provides for a process. If a use falls within one of the types of uses in Chapter 13, the zoning regulations of the Land Development Code apply. *See generally* SDMC Chapter 13. Upon request, the City Manager is to determine the use category and subcategory. SDMC § 131.0110(a). If the applicant disputes the determination, a Planning Commission recommendation may be sought. SDMC § 131.0110(b). If the appropriate use category cannot be determined by reference to the use tables, an amendment to the tables may be sought. SDMC § 131.0110(c).

²The City Council specifically disallowed consultations by medical providers as an accessory use at the MMCCs. SDMC § 141.0614(b).

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CONCLUSION

The City of San Diego does not currently have any land use regulations specifically governing medical marijuana storage. The current City land use regulations only regulate where MMCCs, as defined, may be located, the required permit process, and related conditions of approval and operation of the MMCCs. Therefore, under the current San Diego Municipal Code, storage, as well as any other potential land uses regarding medical marijuana, is subject to those land use regulations that are generally applicable to the use being considered. As stated earlier, that the use involves medical marijuana is irrelevant to the land use determination; if such storage violates state and federal laws, that activity remains illegal under those laws. Should anyone desire a use determination or an amendment to the zoning law, a process is set forth in the San Diego Municipal Code.

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cc: Andrea Tevlin, Independent Budget Analyst