CITY OF LARKSPUR
ORDINANCE No. 986

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LARKSPUR ESTABLISHING A TEMPORARY MORATORIUM ON THE ESTABLISHMENT AND OPERATION OF MEDICAL MARIJUANA DISPENSARIES, TO BECOME EFFECTIVE IMMEDIATELY

WHEREAS, on November 5, 1996, the voters of the State of California approved Proposition 215, codified as Health and Safety Code Section 11362.5 *et seq.* and entitled "The Compassionate Use Act of 1996" ("CUA" or "Act");

WHEREAS, the intent of Proposition 215 was to enable persons who are in need of medical marijuana for specified medical purposes to obtain and use it under limited, specified circumstances;

WHEREAS, the California Legislature adopted Senate Bill 420, effective January 1, 2004, adding Article 2.5, "Medical Marijuana Program" to Division 10 of the California Health and Safety Code § 11362.7, *et seq.* (the "Medical Marijuana Program Act" or "MMPA"). The MMPA created a state-approved voluntary medical marijuana identification card program and provided for certain additional immunities from state marijuana laws;

WHEREAS, Health and Safety Code § 11362.83 authorizes cities to adopt and enforce rules and regulations consistent with the MMPA;

WHEREAS, while the MMPA intended to clarify the scope of the Act, neither the Federal nor the State government has implemented a specific plan "to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana," leaving numerous questions unanswered as to how the CUA and the MMPA should be implemented, particularly in regard to the distribution of medical marijuana through facilities commonly referred to as medical marijuana dispensaries, and local regulation of such facilities;

WHEREAS, the City, when regulating medical marijuana dispensaries in the past relied upon the following cases that it finds to be relevant to its actions:

(A) *People v. Mentch,* 45 Cal.4th 274 (2008), regarding the California Supreme Court's analysis of the limited application and scope of the Act and the Program, and its holding that a "primary caregiver" status requires a specified showing of consistently providing care, independent of any assistance in taking medical marijuana, at or before the time of assuming the responsibility of assisting with medical marijuana.

(B) *People ex rel. Lungren v. Peron,* 59 Cal.App.4th 1383 (1997), the California Court of Appeal recognizing the limited scope of the Act and the Program, and holding that filling out a form that designates a commercial enterprise as the qualified patient's "primary caregiver" is insufficient to establish a caregiver status.

(C) *Claremont v. Kruse,* 177 Cal.App.4th 1153 (2009), California Court of Appeal holding that neither the Act nor the Program expressly or impliedly preempt local exercise of land use and zoning police powers.

(D) *People v. Mower,* 28 Cal.4th 457 (2002), California Supreme Court holding that the defenses accorded by the Act are limited to "patients and primary caregivers" for the possession and cultivation of marijuana only.

(E) *People v. Urziceanu,* 132 Cal.App.4th 747 (2005), California Court of Appeal noting that courts consistently have rejected attempts to broaden the scope

of the Act and the Program and recognizing that the Act did not create a constitutional right to obtain marijuana.

(F) *People v. Hochanadel,* 176 Cal.App.4th 997 (2009), California Court of Appeal concluding that the operators of a storefront dispensary which sold marijuana to individuals did not operate within the CUA and the MMPA, and did not constitute a primary caregiver such that it was entitled to protections of the CUA and MMPA.

(G) *County of San Diego v. NORML,* 165 Cal.App.4th 798 (2008), California Court of Appeal holding that the provisions of the Program requiring California counties to issue identification cards to qualified medical marijuana patients are not preempted by the Federal Controlled Substances Act.

(H) *City of Garden Grove v. Superior Court,* 157 Cal.App.4th 355 (2007), regarding the California Court of Appeal's limited holding that the return of marijuana to a qualified user is not preempted by the Federal Controlled Substances Act.

(I) *City of Lake Forest v. Moen et al.* (Case No. 30-2009-0029887-CU-MC-CJC), trial court granted Lake Forest's preliminary injunction and found that a city's power to enact land use or zoning laws, and a city's enforcement of existing local laws is not preempted by the Compassionate Use Act and Medical Marijuana Program.

WHEREAS, on August 25, 2008, then California Attorney General Edmund G. Brown, issued "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" ("the Attorney General Guidelines") which sets regulations intended to ensure the security and non-diversion of marijuana grown for medical use by qualified patients;

WHEREAS, the Federal Controlled Substances Act provides that the manufacture, cultivation, distribution and dispensing of marijuana is illegal for any purpose, and further provides for criminal penalties for marijuana use;

WHEREAS, the United States Supreme Court held in *Gonzales v. Raich,* 545 U.S. 1 (2005), that the provisions of the federal Controlled Substances Act apply to the personal medical use of marijuana in California, and more recently the Supreme Court held in *Raich v. Gonzalez*, 500 F.3d 850 (2007), that the Controlled Substances Act applied to individual's personal medical use of marijuana, and upheld the provisions of the Controlled Substance Act criminalizing the manufacture, distribution, or possession of marijuana to growers and users of marijuana for medical purposes;

WHEREAS, on October 19, 2009, a memorandum from the U.S. Department of Justice indicated the Department's intent to not use Federal resources on marijuana prosecution if an individual's actions are "in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"; however, on October 7, 2011, Federal prosecutors announced an aggressive crackdown on California pot dispensaries, cited as the first coordinated statewide offensive against marijuana dealers and suppliers;

WHEREAS, the Attorney General Guidelines provide that cities and counties may adopt regulations that allow qualified patients or primary caregivers to possess more medical marijuana in amounts that exceed the MMPA's possession guidelines;

WHEREAS, Health and Safety Code § 11362.765 prohibits the cultivation or distribution of medical marijuana for profit, but neither the Compassionate Use Act nor Medical Marijuana Program impose operational regulations of medical marijuana dispensaries, collectives or cooperatives. Thus, leaving to local governments, such as the City, the imposition of local operational regulations for medical marijuana dispensaries;

WHEREAS, the Compassionate Use Act provides that persons who are in need of medical marijuana for specified purposes may obtain and use it under limited, specified circumstances. The Act has led to the establishment of medical marijuana dispensaries in various communities throughout California; and

WHEREAS, Article XI, Section 7 of the California Constitution provides a city may make and enforce within it limits all local police, sanitary and other ordinances and regulations not in conflict with general laws;

WHEREAS, many localities have chosen to regulate and/or ban medical marijuana dispensaries;

WHEREAS, Chapter 18.90 of the Larkspur Municipal Code prohibits medical marijuana dispensaries in all districts of the City, and also does not allow medical marijuana dispensaries as a home occupation use;

WHEREAS, the California Supreme Court has granted review petitions in the following medical marijuana cases, including two cases accepted just a couple of months ago, and the Court's review may settle the issue of the extent localities may control medical marijuana dispensaries.

1. *Pack v. City of Long Beach* (2011) 199 Cal.App.4th 1070

2. *City of Riverside v. Inland Patient's Health & Wellness Center, Inc.* (2011) 200 Cal.App.4th 885

3. *Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886

4. *People v. G3 Holistic*, 2011 Cal.App.Unpub. LEXIS 8634

In light of the Supreme Court's granting of review of these cases, these appellate court cases are no longer cited as controlling law, and it is uncertain what potential impacts the Supreme Court's decision will have on the ever changing developments in medical marijuana regulation;

WHEREAS, in the very recent case *City of Lake Forest v. Evergreen Holistic Collective,* the Fourth District Court of Appeals, notwithstanding the California Supreme Court having granted review to four appellate cases regarding medical marijuana listed above, issued a decision which is counter to these four appellate cases. In *City of Lake Forest*, the court found that a city may regulate medical marijuana dispensaries, but may not ban them by declaring the dispensaries to be a "nuisance per se," ;

WHEREAS, in order to address recent case law regarding local regulation of medical marijuana dispensaries, the City would like, in addition to Chapter 18.90 of the Municipal Code, to adopt this Urgency Ordinance and place a temporary, 45-day moratorium on any and all local permits regarding medical marijuana dispensaries in the City of Larkspur;

WHEREAS, the City Council desires to wait for further guidance from the California Supreme Court prior to deciding whether to amend the Larkspur Municipal Code with respect to medical marijuana dispensaries;

WHEREAS, in April of 2009, The California Police Chief's Association issued a "White Paper" which identifies that throughout California, many violent crimes have been committed that can be traced back to the proliferation of marijuana dispensaries, including armed robberies and murders. Increased noise and pedestrian traffic, including nonresidents in pursuit of marijuana, and out of area criminals in search of prey, are commonly encountered just outside marijuana dispensaries;

WHEREAS, California Government Code Section 65858, subdivision (a) provides: that city legislative bodies may, to protect public safety, health and welfare, adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying or intends to study within a reasonable time; that adoption of such urgency measures requires a four-fifths vote of the legislative body; that such measures shall be of no effect 45 days from the date of adoption, and may be extended a maximum of two times and have a maximum total duration of two years;

WHEREAS, California Government Code Section 65858, subdivision (c) provides: that legislative bodies may not adopt or extend such interim ordinances unless they contain findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional entitlements would result in that threat to the public health, safety or welfare;

WHEREAS, in accordance with California Government Code Section 65858, subdivision (c), which provides that such interim ordinances that have the effect of denying approvals needed for the development of projects with a significant component of multifamily housing (as defined in California Government Code Section 65858, subdivisions (g) and (h)) may not be extended except upon written findings adopted by the legislative body as specified in the subdivision, the City Council hereby finds that the moratorium established pursuant to this ordinance will not have the effect of denying approvals needed for the development of projects with a significant component of multi-family housing; and that, therefore, the findings specified in Section 65858, subdivision (c), need not be made; and

WHEREAS, pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this ordinance is exempt from CEQA based on the following:

(1) This ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately.

(2) This ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the evaluation and adoption of contemplated local legislation, regulation and policies.

(3) This ordinance is not subject to CEQA under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1) and (2), above, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment.

NOW THEREFORE, the City Council of the City of Larkspur does ordain as follows:

Section 1. Recitals Made Findings. The above recitals are hereby declared to be true and correct and findings of the City Council of the City of Larkspur.

Section 2. Moratorium Imposed.

A. Scope. In accordance with the authority granted the City of Larkspur under Article XI, Section 7 of the California Constitution and California Government Code Section 65858, from and after the effective date of this ordinance, no permit or any other applicable license or entitlement for use, including, but not limited to, the issuance of a business license, building permit, conditional use permit, or other

land use approval, shall be approved or issued for the establishment or operation of a medical marijuana dispensary in the City of Larkspur. Additionally, medical marijuana dispensaries are hereby expressly prohibited in all areas and zoning districts of the City.

B. Definitions.

1. For purposes of this ordinance, "medical marijuana dispensary" or "dispensary" means (1) any facility, building, structure or location, whether fixed or mobile, where a primary caregiver makes available, sells, transmits, gives or otherwise provides medical marijuana to two or more of the following: a qualified patient or a person with an identification card, or a primary caregiver in strict accordance with California Health and Safety Code Section 11362.5 *et seq.*, or (2) any facility, building, structure or location where qualified patients and/or persons with identification cards and/or primary caregivers meet or congregate to cultivate or distribute marijuana for medical purposes. The terms "primary caregiver," "qualified patient," and "person with an identification card" shall be as defined in California Health and Safety Code Section 11362.5 *et seq.*;

A "medical marijuana dispensary" or "dispensary" also means any not-for-profit site, facility or location where one or more Qualified Patients and/or Persons with an Identification Card associate, meet or congregate in order collectively or cooperatively, distribute, sell, dispense, transmit, process, deliver, exchange or give away marijuana for medicinal purposes pursuant to Health and Safety Code Section 11362.5 *et seq.* and organized as a Marijuana Cooperative or Collective as set forth in the Attorney General Guidelines.

2. For purposes of this ordinance, a "medical marijuana dispensary" shall not include the following uses, as long as the location of such uses are otherwise regulated by applicable law: a clinic licensed pursuant to Chapter 1 of Division 2 of the California Health and Safety Code, a health care facility licensed pursuant to Chapter 2 of Division 2 of the California 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 California Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the California Health and Safety Code, a residential hospice, or a home health agency licensed pursuant to Chapter 8 of the California Health and Safety Code, as long as any such use complies strictly with applicable law including, but not limited to, California Health and Safety Code Section 11362.5 *et seq.*

C. Statutory Findings and Purpose

This ordinance is declared to be an interim ordinance as defined under California Government Code Section 65858. This ordinance is deemed necessary based on the following findings of the City Council of the City of set forth in the recitals, incorporated by Section 1 of this Ordinance, and the additional information set forth below:

1. The purpose of this Ordinance is to protect the public safety, health and welfare from a current and immediate threat posed by the issuance of an applicable license or entitlement. The facts constituting the urgency are: California cities that have permitted the establishment of medical marijuana dispensaries have experienced resulting negative secondary effects such as an increase in crime, including burglary, robbery and the sale of illegal drugs, in the areas immediately surrounding medical marijuana dispensaries. The effect of the City of Larkspur's prohibition of medical marijuana dispensaries

depends on the California Supreme Court's review of recent appellate court decisions.

2. Absent the adoption of this urgency ordinance, the establishment and operation of medical marijuana dispensaries in the City would result in the harmful secondary effects identified above.

3. Issuing permits, business licenses or other applicable licenses or entitlements providing for the establishment and/or operation of medical marijuana dispensaries, prior to the completion of the City's study of the potential impact of such facilities, poses a current and immediate threat to the public health, safety, and welfare.

4. In light of the harmful secondary effects associated with medical marijuana dispensaries and the current and immediate threat such secondary effects pose to the public health, safety and welfare, it is necessary, in accordance with Government Code Section 65858, to impose a moratorium on the issuance of entitlements for and the establishment of new medical marijuana dispensaries in the City to provide time for the City Council to further evaluate and consider possible adoption of legislation, guidelines and/or polices as required to avert the potential impacts of medical marijuana dispensaries.

Section 3. **Establishment, Maintenance or Operation of Medical Marijuana Dispensary Declared Public Nuisance.** The establishment, maintenance or operation of a medical marijuana dispensary as defined herein within the City limits of the City of Larkspur is declared to be a public nuisance. Violations of this ordinance may be enforced by any means provided inapplicable laws or ordinances, including but not limited to injunctions, or administrative or criminal penalties under the Larkspur Municipal Code.

Section 4. **Severability.** If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council of the City of Larkspur hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 5. **Effective Date and Duration.** This Ordinance shall become effective immediately upon passage and adoption if passed and adopted by at least four-fifths vote of the City Council and shall be in effect for 45 days therefrom unless extended by the City in accordance with California Government Code Section 65858.

Section 6. **Penalties.** Any person who violates any section of this ordinance shall be guilty of a misdemeanor and subject to a fine of up to one thousand dollars ($1,000) and/or imprisonment in the county jail for up to a period of six (6) months.

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IT IS HEREBY CERTIFIED that the foregoing urgency ordinance was duly introduced at a regular meeting of the Larkspur City Council held on the 4th of April, 2012, and thereafter passed and adopted by the Larkspur City Council on the 4th day of April, 2012, by the following vote, to wit:

AYES: COUNCILMEMBER: Chu, Hillmer, Morrison, Rifkind

NOES: COUNCILMEMBER: None

ABSENT: COUNCILMEMBER: Marsh

ABSTAIN: COUNCILMEMBER: None

MAYOR

ATTEST:

CITY CLERK

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