City of Morro Bay

City Council Agenda

Mission Statement
The City of Morro Bay is dedicated to the preservation and enhancement of the quality of life. The City shall be committed to this purpose and will provide a level of municipal service and safety consistent with and responsive to the needs of the public.

REGULAR MEETING – TUESDAY, APRIL 26, 2011
VETERANS MEMORIAL HALL - 6:00 P.M.
209 SURF ST., MORRO BAY, CA

ESTABLISH QUORUM AND CALL TO ORDER
MOMENT OF SILENCE
PLEDGE OF ALLEGIANCE
MAYOR AND COUNCILMEMBERS ANNOUNCEMENTS & PRESENTATIONS
CLOSED SESSION REPORT

PUBLIC COMMENT PERIOD - Members of the audience wishing to address the Council on City business matters (other than Public Hearing items under Section B) may do so at this time.

To increase the effectiveness of the Public Comment Period, the following rules shall be followed:

- When recognized by the Mayor, please come forward to the podium and state your name and address for the record. Comments are to be limited to three minutes.
- All remarks shall be addressed to Council, as a whole, and not to any individual member thereof.
- The Council respectfully requests that you refrain from making slanderous, profane or personal remarks against any elected official, commission and/or staff.
- Please refrain from public displays or outbursts such as unsolicited applause, comments or cheering.
- Any disruptive activities that substantially interfere with the ability of the City Council to carry out its meeting will not be permitted and offenders will be requested to leave the meeting.
- Your participation in City Council meetings is welcome and your courtesy will be appreciated.

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the City Clerk, (805) 772-6205. Notification 24 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting.

A. CONSENT CALENDAR

Unless an item is pulled for separate action by the City Council, the following actions are approved without discussion.

A-1 QUARTERLY FINANCIAL STATUS REPORT FOR THE FISCAL YEAR ENDED MARCH 31, 2011; (ADMINISTRATIVE SERVICES)

RECOMMENDATION: Accept the report as presented.

A-2 RECIPROCAL AGREEMENT TO PARTICIPATE IN THE FRANCHISE TAX BOARD'S CITY BUSINESS TAX PROGRAM; (PUBLIC SERVICES)

RECOMMENDATION: Adopt Resolution No. 30-11 reaffirming the City's participation in the Franchise Tax Board City Business Tax Program.

A-3 PROCLAMATION DECLARING MAY 2011 AS "BIKE MONTH" AND MAY 16 TO MAY 20, 2011 AS "BIKE TO WORK AND SCHOOL WEEK"; (ADMINISTRATION)

RECOMMENDATION: Adopt Proclamation.

A-4 PROCLAMATION DECLARING MAY 2011 AS "NATIONAL TOURISM MONTH"; (ADMINISTRATION)

RECOMMENDATION: Adopt Proclamation.

B. PUBLIC HEARINGS, REPORTS & APPEARANCES

B-1 CONSIDERATION OF AN AMENDMENT TO MORRO BAY MUNICIPAL CODE TITLE 5 ADDING CHAPTER 5.50 ESTABLISHING REGULATIONS AND PROCEDURES ENTITLED "MEDICAL MARIJUANA COLLECTIVES AND COOPERATIVES"; (CITY ATTORNEY)

RECOMMENDATION: Open for public testimony; review, and direct staff accordingly.

C. UNFINISHED BUSINESS

D. NEW BUSINESS

D-1 ENFORCEMENT OF REGULATIONS PROHIBITING A-FRAME SIGNS; (CITY COUNCIL)

RECOMMENDATION: Immediate enforcement of Morro Bay Municipal Code Section 17.68.030 prohibiting A-frame signs and rescinding the A-frame sign exception.

D-2 ANNUAL REVIEW OF HARBOR LEASE SITE BUSINESSES; (HARBOR)

RECOMMENDATION: Consider the annual review of Harbor Lease Site Businesses.

D-3 DISCUSSION OF A BIKE RACKS WITH DEDICATION PLAQUES PROGRAM; (PUBLIC SERVICES)

RECOMMENDATION: Discuss a Bike Rack with Commemorative Plaque Dedication, and provide direction to staff.

E. DECLARATION OF FUTURE AGENDA ITEMS

F. ADJOURNMENT

THIS AGENDA IS SUBJECT TO AMENDMENT UP TO 72 HOURS PRIOR TO THE DATE AND TIME SET FOR THE MEETING. PLEASE REFER TO THE AGENDA POSTED AT CITY HALL FOR ANY REVISIONS OR CALL THE CLERK'S OFFICE AT 772-6200 FOR FURTHER INFORMATION.

MATERIALS RELATED TO AN ITEM ON THIS AGENDA SUBMITTED TO THE CITY COUNCIL AFTER DISTRIBUTION OF THE AGENDA PACKET ARE AVAILABLE FOR PUBLIC INSPECTION AT CITY HALL LOCATED AT 595 HARBOR STREET; MORRO BAY LIBRARY LOCATED AT 625 HARBOR STREET; AND MILL'S COPY CENTER LOCATED AT 495 MORRO BAY BOULEVARD DURING NORMAL BUSINESS HOURS.

AGENDA NO:	**A-1**
MEETING DATE:	**04/26/11**

Staff Report

TO: **Honorable Mayor and City Council** **DATE: April 18, 2011**

FROM: **Susan Slayton, Administrative Services Director**

SUBJECT: **Quarterly Financial Status Report for the Fiscal Year Ended March 31, 2011**

RECOMMENDATION:
Council to accept the report as presented.

FISCAL IMPACT:
None.

SUMMARY:
Presented tonight is the quarterly financial status report for the fiscal year ended March 31, 2011.

DISCUSSION:
The status reports presented are for operations as of the third quarter of the 2010/11 fiscal year ended March 31, 2011. Please remember that when looking at these reports, timing plays a role in revenue receipt; for example, Transient Occupancy Tax is always received one month after the tax was collected (TOT charged in March is not due to the City until April 30). In June, we "double up," receiving the May TOT by June 30, and accruing June TOT into the current fiscal year with a journal entry. Expenditures are generally more accurate, although one-time expenditures, such as annual maintenance contracts, will skew the percentage expended.

General Fund revenues, without transfers in (page 4), are 68.72% received as of March 31. Interest income is down $80,000 from last year, but sales tax and TOT are experiencing slight increases. The sales tax increase is directly related to the rise in gasoline prices, while the TOT increase is likely a mix of the additional marketing efforts by the TBID, as well as some stabilization in the economy.

General Fund expenditures, without transfers out (page 19), are 69.53% spent as of March 31. The departments are managing to function within their budgetary constraints. Unfortunately, safety, upgrades, and training continue to be shelved in order to cover the rising costs of personnel, maintenance contracts, and increases from outside vendors, such as gasoline.

The General Fund will likely complete the year with 100% of both its expenditure and revenue budgets met.

Prepared By: ________	**Dept Review:**_____
City Manager Review: ________	
City Attorney Review: ________	

As of March 31, budget to actual results on the enterprise funds are as follows:

FUND	PAGE	PERCENT RECEIVED/SPENT REVENUES	EXPENSES	GAIN (LOSS)
Transit	30	44%	68%	(108,903)
Water	32	65%	92%	(997,917)
Sewer	34	92%	64%	806,063
Harbor	37	75%	77%	(36,409)

As of March 31, budget to actual results on the Wastewater Treatment Plant are as follows:

FUND	PAGE	PERCENT RECEIVED/SPENT REVENUES	EXPENSES	GAIN (LOSS)
WWTP	42	38%	57%	(637,926)

AGENDA NO:	**A-2**
MEETING DATE:	**04/26/2011**

Staff Report

TO: **Honorable Mayor and City Council** **DATE: April 14, 2011**

FROM: **Rob Livick, PE/PLS-Public Services Director**

SUBJECT: **Reciprocal Agreement to Participate in the Franchise Tax Board's City Business Tax Program**

RECOMMENDATION:

Staff recommends that Council adopt Resolution No. 30-11 reaffirming the City's participation in the Franchise Tax Board City Business Tax Program.

FISCAL IMPACT:

No outside vendor cost to setup program, but will require additional staff time. It will require that we modify some of our applications to include additional information and run the additional reports. Access to State Tax Records will have a potential increase in business tax revenues.

SUMMARY:

This Agreement is for a three year period. Program details are outlined in Exhibit A & D; Reporting specifics are outlined in Exhibit E & F.

DISCUSSION:

The City has been participating in the Franchise Tax Board City Business Tax Program for a number of years, however due to the transition in business license processing from the Finance Department to the Public Services Department we have not participated in last two years. This program provides for a sharing of information to allow both entities (the City and the Franchise Tax Board) to determine if there are businesses identified to one entity and not to the other. Participating cities can benefit from discovering individuals and businesses that may have a business tax filing requirement and FTB can find self-employed individuals who have a business license but may not be filing state income tax returns.

Prepared By: R. Livick	**Dept Review: R. Livick**
City Manager Review: ________	
City Attorney Review: ________	

CONCLUSION:
Staff recommends that Council reaffirm the City's participation in the Franchise Tax Board City Business Tax Program.

ATTACHMENT

1. Exhibit A- Resolution No. 30-11
4. Exhibit D-Standard Agreement

RESOLUTION NO. 30-11

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MORRO BAY, CALIFORNIA AUTHORIZING THE CITY TO PARTICIPATE IN THE FRANCHISE TAX BOARD'S CITY BUSINESS TAX PROGRAM

T H E C I T Y C O U N C I L
City of Morro Bay, California

WHEREAS, In order to increase revenues in the City's Business Tax (License) Division the City may exchange data with the California Franchise Tax Board (FTB); and

WHEREAS, this agreement allows the Franchise Tax Board and the City to enter into a reciprocal agreement to exchange tax data specific to city business license information for tax administration purposes; and

WHEREAS, California Revenue and Taxation Code (R&TC) Section 19551.5 mandates cities to provide city business tax data to FTB. R&TC 19551.1 authorizes a reciprocal agreement for the exchange of city business tax and income tax information between a city and the FTB; and

WHEREAS, the City agrees that the information provided by FTB will be used exclusively to administer the City's business tax program; and

WHEREAS, the City agrees that information obtained under this Agreement will not be reproduced, published, sold or released in original or in any other form for any purpose; and only accessed by City employees.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Morro Bay, California, by signing Reciprocal Agreement (STD 213) by an authorized signatory, Morro Bay will participate in the Franchise Tax Board's City Business Tax Program. Be it further resolved that the City Manager is authorized to execute said Reciprocal Agreement.

PASSED AND ADOPTED by the City Council of the City of Morro Bay at a regular meeting thereof held on the 26th day of April, 2011 on the following vote:

AYES:
NOES:
ABSENT:

____
WILLIAM YATES, Mayor

ATTEST:

____
BRIDGETT KESSLING, City Clerk

STATE OF CALIFORNIA

STANDARD AGREEMENT

STD 213 (Rev 06/03)

AGREEMENT NUMBER	REGISTRATION NUMBER
C1000239	

1. This Agreement is entered into between the State Agency and the Contractor named below:

STATE AGENCY'S NAME
Franchise Tax Board

CONTRACTOR'S NAME
City of Morro Bay

2. The term of this Agreement is: June 1, 2011 through December 31, 2013

3. The maximum amount of this Agreement is: **$** 0.00 NON-FINANCIAL AGREEMENT

4. The parties agree to comply with the terms and conditions of the following exhibits, which are by this reference made a part of the Agreement.

Exhibit A – Scope of Work	3 pages
Exhibit C* – General Terms and Conditions	GTC610
Exhibit D - Special Terms and Conditions	3 pages
Exhibit E - City Record Format Specifications	2 pages
Exhibit F - FTB Record Layout Specifications	1 page
Exhibit G – Confidentiality Statement	1 page

Items shown with an Asterisk (*), are hereby incorporated by reference and made part of this agreement as if attached hereto. These documents can be viewed at *www.ols.dgs.ca.gov/Standard+Language/default.htm*

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto.

CONTRACTOR

CONTRACTOR'S NAME *(if other than an individual, state whether a corporation, partnership, etc.)*
City of Morro Bay

BY *(Authorized Signature)*	DATE SIGNED*(Do not type)*
✍	

PRINTED NAME AND TITLE OF PERSON SIGNING

ADDRESS
595 Harbor Street, Morro Bay, CA 93442

STATE OF CALIFORNIA

AGENCY NAME
Franchise Tax Board

BY *(Authorized Signature)*	DATE SIGNED*(Do not type)*
✍	

PRINTED NAME AND TITLE OF PERSON SIGNING
Lisa Garrison, Chief Financial Officer

ADDRESS
P.O. Box 2086, Rancho Cordova, CA 95741-2086

California Department of General Services Use Only

☒ Exempt per: SCM 4.04.5.b.

EXHIBIT A

SCOPE OF WORK

This Agreement is entered into by and between the Franchise Tax Board, herein referred to as (FTB) and the City of Morro Bay, herein after referred to as the City.

Purpose:
This Agreement allows FTB and the City to enter into a reciprocal agreement to exchange tax data specific to city business license information for tax administration purposes. By entering into a reciprocal agreement, each party agrees to bear their own costs of providing the data and the City is precluded from obtaining reimbursement.

Both parties will abide by the legal and confidential provisions of this Agreement. Exhibits A, C, D, E, F, and G attached hereto and incorporated by reference herein, set forth additional terms to which the parties agree to be bound.

Legal Authority:
California Revenue and Taxation Code (R&TC) Section 19551.5 mandates cities to provide city business tax data to FTB. R&TC 19551.1 authorizes a reciprocal agreement for the exchange of city business tax and income tax information between a city and FTB.

City Responsibilities:
1. The City agrees that the information provided by FTB will be used exclusively to administer the City's business tax program.

2. The City agrees that information obtained under this Agreement will not be reproduced, published, sold, or released in original or in any other form for any purpose; and only accessed by City employees.

3. The City agrees to provide FTB with tax information pursuant to Exhibit E, Format Specifications, which shall include but is not limited to the following:

    - Business or owner's name.
    - Business or residence address.
    - Federal employer identification number or social security number.
    - North American Industry Classification Code or Standard Industry Classification Code.

4. The City agrees to extract and provide City data to FTB annually in June for each tax year that the Agreement is in place, June 2011, 2012, and 2013. If the Agreement is executed after June 30, 2011, the City has 30 days after execution to provide FTB with the first year's data.

5. The City agrees to submit the records to FTB using FTB's Secure Web Internet File Transfer (SWIFT).

6. The City agrees to submit the records to FTB in ASCII fixed length format, .txt, per the Format Specifications, Exhibit E.

EXHIBIT A

SCOPE OF WORK (continued)

7. The City agrees to resubmit data in the event data is initially submitted with errors. The resubmission of data must be within 30 days of notification. If data is not submitted accurately and timely, the City forfeits its rights to FTB data for that year.

8. The City agrees that each City employee having access to FTB data shall sign a Confidentiality Statement, Exhibit G. The signed statement is to be retained by the City and produced to FTB upon request.

9. The City agrees to submit to FTB a completed safeguard questionnaire prior to receiving FTB data. The safeguard questionnaire is valid for the duration of the Agreement.

10. The City agrees to provide a copy of the resolution, order, motion, or ordinance of the local governing body, authorizing the execution of the Agreement.

FTB Responsibilities:

1. FTB agrees that information provided by the City will be used for tax administration and non-tax programs that FTB administers and may be shared with other state/federal agencies as authorized by law.

2. FTB agrees that information obtained under this Agreement will not be reproduced, published, sold, or released in original or in any other form for any purpose.

3. FTB agrees to provide the City data extracted from the Taxpayer Information (TI) and Business Entities Tax System (BETS). FTB will provide the City records for taxpayers within the city's jurisdiction who indicate a business on their personal or corporation income tax return. The Record Layout, Exhibit F shall include, but is not limited to:

   - Taxpayer name.
   - Taxpayer address.
   - Taxpayer social security number or federal employer identification number.
   - Principal business activity code.

4. FTB agrees to match the data provided by the City using the social security number or federal employer identification number against FTB's data with a yes or no indicator on the Record Layout, Exhibit F. The first year's data match is at the discretion of FTB and will be based on when the data is received and processed.

5. FTB agrees to provide the City an annual extraction in December 2011 for tax year 2010, December 2012 for tax year 2011, and December 2013 for tax year 2012 via SWIFT.

6. FTB agrees to register the City for a SWIFT account, allowing for the secure electronic transmission of data.

7. FTB agrees to provide the City a unique City Business Tax Number to be used for reporting purposes only.

8. FTB agrees to allow the City to resubmit data within 30 days of notification, in the event data is initially submitted with errors.

EXHIBIT A

SCOPE OF WORK (continued)

Project Coordinators:

The project coordinators during the term of this Agreement will be:

Franchise Tax Board
Cathy McCollum
Data Resources and Services Unit
P.O. Box 1468, Mailstop A181
Sacramento, CA 95812-1468
Phone: (916) 845-4431
Fax: (916) 845-4849

City of Morro Bay
Cathy Weaver
595 Harbor Street
Morro Bay, CA 93442
Phone: (805) 772-6261

Return executed agreement to:

Franchise Tax Board
Procurement & Asset Management Bureau
Attention: Nel Bohling
P.O. Box 2086, Mailstop A-374
Rancho Cordova, CA 95741-2086
Phone: (916) 845-7870
Fax: (916) 845-3599

EXHIBIT D

SPECIAL TERMS AND CONDITIONS

1. DATA OWNERSHIP: The classified confidential tax information being provided to the City under this Agreement remains the exclusive property of FTB. The City shall have the right to use and process the disclosed information for the purposes stated in this Agreement, which right shall be revoked and terminated immediately upon completion of this Agreement.

2. STATEMENT OF CONFIDENTIALITY: The Franchise Tax Board has tax return information and other data in its custody, which is confidential data. Unauthorized inspection or disclosure of state tax return information or other confidential data is a misdemeanor (Revenue and Taxation Code Section 19542 and 19542.1).

3. USE OF INFORMATION: The City and FTB agree that the information furnished or secured pursuant to this Agreement shall be used solely for the purposes described by this Agreement. The information obtained by FTB shall be used for tax administration and non-tax programs that FTB administers and may be shared with other state/federal agencies as authorized by law. The City and FTB further agree that information obtained under this Agreement will not be reproduced, published, sold, or released in original or in any other form for any purpose other than identified in this Agreement or as authorized by law.

4. EMPLOYEE ACCESS TO INFORMATION: Both FTB and the City agree that the information obtained will be kept in the strictest confidence and shall make information available to its own employees only on a “need to know” basis. The “need to know” standard is met by authorized employees who need information to perform their official duties in connection with the uses of the information authorized by this Agreement. Both parties recognize their responsibilities to protect the confidentiality of this information as provided by law and ensures such information is disclosed only to those individuals and of such purpose, as authorized by the Revenue and Taxation Code.

5. DISCLOSURE OF CONFIDENTIAL INFORMATION**:** Any unwarranted disclosure or use of state tax return information or any willful unauthorized inspection of the return information is an act punishable as a misdemeanor. Inspection is defined to mean any examination of confidential information. No one other than authorized employees may access, use, view or manipulate the data being transmitted to the City under this Agreement. The City, in recognizing the confidentiality of state tax return information, agrees to take all appropriate precautions to protect from unauthorized disclosure of the confidential information obtained pursuant to this Agreement. The City will conduct oversight of its users with access to the confidential information provided under this Agreement, and will promptly notify FTB of any suspected violations of security or confidentiality by its users.

   The City and each of the City’s employees who may have access to the confidential data of FTB will be required to sign a Confidentiality Statement, Exhibit G, attesting to the fact that he/she is aware of the confidential data and the penalties for unauthorized disclosure thereof. The signed statement shall be retained by the City and furnished to FTB upon request.

EXHIBIT D

SPECIAL TERMS AND CONDITIONS (continued)

6. INCIDENT REPORTING: All unauthorized or suspected unauthorized access; use and/or disclosure (incidents) of FTB data shall be reported to FTB's contact, Cathy McCollum at (916) 845-4431, immediately upon discovery of the incident. The incident report shall contain the following: date, time, employee name, description of the incident or circumstances, and means of discovery. Upon discovery of any such incident, FTB will make the appropriate notification to affected California resident(s) pursuant to the requirements of Civil Code Section 1798.29.

7. INFORMATION SECURITY: Information security is defined as the preservation of the confidentiality, integrity, availability, authenticity, and utility of information. A secure environment is required to protect the confidential information obtained from FTB pursuant to this Agreement. The City will store information so that it is physically secure from unauthorized access. The records received by the City will be securely maintained and accessible only by employees of the city business license program who are committed to protect the data from unauthorized access, use, and disclosure.

8. DESTRUCTION OF RECORDS: All records received by the City from FTB and any database(s) created, copies made, or files attributed to the records received will be destroyed within three years of receipt. The records shall be destructed in a manner to be deemed unusable or unreadable and to the extent that an individual record can no longer be reasonably ascertained. FTB will destroy City data in accordance with the Department's data retention policies.

9. INDEMNIFICATION: Both parties agree to indemnify, defend, and save harmless each other, its officers, agents, and employees from any and all claims and losses accruing or resulting from any breach of confidentiality by either party and/or its employees.

10. SETTLEMENT OF DISPUTES: In the event of a dispute, the City shall file a "Notice of Dispute" with the Chief Counsel of the Franchise Tax Board within ten (10) days of discovery of the problem. Within ten (10) days, the Chief Counsel or his/her designee shall meet with the City and the FTB contact for purposes of resolving the dispute. The decision of the Chief Counsel shall be final.

11. SAFEGUARD QUESTIONNAIRE and REVIEW: Prior to sending data to the City, FTB requires the City to submit a safeguard questionnaire certifying the protection and confidentiality of FTB data. The FTB retains the right to conduct an on-site safeguard review of the City. The City will be provided a minimum of seven (7) days' notice prior to a safeguard review being conducted by the FTB Disclosure Office. The safeguard review will examine the adequacy of information security controls established by the City in compliance with the confidentiality requirements pursuant to this Agreement. The City will take appropriate disciplinary actions against any user determined to have violated security or confidentiality requirements.

12. LIMITED WARRANTY: Either party does not warrant or represent the accuracy or content of the material available through this Agreement, and expressly disclaims any express or implied warranty, including any implied warranty of fitness for a specific purpose.

EXHIBIT D

SPECIAL TERMS AND CONDITIONS (continued)

13. CANCELLATION: Either party may terminate this Agreement, in writing for any reason, upon thirty days' (30) prior written notice. This Agreement may be terminated by either party in the event of any breach of the terms of this Agreement. Both parties agree that in the event of a breach to the terms of this Agreement, it shall destroy all records and any databases created, copies made, or files attributed to the records received. The records shall be destructed in a manner to be deemed unusable or unreadable and to the extent that an individual record can no longer be reasonably ascertained, upon destruction.

14. NO THIRD PARTY LIABILITY: Nothing contained in this Agreement or otherwise shall create any contractual relation between either party and any other party, and no party shall relieve the City or FTB of its responsibilities and obligations hereunder. Both parties agree to be fully responsible for the acts and omissions of its third parties and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the City or FTB. Both parties shall have no obligation to pay or to see the payment of any monies to any party or persons either directly or indirectly employed by the City or FTB.

EXHIBIT E

CITY RECORD FORMAT SPECIFICATIONS

Data Element Name	Start Pos.	End Pos.	Field Size	Usage	Description
SOCIAL SECURITY NUMBER (SSN)	1	9	9	AN	Must be present unless FEIN is provided. Fill unused field with blanks.
FEDERAL EMPLOYER ID NUMBER (FEIN)	10	18	9	AN	Must be present unless SSN is provided. Fill unused field with blanks.
OWNERSHIP TYPE	19	19	1	AN	Must be present: S = Sole Proprietorship P = Partnership C = Corporation T = Trust L = Limited Liability Company
OWNER'S LAST NAME	20	34	15	AN	Must be present if Ownership Type in position 19 = S.
OWNER'S FIRST NAME	35	45	11	AN	Must be present if Ownership Type in position 19 = S.
OWNER'S MIDDLE INITIAL	46	46	1	AN	May be left blank.
BUSINESS NAME	47	86	40	AN	Enter if business is operating under a fictitious name (Doing Business As (DBA)).
BUSINESS ADDRESS NUMBER AND STREET	87	126	40	AN	Address of the business location or the residence of the owner if sole proprietorship.
CITY	127	166	40	A	Must be present.
STATE	167	168	2	A	Enter standard state abbreviation.
ZIP CODE	169	177	9	AN	Enter the five- or nine-digit ZIP Code assigned by the U.S. Postal Service. If only the first five-digits are known, left-justify information and fill the unused fields with blanks.
BUSINESS START DATE	178	185	8	N	Enter the eight-digit date (MMDDYYYY). Zero fill if not known.
BUSINESS CEASE DATE	186	193	8	N	Enter the eight-digit date (MMDDYYYY) if out of business. Zero fill if not known or still in business.

CITY BUSINESS TAX NUMBER	194	196	3	N	Enter three-digit number assigned by FTB.
NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS)	197	202	6	N	Enter the six-digit NAICS code. Fill unused fields with zeros.
STANDARD INDUSTRIAL CLASSIFICATION (SIC)	203	206	4	N	Enter the 2-4 digit SIC code. Left justify (example 99 will be 9900). Fill unused fields with zeros.
TOTAL RECORD LENGTH		206			

EXHIBIT F

FRANCHISE TAX BOARD RECORD LAYOUT SPECIFICATIONS

Field Name	Length	Start Pos.	Description
ENTITY TYPE	1	1	"P" – personal income tax record; "B" – business entity tax record.
SSN or FEIN	9	2	For "P" records, primary taxpayer's social security number; For "B" records, federal employer identification number.
LAST NAME	40	11	For "P" records, the primary taxpayer's last name; For "B" records, business name.
FIRST NAME	11	51	For "P" records ONLY.
MIDDLE INITIAL	1	62	For "P" records ONLY.
SPOUSE SSN	9	63	For "P" records filed with a joint return.
SPOUSE LAST NAME	17	72	For "P" records filed with a joint return.
SPOUSE FIRST NAME	11	89	For "P" records filed with a joint return.
SPOUSE MIDDLE INITIAL	1	100	For "P" records filed with a joint return.
PBA CODE	6	101	Principal business activity code.
ADDRESS NUMBER	10	107	
PRE-DIRECTIONAL DIRECTOR	2	117	Postal Service term (i.e., N, S, E, W, NE, NW, SE, SW).
STREET NAME	28	119	
STREET SUFFIX	4	147	e.g., ST, WAY, HWY, BLVD, etc.
POST-DIRECTIONAL INDICATOR	2	151	Postal Service term (i.e., N, S, E, W, NE, NW, SE, SW).
STREET SUFFIX 2	4	153	
APARTMENT/SUITE NUMBER	10	157	e.g., APT, UNIT, FL, etc.
CITY	13	167	
STATE	2	180	Standard state abbreviation.
ZIP CODE	5	182	The five-digit ZIP Code assigned by the U.S. Postal Service.
ZIP CODE SUFFIX	4	187	Provided if known.
CBT MATCH	1	191	"N" – No match per CBT data. "Y" – Yes: CBT matched to state tax return filed.

EXHIBIT G

CONFIDENTIALITY STATEMENT

State of California **Franchise Tax Board**

Confidential tax return information is protected from disclosure by law, regulation, and policy. Information security is strictly enforced. Violators may be subject to disciplinary, civil, and/or criminal action. Protecting confidential tax return information is in the public's interest, the state's interest, and the city's interest.

A city employee is required to protect the following types of information received from the Franchise Tax Board:

- Taxpayer name
- Taxpayer address
- Taxpayer social security number or taxpayer identification number
- Principal business activity code

A city employee is required to protect confidential information by:

- Accessing or modifying information only for the purpose of performing official duties.
- Never accessing or inspecting information for curiosity or personal reasons.
- Never showing or discussing confidential information to or with anyone who does not have the need to know.
- Placing confidential information only in approved locations.
- Never removing confidential information from your work site without authorization.

As a city employee, you are required to know whether information is protected. If you have any question regarding whether particular information is confidential, check with your department's project coordinator.

Unauthorized inspection, access, use, or disclosure of confidential tax return information is a crime under state laws, including but not limited to Sections 19542 and 19552 of the California Revenue and Taxation Code and Section 502 of the Penal Code. Unauthorized access, inspection, use, or disclosure may result in either or both of the following:

- State criminal action
- State and/or taxpayer civil action

You are reminded that these rules are designed to protect everyone's right to privacy, including your own.

I certify that I have read the confidentiality statement printed above. I further certify and understand that unauthorized access, inspection, use, or disclosure of confidential information may be punishable as a crime and may result in disciplinary and/or civil action being taken against me.

Name	
Signature	***Date***

AGENDA NO: A-3

MEETING DATE: 4/26/11

A PROCLAMATION OF THE CITY OF MORRO BAY DECLARING MAY 2011 AS "BIKE MONTH" MAY 16 TO MAY 20, 2011 AS "BIKE TO WORK AND SCHOOL WEEK"

CITY COUNCIL
City of Morro Bay, California

WHEREAS, bicycle commuting is an effective means to reduce air pollution and conserve energy and promotes the "livability" of communities by reducing traffic, noise and congestion; and

WHEREAS, "Change Lanes" is the theme for 2011, an inclusive request to people of all ages and abilities, whether veteran or novice, commuter or recreational rider, to ride bicycles to their destinations throughout San Luis Obispo County; and

WHEREAS, Rideshare will help businesses, organizations and schools encourage and reward customers, students and employees who commute by bicycle through incentives , awards, lockers and other benefits; and

WHEREAS, bicycle transportation is an integral part of the "multi-modal" transportation system planned by federal, state, regional, and local transportation agencies; and

WHEREAS, Bike Month promotions such as Bike to Work and School Week and the Commuter Bike Challenge encourages citizens to ride their bicycles, thereby reducing vehicular emissions in the county; and

WHEREAS, the Executive Challenge creates a forum for leaders, business executives, management, Directors, City Council members, Mayors and the Board of Supervisors to use active transportation and lead by example on May 18th.

NOW, THEREFORE BE IT RESOLVED that the City of Morro Bay does hereby proclaim May 2011 as Bike Month and May 16 to May 20, 2011 as Bike to Work and School Week.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the City of Morro Bay to be affixed this 26th day of April 2011.

____

WILLIAM YATES, Mayor
City of Morro Bay, California

AGENDA NO: A-4

MEETING DATE: 4/26/11

A PROCLAMATION DECLARING MAY 2011 AS "NATIONAL TOURISM MONTH"

CITY COUNCIL
City of Morro Bay, California

WHEREAS, travel is at the heart of America's economic and national security; and

WHEREAS, travel is one of America's largest service exports creating a travel trade surplus in excess of $22 billion and is one of the nation's largest employers accounting for more than 7.4 million direct travel-generated jobs, or one in every eight U.S. non-farm jobs; and

WHEREAS, including the direct spending in the U.S. by domestic and international visitors, travel and tourism generated $704 billion last year, providing $113 billion in tax revenue to local, state and federal governments; and

WHEREAS, the travel industry supports the interests of San Luis Obispo County, contributing to our employment, economic prosperity, international trade and relations, peace, understanding and goodwill;

WHEREAS, travel ranks as the largest industry in San Luis Obispo County in terms of revenues generated; and

WHEREAS, 2.3 million travelers visited San Luis Obispo County contributing $1 million to the economy in the County; and

WHEREAS, travel provided employment for 16,610 in San Luis Obispo County, generating a payroll of $369.1 million; and

WHEREAS, as people throughout the world become increasingly aware of the outstanding cultural and recreational opportunities available in San Luis Obispo County and throughout the United States, travel will become an increasingly vital resource in improving America's image around the world and an extension of our public diplomacy; and

WHEREAS, the Sunset Savor the Central Coast event will take place September 29th through October 2, 2011 throughout San Luis Obispo County highlighting the beauty and bounty of our region to visitors and local alike leaving behind an economic impact of several million dollars; and

WHEREAS, given these laudable contributions to the economic, social and cultural well-being of the citizens of San Luis Obispo County, it is fitting that we recognize the importance of the American travel industry.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Morro Bay declare May 2011 as “NATIONAL TOURISM MONTH”, and urge all citizens to support this month with appropriate ceremonies and activities.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the City of Morro Bay to be affixed this 26th day of April 2011.

____

WILLIAM YATES, Mayor
City of Morro Bay, California

AGENDA NO: B-1

MEETING DATE: 04/26/11

Staff Report

TO: Honorable Mayor and City Council **DATE:** April 20, 2011

FROM: Rob Schultz, City Attorney

SUBJECT: Consideration of an Amendment to Morro Bay Municipal Code Title 5 Adding Chapter 5.50 Establishing Regulations and Procedures Entitled "Medical Marijuana Collectives and Cooperatives"

RECOMMENDATION:

At the March 8, 2011 Council meeting, the City Council "requested that the City Attorney return this item to the City Council as a draft within 45 days or less." Therefore, the City Attorney has brought this matter forward again for your review and direction.

FISCAL IMPACT:

None at this time.

SUMMARY:

Attached as Exhibit "A" is the Staff Report from the March 8, 2011 Council meeting.

Attached as Exhibit "B" are the Minutes from the March 8, 2011 Council meeting.

Attached as Exhibit "C" is the revised draft Ordinance.

Attached as Exhibit "D" are the Attorney General's "Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Purposes."

Attached as Exhibit "E" is "What the Attorney General's Guidelines Mean for Medical Cannabis Dispensing Collectives in California" by Americans for Safe Access.

Attached as Exhibit "F" is "Whitepaper on Marijuana Dispensaries" by the California Police Chiefs Association.

Prepared By: ________ **Dept Review:**_____

City Manager Review: ________

City Attorney Review: ________

DISCUSSION:

At the March 8, 2011 Council meeting, the entire Council was concerned with the recently elected SLO County Sheriff's position on medical marijuana enforcement and the longstanding inconsistencies between state and federal law. The SLO County Sheriff's Department is still in the process of developing their position in regard to medical marijuana enforcement and is also preparing new guidelines. Therefore, no new information is available.

The City Attorney and Police Chief will be at the Council meeting to discuss key issues that were raised at the last Council meeting such as crime, primary care status, and regulating quantities.

The draft ordinance attempts to best suit the scale of Morro Bay by providing the possibility of two medical marijuana dispensaries under specific circumstances and a detailed permitting process. The Council should review the draft ordinance and direct the City Attorney on how to proceed.

CONCLUSION:

The City Attorney's office has attempted to prepare a draft ordinance that blends many of the interests and options gleaned from the broad information gathered. The draft ordinance contains many policy decisions that the City Council will want to consider and direct the City Attorney on how to proceed.

Exhibit "A"

AGENDA NO:	B-1
MEETING DATE:	March 8, 2011

Staff Report

TO: **Honorable Mayor and City Council** **DATE: March 1, 2011**

FROM: **Rob Schultz, City Attorney**

SUBJECT: **Consideration of an Amendment to Morro Bay Municipal Code Title 5 Adding Chapter 5.50 Establishing Regulations and Procedures Entitled "Medical Marijuana Collectives and Cooperatives"**

RECOMMENDATION:

Review the Staff Report and attached draft Regulations and Procedures entitled "Medical Marijuana Collectives and Cooperatives", and direct staff to return with this item for Introduction and First Reading with any changes suggested by Council.

FISCAL IMPACT:

None at this time.

SUMMARY:

In 1996 California voters enacted Proposition 215, the Compassionate Use Act, which protects qualified patients and their primary caregivers from prosecution under California laws for possession or cultivation of marijuana to treat serious illness pursuant to a doctor's recommendation. Several years later, in 2003, the state legislature enacted implementing legislation to allow qualified patients and caregivers to obtain identification cards that insulate them from arrest for cultivation and/or use of marijuana for authorized medical purposes. Although dispensaries are not expressly authorized under these laws, many individuals have used these laws as the legal backdrop to set up medical marijuana dispensaries where qualified patients and caregivers could purchase marijuana for medical use.

BACKGROUND:

In June 2005, Staff recommended to the City Council that they enact an interim urgency ordinance imposing a moratorium on medical marijuana dispensaries until Staff had an opportunity to propose regulations. The interim urgency ordinance was not adopted by City Council and Staff was directed to allow medical marijuana dispensaries pursuant to our current municipal code. Pursuant to Council direction, medical marijuana dispensaries were allowed in the City of Morro

Prepared By: ______	**Dept Review:** ______
City Manager Review:	
City Attorney Review: ______	

Bay in the C-1 District by obtaining a business license and with a minor use permit in the MCR District under the category of "drugs".

Based upon Council's action, in 2006, the City approved a Medical Marijuana Dispensary at 780 Monterey Street. This location was in the General Commercial zoning district. Staff issued a business license since the sale of drugs (in this case medical marijuana) was an allowable use in the General Commercial zoning district.

In 2007, an application was received for the establishment of a Medical Marijuana Dispensary at 2840 Main Street. This location is in the Mixed Commercial/Residential zoning district, so a minor use permit was required. Staff issued a minor use permit since the sale of drugs (in this case medical marijuana) was an allowable use in the Mixed Commercial/Residential zoning district. The minor use permit was appealed to the Planning Commission. While the appeal was pending, the City Council declared a moratorium on medical marijuana dispensaries.

In 2008, after reviewing the current status of federal and state law and the associated risks and possible consequences of establishing an ordinance allowing medical marijuana dispensaries, the City Council instructed the City Attorney to prepare an ordinance that would eliminate the possibility of storefront medical marijuana sales in the City. Pursuant to Council's direction, Ordinance No 547 was enacted in 2009.

In 2010, the City Council expressed interest in considering an ordinance that would establish provisions for locating and regulating medical marijuana dispensaries (MMDs) within the City of Morro Bay and directed the City Attorney to form a subcommittee to develop a draft ordinance regulating medical marijuana dispensaries.

The subcommittee has met on numerous occasions to develop a possible approach to locating and regulating MMDs which entails specifying the zoning districts in which MMDs may be established and developing regulations governing the procedures to be followed in applying for, permitting, revoking and renewing a license required to operate an MMD. Attached please find a draft ordinance that would implement this approach.

The draft ordinance is based upon both adopted and draft ordinances of several jurisdictions that allow MMDs or are considering allowing MMDs. It represents a comprehensive examination of potential impacts and sets forth detailed requirements for the operators of an MMD.

LEGAL ANALYSIS:

State Law

In November 1996, California voters passed the Compassionate Use Act of 1996 (CUA), which protects patients, their primary caregivers (defined as an individual designated by the patient who has consistently assumed responsibility for the housing, health, or safety of the patient), and physicians who prescribe marijuana for medical treatment, from criminal prosecution or sanction. While 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 2004, the CUA was supplemented by Senate Bill 420 (hereinafter "S.B. 420"). S.B. 420 mandates the State of California via the Department of Health Services to create and maintain a voluntary program for the issuance of identification cards for qualified patients. Although mandated to establish the identification program, the Department has not done so. S.B. 420 also requires that "every county health department, or the county's designee" provide applications for identification cards, process completed applications, maintain records and utilize protocols adopted by the Department of Health Services. As of this date, San Luis Obispo County has not issued identification cards in compliance with S.B. 420. Neither the original 1996 CUA nor the additions contained in S.B. 420 speak to the regulation of medical marijuana dispensaries.

Neither the CUA nor S.B. 420 specifically addresses medical marijuana dispensaries; however, the findings made by the legislature when approving S.B. 420 include a statement that the legislation is intended to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." It is asserted by those seeking to operate medical marijuana dispensaries that this language authorizes such facilities.

Federal Law

The Federal Controlled Substances Act (21 USC 801 et seq.) prohibits the possession, cultivation, and dispensing of marijuana, regardless of its purpose. Therefore, a conflict exists between California and Federal law regarding medical marijuana, and for this reason some cities in California have banned medical marijuana dispensaries, or have adopted moratoria prohibiting medical marijuana dispensaries until the law is settled.

On June 6, 2005, the U.S. Supreme Court addressed the California voter-enacted Compassionate Use Act, holding that Congress (i.e., the federal government) has the power to prohibit the local possession, cultivation and use of marijuana. Thus, notwithstanding the Compassionate Use Act, those using or distributing marijuana for medical reasons could still be prosecuted under federal law. In Gonzales v. Raich (2005) 125 S.Ct. 2195, the Federal Court found that the federal prohibition on use of marijuana for medicinal purposes could be enforced even though it was in conflict with the law of the State of California. As such, the Court ruled that the federal prohibition could be applied to prosecute persons growing, dispensing, possessing, and using marijuana wholly within the borders of the State of California and without having carried on a commercial transaction.

The Supreme Court did not go so far, however, as to invalidate California law permitting the medicinal use of marijuana. No appellate court has as yet invalidated the California law. What has resulted is a substantial controversy over the validity of state law permitting medicinal use of marijuana when federal authorities may legally raid medical marijuana dispensaries, shut them down, and prosecute those persons dispensing or using marijuana inside them.

In response to the Supreme Court decision, California Attorney General Bill Lockyer issued a statement that the "ruling does not overturn California law permitting the use of medical marijuana." The California Department of Justice issued a bulletin to law enforcement agencies stating that the decision does not pre-empt the Compassionate Use Act and that law enforcement should not change current practices for non-arrest and non-prosecution of individuals who are within the legal scope of the Act.

In August 2008, California Attorney General (AG) Jerry Brown issued guidelines for the operation of California's medical marijuana laws (as he is required to do under those laws). The AG guidelines were an important step towards fully clarifying the legal landscape and towards implementing medical marijuana law in California. They advise patients on how to stay within the confines of state law. They advise law enforcement on how to approach encounters with medical marijuana patients. They advise patients, law enforcement, and local communities on what is allowed and what is not allowed with regards to medical marijuana under California law. Although the AG guidelines are recommendations and are not binding on any court, they do provide powerful direction to state and local law enforcement, judges, and other public officials.

Perhaps most importantly, the AG guidelines provide recommendations for operating medical marijuana dispensaries in accordance with state law. Specifically, the Attorney General states:

> ...a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines...are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver—and then offering marijuana in exchange for cash "donations"—are likely unlawful.

The AG guidelines also contain a provision requiring medical marijuana dispensaries to operate on a not-for-profit basis.

On November 24, 2008, the California Supreme Court, in a unanimous decision, defined the term "primary caregiver" as used in the CUA. In the case of People v. Mentch, S148204, the Court held that the CUA "provides partial immunity for the possession and cultivation of marijuana to two groups of people: qualified medical marijuana patients and their primary caregivers." The Supreme Court in Mentch held that "the statutory definition has two parts: (1) a primary caregiver must have been designated as such by the medical marijuana patient; and (2) he or she must be a person 'who has consistently assumed responsibility for the housing, health, or safety' of the patient." The Court concluded "a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided care giving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana."

The Supreme Court in Mentch discussed the purpose of the CUA as one to help those who were seriously ill and who could benefit from the use of marijuana for medical purposes. It pointed out that the CUA's "focus is on the seriously and terminally ill, [and] logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows 'primary caregivers' the same authority to act on behalf of those too ill or bedridden to do so. To exercise that authority, however, one must be a 'primary'—principal, lead, central—'caregiver'—one responsible for rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient."

After eight years of police raids on marijuana dispensaries under the preceding administration, federal law enforcement, through Attorney General Eric Holder, has changed the course of federal marijuana enforcement policy by declaring federal authorities will no longer be raiding state licensed medical marijuana dispensaries and clinics that are in compliance with their own state laws and regulations concerning the medical use and safe access to marijuana. Under current federal law however, the use, sale or possession of marijuana, whether medically prescribed or not, is still unlawful and carries significant criminal penalties.

SUMMARY OF DRAFT REGULATIONS:

The draft Medical Marijuana Collectives and Cooperatives ordinance proposes to add Chapter 5.50 to Title 5 (Business Licenses and Regulations) establishing licensing provisions for facilities to dispense medical cannabis, consistent with the intent of Health and Safety Code Section 11362, et. seq. The draft ordinance establishes the following main provisions:

1. Dispensary Permit Required.
   - Requires a permit to operate a facility.
   - Establishes an annual permit renewal and fee.

2. Limitations on Dispensaries. Limits the number, size, and location of dispensaries.

3. Operating requirements. Establishes the following operating requirements:
   - Prohibits operators with a criminal history.
   - Prohibits/controls access by non-patients and minors.
   - Limits days and hours of operation.
   - Controls size, supply, storage and general operations.
   - Establishes floor plan, security, and storage requirements.
   - Requires patients to have physician's recommendation before visiting site.
   - Prohibits on-site prescribing of medical cannabis.
   - Prohibits on-site and open public consumption.
   - Requires operators to advise patients of rules and etiquette.
   - Prohibits all retail sales.
   - Requires active management of site activities, litter and graffiti control.
   - Requires staff training.
   - Establishes signage and noticing requirements.
   - Requires emergency contact information, record keeping.

4. Application Requirements. Establishes application eligibility and submittal requirements, including:
   - Background information on applicant and employees.
   - Preparation of a security plan.
   - Preparation of a dispensary plan of operations, identifying how the use would comply with codes.
   - Submittal of site, floor and lighting plans that demonstrate adequate site visibility, ability to provide site security and compliance with standards for entry, storage and dispensing.

5. Criteria for Review. Establishes criteria for approval or denial of permits, including consideration of:
   - Crime statistics in area.
   - The location and design of the facility.
   - The dispensary's plan of operations.
   - Any nuisance issues.
   - Any felony conviction of applicants.
   - Age limit—minors are not allowed to operate or work at site.

Additionally, the draft ordinance establishes the authority to revoke the permit or not renew the permit if issues result. Fees are also required to cover costs of administration and enforcement.

CONCLUSION:

Cities in California definitely find themselves at the center of the discussion regarding the compassionate use of marijuana. Staff has reviewed and analyzed several ordinances and reports and can attest to a strong public interest in its use to combat the symptoms of various debilitating illnesses. However, allowing a medical marijuana dispensary is not without concerns, as described in this report.

The City Attorney's office has attempted to draft an ordinance that suits the scale of Morro Bay by providing the possibility of two medical marijuana dispensaries under specific circumstances. The use of the license process will allow greater control by the City should the dispensary be found to be a nuisance.

In addition, the City Attorney's office has attempted to prepare a draft ordinance that blends many of the interests and options gleaned from the broad information gathered. The draft ordinance contains many policy decisions that the City Council will want to consider.

Exhibit "B"

MINUTES - MORRO BAY CITY COUNCIL
CLOSED SESSION – MARCH 8, 2011
CITY HALL CONFERENCE ROOM - 5:00 P.M.

Mayor Yates called the meeting to order at 5:00 p.m.

PRESENT:	William Yates	Mayor
	Carla Borchard	Councilmember
	Nancy Johnson	Councilmember
	George Leage	Councilmember
	Noah Smukler	Councilmember
STAFF:	Andrea Lueker	City Manager
	Robert Schultz	City Attorney

CLOSED SESSION

MOTION: Councilmember Borchard moved the meeting be adjourned to Closed Session. The motion was seconded by Councilmember Johnson and unanimously carried. (5-0)

Mayor Yates read the Closed Session Statement.

CS-1 **GOVERNMENT CODE SECTION 54957.6; CONFERENCE WITH LABOR NEGOTIATOR**. Conference with City Manager, the City's Designated Representative, for the purpose of reviewing the City's position regarding the terms and compensation paid to the City Employees and giving instructions to the Designated Representative.

CS-2 **GOVERNMENT CODE SECTION 54956.8; REAL PROPERTY TRANSACTIONS**. Instructing City's real property negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property as to 2 parcels.

- Property: Embarcadero Grill - Lease Site 86-86W
  Negotiating Parties: Caldwell and City of Morro Bay.
  Negotiations: Lease Terms and Conditions.
- Property: Outrigger - Lease Site 87-88/87W-88W
  Negotiating Parties: V. Leage and City of Morro Bay.
  Negotiations: Lease Terms and Conditions.

Councilmember Leage left the meeting due to a conflict of interest on Item CS-2.

The meeting adjourned to Closed Session at 5:00 p.m. and returned to regular session at 5:45 p.m.

MOTION: Mayor Yates moved the meeting be adjourned. The motion was seconded by Councilmember Borchard and unanimously carried. (4-0)

The meeting adjourned at 5:45 p.m.

MINUTES - MORRO BAY CITY COUNCIL
REGULAR MEETING – MARCH 8, 2011
VETERANS MEMORIAL HALL - 6:00 P.M.

Mayor Yates called the meeting to order at 6:05 p.m.

PRESENT:	William Yates	Mayor
	Carla Borchard	Councilmember
	Nancy Johnson	Councilmember
	George Leage	Councilmember
	Noah Smukler	Councilmember
STAFF:	Andrea Lueker	City Manager
	Robert Schultz	City Attorney
	Bridgett Kessling	City Clerk
	Susan Lichtenbaum	Harbor Business Manager
	Rob Livick	Public Services Director
	Tim Olivas	Police Chief
	Mike Pond	Fire Chief
	Susan Slayton	Administrative Services Director
	Joe Woods	Recreation & Parks Director

ESTABLISH QUORUM AND CALL TO ORDER
MOMENT OF SILENCE
PLEDGE OF ALLEGIANCE
MAYOR AND COUNCIL MEMBERS REPORTS, ANNOUNCEMENTS & PRESENTATIONS
CLOSED SESSION REPORT - City Attorney Robert Schultz reported the City Council met in Closed Session, and no reportable action under the Brown Act was taken.

PUBLIC COMMENT

Linda Williams, representing Morro Bay Beautiful, announced the City-wide Yard Sale "Treasure Hunt Weekend" will be held April 2nd and 3rd.

Sharon Moore, owner of Virg's Fishing, stated Virg's has been in business in Morro Bay since 1954 on the Embarcadero. She announced they are looking for a new location on the Embarcadero to move their boats and tackle shop and will keep the City appraised of these changes.

D'Onna Kennedy announced the Central Coast Veterans Support Group will hold its meeting on the third Tuesday of each month at 6:00 p.m. and will be held at the Eagles Lodge in Morro Bay.

Bill Martony expressed his appreciation that the improvement of the Morro Rock parking lot has been brought as a consideration by Council because it is the jewel of Morro Bay.

Jaime Irons announced the 2nd Annual Trail Work Day will be held on March 20th at Black Mountain and Cerro Cabrillo to perform trail maintenance work in cooperation with the California Parks and Recreation Department.

Peter Behman announced a "Luau Fundraiser" will be held on March 20th at the Harbor Hut to raise funds for the 4th of July festivities.

Chris Christianson, Morro Bay 4th Vice-President, expressed thanks for the generous support of the Tourism Business Improvement District Advisory Board, Community Promotions Committee and Morro Bay Chamber of Commerce; because of this support they are well on their way to guaranteeing the 4th of July fireworks will be back again this year.

Gary Richard Arnold expressed displeasure with the direction the government is going towards. He referred to the following website: freedomadvocates.org.

Jack McCurdy announced the Coastal Commission will be reviewing the Morro Bay/Cayucos Sanitary District's Wastewater Treatment Plant upgrade project on March 11th in Santa Cruz.

David Nelson referred to an article in the *Tribune* regarding permit fees for solar panels where a survey of local governments in San Luis Obispo County provided by the Sierra Club showed a wide variation in permit fees charged to businesses to install solar power, and Morro Bay's fees were amongst the highest in the County. He said the City should start looking at renewable projects through the California Energy Commission. Mr. Nelson stated the City should purchase the power plant on the Embarcadero and use it to provide renewable energy.

Virginia Hiramatsu, representing Relay for Life, announced the team fundraiser for Relay for Life will be a Bunco "Against Cancer" Party held on March 16th at 6:00 p.m. at St. Timothy's Church; and there will be a Community Kick-Off on March 24th at 6:00 p.m. at the Embarcadero Grill.

Ken Vesterfelt announced the first Emergency Vehicle Show will be held on April 16th on Main and Morro Bay Boulevard. He also announced the Tip-a-Cop dinner will be held on April 8th at the Community Center.

Craig Schmidt. Chamber of Commerce CEO announced the Annual Chili Cook-Off and Beer Fest will be held on March 12th at the Community Center which a portion of the proceeds will go towards the Morro Bay Community Foundation.

Janice Peters thanked those who supported Fundraiser Follies last weekend.

Brian Stacy stated there was a federally-declared salmon disaster in September 2010 and the federal government failed to fund it. He said there are a lot of fishermen who were not allowed to catch salmon last year and the upcoming season may not be any better. He requested the City Council consider sending a letter of support to the federal government to make funds available for our local fishermen. Mr. Stacy also expressed concern with the community fishing quota bought by the Nature Conservancy and then leased out.

Gary Hixson reviewed the roles he plays on Channel 2 including Jamie Summers on the Biotronic Woman and the Gary Tyler Moore show. He also talked about various other topics.

Richard Margesten addressed public comment on agenda items and stated the law of the State of the California supersedes the Mayor's way of handling this policy.

The following people addressed Item D-1 (Award of the Marketing and Advertising Services Contract) and requested the City Council award the Marketing and Advertising Services Contract to Barnett Cox & Associates in order to provide a different marketing strategy for the City's tourism industry: John Solu, Shaun Farmer, Harold Biaggini, Bill Shewchek, Stan Trapp, and Len Wilhitte.

The following people addressed Item D-1 and requested the City Council award the Marketing and Advertising Services Contract to TJA Advertising in order to maintain the quality in marketing solutions that has been provided the City for the past 15 years: Mike Casola, Janice Peters, Susan Stewart, Ed Krovitz and Bill Stafford.

Jayne Behman, Tourism Business Improvement District Advisory Board Member, stated she felt obligated at the joint Community Promotions Committee/Tourism Business Improvement District Advisory Board meeting to make a decision and yet did not have sufficient time to digest the information provided. She said when an independent contractor's contract is up for renewal, an audit should be conducted that would indicate a correlation between performance and cost. Ms. Behman stated in speaking with other hoteliers and personnel from the Visitor Center and Chamber of Commerce she found the City's infrastructure is inadequate to support any marketing firms, and the hoteliers do not want an increase in their tax structure. She requested the City Council not approve either of these contracts at this time.

John Sorgenfrei, TJA Advertising, stated he is available to answer any questions relating to Item D-1.

John Barta addressed Item D-1 stating Council should consider putting out a narrower request for proposal that is focused solely on an analysis on the City's tourist assets, the City's existing market and competitor's market and the City's preferred market, and how to reach each of those in the future. Mr. Barta urged the City Council not to choose either contract tonight.

Mayor Yates closed the hearing for public comment.

Mayor Yates called for a break at 7:30 p.m.; the meeting resumed at 7:40 p.m.

A. <u>CONSENT CALENDAR</u>

Unless an item is pulled for separate action by the City Council, the following actions are approved without discussion.

A-1 APPROVAL OF CITY COUNCIL MINUTES FOR REGULAR MEETING OF FEBRUARY 22, 2011; (ADMINISTRATION)

RECOMMENDATION: This item has been pulled from the agenda.

A-2 RESOLUTION NO. 14-11 ADOPTING MEMORANDUM OF UNDERSTANDING WITH THE MORRO BAY POLICE OFFICERS ASSOCIATION; (ADMINISTRATIVE SERVICES)

RECOMMENDATION: Adopt Resolution No. 14-11.

A-3 RESOLUTION NO. 15-11 AUTHORIZING THE EXAMINATION OF SALES OR TRANSACTIONS AND USE TAX RECORDS; (ADMINISTRATIVE SERVICES)

RECOMMENDATION: Adopt Resolution No. 15-11.

A-4 RESOLUTION NO. 19-11 IDENTIFYING THE PAYMENT SCHEDULE AND TRACKING OF FUNDS FOR THE REPAYMENT OF THE SALE OF THE PACIFIC/MARKET STREET PROPERTIES; (CITY ATTORNEY)

RECOMMENDATION: Adopt Resolution No. 19-11.

A-5 PROCLAMATION DECLARING APRIL 2011 AS "AUTISM AWARENESS MONTH"; (ADMINISTRATION)

RECOMMENDATION: Adopt Proclamation.

A-6 PROCLAMATION DECLARING THE 100-YEAR ANNIVERSARY OF CALIFORNIA WOMEN HAVING THE RIGHT TO VOTE IN THE CITY OF MORRO BAY; (CITY COUNCIL)

RECOMMENDATION: Adopt Proclamation.

A-7 APPROVAL OF PARCEL MAP MB 08-0019 (285 MAIN ST.) WITH ACCEPTANCE OF ASSOCIATED RIGHT-OF-WAY DEDICATION AND ABANDONMENTS; (PUBLIC SERVICES)

RECOMMENDATION: Adopt Resolution No. 20-11 approving the Parcel Map MB 09-0019 with the acceptance of associated Right-of-Way Dedication and Abandonment.

Mayor Yates requested to pull Item A-6 from the Consent Calendar.

MOTION: Councilmember Johnson moved the City Council approve the Consent Calendar with the exception of Item A-6. The motion was seconded by Councilmember Borchard and carried unanimously. (5-0)

A-6 PROCLAMATION DECLARING THE 100-YEAR ANNIVERSARY OF CALIFORNIA WOMEN HAVING THE RIGHT TO VOTE IN THE CITY OF MORRO BAY; (CITY COUNCIL)

Mayor Yates pulled this proclamation in order to make a presentation.

MOTION: Councilmember Johnson moved the City Council approve Item A-6 of the Consent Calendar. The motion was seconded by Councilmember Borchard and carried unanimously. (5-0)

B. PUBLIC HEARINGS, REPORTS & APPEARANCES

B-1 CONSIDERATION OF AN AMENDMENT TO MORRO BAY MUNICIPAL CODE TITLE 5 ADDING CHAPTER 5.50 ESTABLISHING REGULATIONS AND PROCEDURES ENTITLED "MEDICAL MARIJUANA COLLECTIVES AND COOPERATIVES"; (CITY ATTORNEY)

City Attorney Robert Schultz stated in **1996** California voters enacted Proposition 215, the Compassionate Use Act, which protects qualified patients and their primary caregivers from prosecution under California laws for possession or cultivation of marijuana to treat serious illness pursuant to a doctor's recommendation. Several years later, in **2003**, the state legislature enacted implementing legislation to allow qualified patients and caregivers to obtain identification cards that insulate them from arrest for cultivation and/or use of marijuana for authorized medical purposes. Although dispensaries are not expressly authorized under these laws, many individuals have used these laws as the legal backdrop to set up medical marijuana dispensaries where qualified patients and caregivers could purchase marijuana for medical use. In **June 2005**, Staff recommended to the City Council that they enact an interim urgency ordinance imposing a moratorium on medical marijuana dispensaries until Staff had an opportunity to propose regulations.

The interim urgency ordinance was not adopted by City Council and Staff was directed to allow medical marijuana dispensaries pursuant to our current municipal code. Pursuant to Council direction, medical marijuana dispensaries were allowed in the City of Morro Bay in the C-1 District by obtaining a business license and with a minor use permit in the MCR District under the category of "drugs". Based upon Council's action, in **2006**, the City approved a Medical Marijuana Dispensary at 780 Monterey Street. This location was in the General Commercial zoning district. Staff issued a business license since the sale of drugs (in this case medical marijuana) was an allowable use in the General Commercial zoning district. In **2007**, an application was received for the establishment of a Medical Marijuana Dispensary at 2840 Main Street. This location is in the Mixed Commercial/Residential zoning district, so a minor use permit was required. Staff issued a minor use permit since the sale of drugs (in this case medical marijuana) was an allowable use in the Mixed Commercial/Residential zoning district. The minor use permit was appealed to the Planning Commission. While the appeal was pending, the City Council declared a moratorium on medical marijuana dispensaries. In **2008**, after reviewing the current status of federal and state law and the associated risks and possible consequences of establishing an ordinance allowing medical marijuana dispensaries, the City Council instructed the City Attorney to prepare an ordinance that would eliminate the possibility of storefront medical marijuana sales in the City. Pursuant to Council's direction, Ordinance No 547 was enacted in **2009**. In **2010**, the City Council expressed interest in considering an ordinance that would establish provisions for locating and regulating medical marijuana dispensaries (MMDs) within the City of Morro Bay and directed the City Attorney to form a subcommittee to develop a draft ordinance regulating medical marijuana dispensaries. The subcommittee has met on numerous occasions to develop a possible approach to locating and regulating MMDs which entails specifying the zoning districts in which MMDs may be established and developing regulations governing the procedures to be followed in applying for, permitting, revoking and renewing a license required to operate an MMD. Mr. Schultz recommended the City Council review the report and attached draft Regulations and Procedures entitled "Medical Marijuana Collectives and Cooperatives", and direct staff to return with and Ordinance for Introduction and First Reading with any changes suggested by Council.

Mayor Yates opened the hearing for public comment.

Betty Winholtz requested clarification on several issues such as permits fees, how many dispensaries will be allowed, the distance between a dispensary and a receptor site, how much medical marijuana will be allowed to be purchased, and ownership of dispensaries. She expressed concern that the background checks would only be performed on the owner and/or manager of the dispensary; she feels they should also be performed on all personnel and volunteers.

Ken Vesterfelt stated Sheriff Ian Parkinson is investigating all the current rules and regulations on medical marijuana dispensaries, and perhaps the City Council may want to consider waiting to hear his perspective and the federal regulations.

David Nelson stated it is extortion to charge a sales tax on medication, such as medical marijuana.

John Barta stated this is a controversial issue; however, the people spoke on this issue at the last election and Council needs to implement that decision. He said Council has considerable discretion based on a comprehensive report written by the City Attorney, and to remember there continues to be a conflict with federal law that may have to be dealt with in the future.

Chris James expressed support for allowing those who have medical needs to be able to have safe access to medical marijuana.

Rich Donald, Chairman of the San Luis Obispo Chapter of Americans for Safe Access, referred to a recent court decision wherein the Appellate Court believes California has the right to have medical marijuana sales. He also stated there should not be a limit on how many dispensaries are allowed if the appropriate location is available.

Rennie Wilson stated it is imperative to have a sales tax, as well as an additional tax because of the cost that will be incurred by the City. She said the City should make this a two-part ordinance where the City has a selection process for the dispensary, and then select the appropriate zoning of where the dispensary should be located. Ms. Wilson stated the ordinance should tie the dispensary to the property.

Linda Hill, Board Member of the San Luis Obispo Chapter of Americans for Safe Access, commended Council for their compassion and support for this worthy cause.

Mayor Yates closed the hearing for public comment.

Mayor Yates expressed his support on moving forward with this Ordinance. He stated he is in support of receiving input from the Sheriff on this matter; however, he would like the City to continue with the process.

Councilmember Johnson stated she would like to wait to receive the County Sheriff's report before moving forward with the City's Ordinance. She also said a key component is to receive feedback from the City's Police Chief. Councilmember Johnson stated she recognizes that due to the election results that the Ordinance must go forward; however, there are so many concerns that must be addressed before moving forward with this Ordinance.

Councilmember Borchard stated she has many concerns along with not knowing what the Sheriff's enforcement is going to be on this issue. She said the City has very limited resources for monitoring a collective dispensary. Councilmember Borchard stated she is not supportive of moving forward until these concerns have been alleviated.

Councilmember Leage stated there are so many unknowns and he would like to put this issue on hold until there are more answers from the County and federal government.

Councilmember Smukler stated he is interested in the Sheriff Department's comments. He suggested discussing key policy issues such as crime, primary care status, and regulating quantities. Councilmember Smukler stated he would like Council to direct the City Attorney to pursue this issue with the Sheriff. He suggested issues for a selection committee to review are local sourcing elements and quality control, working with the Sheriff's Department, potential City costs and impacts and developing a plan to cover these costs, and the review of quantity limits. Councilmember Smukler stated a City map and buffer zones would be helpful in the review of potential locations.

Council had consensus that they did not want to be involved in the selection committee; the City Manager would be in charge of appointing the selection committee members who should be key City employees.

Council requested the City Attorney return this item to the City Council as a draft within 45 days or less.

No further action was taken on this item.

B-2 COUNCIL DIRECTION ON THE 2011/2012 CITY GOALS AND BUDGET PRIORITIES; (ADMINISTRATION)

City Manager Andrea Lueker stated in November 2007, the City Council determined that conducting an annual Goal Setting Process was an important part of strategic planning for the City of Morro Bay. As a result in June 2008, the City Council held their first workshop, and has continued the process each year. It is anticipated that if the City of Morro Bay continues with the goals that were established last year, including the direction on pension reform, staff is confident that it can bring to the City Council a structurally sustainable balanced budget. However, since the major revenue sources for the City are fairly stable, including a slight increase in both the Transient Occupancy Tax and Property Tax and flat Sales Tax figures, the biennial budget is not anticipated to have significant additional and available funding above and beyond previous years. Ms. Lueker recommended the City Council review the goals from 2010, the status of each goal, and makes a determination on any new goals for the upcoming year and/or continuing existing goals. It is further recommended the City Council provide input to staff on budget priorities based on the stated goals in order for the initial preparation of the 2011–2013 biennial budget documents.

Mayor Yates opened the hearing for public comment.

David Nelson stated he has not seen any real street repairs other than patching in the last 10 years. He said the infrastructure should be set as a higher priority.

John Barta stated it would cost tens of millions of dollars to repair the streets in the City. He said the City needs to work on bringing in more revenue into the City.

Mayor Yates closed the hearing for public comment.

Councilmember Smukler stated he hopes the City continues with the priority goals of developing and maintaining a structurally sustainable budget, and maintaining the City's infrastructure. He said he would like to continue with the consideration of a capital plan to stay organized, a five-year budget plan, and a pavement management plan. Councilmember Smukler stated more effort is needed revolving around the urban forest, which requires a better plan. He said it is time to focus on volunteerism and form a sub-committee relating to the City's transit program. Councilmember Smukler stated a strategy plan needs to be developed on how to resolve the challenge on the General Plan/Local Coastal Plan.

Council consensus was to refer the Urban Forest Management Plan as a low priority goal to the Public Works Advisory Board and Recreation & Parks Commission.

Council consensus was to appoint Councilmember Borchard and Councilmember Smukler to serve as the transit sub-committee to meet with staff.

City Attorney Robert Schultz stated the review of the General Plan/Local Coastal Plan update will be before the City Council within the next few months.

Councilmember Johnson stated she would like to see a five-year budget and long-range planning. She said the City needs to look at an Economic Development Plan to bring in some money.

Councilmember Borchard stated she supports long-range strategic planning however she has concerns with the present economy. She said the City has taken great strides in selling the City property on Market Street, and creating a Facility Maintenance Fund.

Mayor Yates stated it is impossible to project future expenditures with this economy.

Administrative Services Director Susan Slayton stated in this current economy, planning a budget more than two years ahead would be very difficult. She said some departments are creating long-range capital project plans.

No action was taken on this item.

Mayor Yates called for a break at 9:30 p.m.; the meeting resumed at 9:40 p.m.

UNFINISHED BUSINESS – None.

D. NEW BUSINESS

D-1 AWARD OF THE MARKETING AND ADVERTISING SERVICES CONTRACT; (ADMINISTRATION)

City Manager Andrea Lueker stated the City of Morro Bay has gone through an extensive Request for Proposal (RFP) process which was reviewed at the Special Joint Meeting of the Community Promotions Committee (CPC) and the Tourism Business Improvement District Advisory Board (TBID) held on March 1, 2011. At that meeting, both the CPC and TBID, by a vote of 4-2, recommended the City Council award the Marketing and Advertising Services Contract to TJA Advertising. Ms. Lueker recommended the City Council review the recommendations from both the CPC and TBID and makes a final determination on the award of contract.

Mayor Yates stated based on the vote of the Community Promotions Committee and Tourism Business Improvement District Advisory Board at the March 1st meeting and their recommendation he expressed his support for TJA Advertising.

Councilmember Borchard stated it was not a unanimous vote of the two boards on March 1st. She said based on the last 18 months, she does not feel the City has received a measurable rate of return in marketing advertising. Councilmember Borchard stated she supports a more innovative approach and moving forward in a different way with social media.

Councilmember Johnson suggested starting over with a new request for proposal and find out where the City's target audience is. She said she would like to know more about the relationship between the City, the Community Promotions Committee, Tourism Business Improvement District Advisory Board and the Visitor Center.

Councilmember Leage stated he agrees the City should start over and submit a new request for proposal. He said the City is in no better shape than it was years ago and the targeting has been very poorly done.

Councilmember Smukler stated he supports maintaining a three-year revolving request for proposal process. He said he is inclined towards the Barnett Cox & Associates proposal however he still has concerns with the cost. Councilmember Smukler stated he would prefer more dialogue on this issue before making a decision.

MOTION: Councilmember Borchard moved the City Council award the Marketing and Advertising Services Contract to Barnett Cox & Associates. The motion was seconded by Councilmember Leage and carried with Mayor Yates voting no. (4-1)

D-2 DISCUSSION OF THE GREEN BUILDING INCENTIVES PROGRAM; (PUBLIC SERVICES)

Public Services Director Rob Livick stated the "Green Building Incentive Program" was approved by City Council on May 26, 2009 by Resolution No. 24-09. The program was initiated to reward project proponents committed to implementing either broad or focused sustainability measures. Fee rebates vary depending on the level of commitment and/or beneficial outcomes. Integration of green building features into development projects can potentially generate energy, water and materials efficiencies, resulting in reduced operating costs of 20-80% over the life of the building. Reduced operating costs generate increased cash flow, which helps free capital for other investments. Although from a financial standpoint the incentive program is not sustainable without some source of outside funding, Staff does not anticipate a significant increase in rebate requests. Mr. Livick recommended the City Council continue the program, and direct staff to provide an annual update memo to the City Council.

Council consensus was in support to continue the Green Building Incentives Program, and direct staff to provide an annual update memo to the City Council. Council further directed staff to return with a Master Fee Schedule amendment comprised of a formula for deducting the cost for the non-inspected components of the solar photovoltaic system.

No further action was taken on this item.

E. <u>DECLARATION OF FUTURE AGENDA ITEMS</u> – None.

<u>ADJOURNMENT</u>

The meeting adjourned at 10:25 p.m.

Recorded by:

Bridgett Kessling
City Clerk

Exhibit "C"

ORDINANCE NO.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORRO BAY AMENDING THE MUNICIPAL CODE BY ADDING CHAPTER 5.50 ESTABLISHING REGULATIONS AND PROCEDURES ENTITLED "MEDICAL MARIJUANA COLLECTIVES AND COOPERATIVES"

THE CITY COUNCIL
City of Morro Bay, California

The Council of the City of Morro Bay does ordain as follows:

SECTION ONE. Chapter 5.50 of Title 5 of the Morro Bay Municipal Code, entitled "Medical Marijuana Collectives and Cooperatives Dispensaries," is added to read as follows:

Chapter 5.50

MEDICAL MARIJUANA COLLECTIVES & COOPERATIVES DISPENSARIES

Sections:

5.50.010 Purpose and intent.

It is the purpose and intent of this Chapter to regulate Medical Marijuana Collectives and Cooperatives in order to ensure the health, safety and welfare of the residents and businesses of the City of Morro Bay. The regulations in this Chapter, in compliance with the Compassionate Use Act, the Medical Marijuana Program Act, and the California Health and Safety Code (collectively referred to as "State Law") do not interfere with a patient's right to use medical marijuana as authorized under State Law, nor do they criminalize the possession or cultivation of medical marijuana by specifically defined classifications of persons, as authorized under State Law. Under State Law, only qualified patients, persons with identification cards, and primary caregivers may cultivate medical marijuana collectively. Medical Marijuana Collectives and Cooperatives shall comply with all provisions of the Morro Bay Municipal Code ("Code"), State

Law, and all other applicable local and state laws. Nothing in this article purports to permit activities that are otherwise illegal under state or local law.

5.50.020 Interpretation and applicability.

A. No part of this ordinance shall be deemed to conflict with federal law as contained in the Controlled Substances Act, 21 U.S.C. section 800 et seq., nor to otherwise permit any activity that is prohibited under that Act or any other local, state or federal law, statute, rule or regulation.

B. Nothing in this ordinance is intended, nor shall it be construed, to burden any defense to criminal prosecution otherwise afforded by California law.

C. Nothing in this ordinance is intended, nor shall it be construed, to preclude a landlord from limiting or prohibiting Medical Marijuana Collective or Cooperatives or other related activities by tenants.

D. Nothing in this ordinance is intended, nor shall it be construed, to exempt any Medical Marijuana Collective or Cooperatives related activity from any and all applicable local and state construction, electrical, plumbing, land use, or any other building or land use standards or permitting requirements.

E. Nothing in this ordinance is intended, nor shall it be construed, to make legal any cultivation, transportation, sale, or other use of cannabis that is otherwise prohibited under California law.

5.50.030 Release of liability and hold harmless.

As a condition of approval of any business license and/or permit approved for a Medical Marijuana Collective or Cooperative, the owner or permittee of each Medical Marijuana Collective or Cooperative shall indemnify and hold harmless the City of Morro Bay and its agents, officers, elected officials, and employees for any claims, damages, or injuries brought by adjacent or nearby property owners or other third parties due to the operations at the Medical Marijuana Collective or Cooperative, and for any claims brought by any of their clients for problems, injuries, damages, or liabilities of any kind that may arise out of the cultivation, processing or distribution of medical marijuana.

5.50.040 Definitions.

For the purpose of this chapter, the following words and phrases shall have the following meanings:

A. "Applicant". A person who is required to file an application for a permit under this chapter, including an individual owner, managing partner, officer of a corporation, or any other operator, manager, employee, or agent of a Collective or Cooperative.

B. "Drug Paraphernalia". As defined in California Health and Safety Code Section 11014.5, and as may be amended from time to time.

C. "Identification Card". As defined in California Health and Safety Code Section 11362.71, and as may be amended from time to time.

D. "Location" The parcel or lot or portion thereof that is used by a medical marijuana collective or cooperative.

E. "Medical Marijuana Collective or Cooperative". An incorporated or unincorporated association, composed solely of qualified patients, persons with identification cards, and designated primary caregivers of qualified patients (collectively referred to as members) who associate at a particular location to collectively or cooperatively make available, sell, transmit, give, distribute, or otherwise provide medical marijuana to qualified patients under the purported authority of medical marijuana laws. A "Medical Marijuana Collective or Cooperative " shall not include any of the following uses:

1. A clinic licensed pursuant to Chapter 1 of Division 2 of the California Health and Safety Code;

2. A health care facility licensed pursuant to Chapter 2 of Division 2 of the California Health and Safety Code;

3. 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;

4. A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the California Health and Safety Code;

5. A hospice or home health agency, licensed pursuant to Chapter 8 of Division 2 of the California Health and Safety Code.

F. "Medical marijuana laws" mean California Health and Safety Code Section 11362.5 (the "Compassionate Use Act of 1996"), and the laws and regulations of the state of California adopted in furtherance thereof, including California Health and Safety Code Sections 11362.7, et seq. (the "Medical Marijuana Program Act"), and guidelines adopted by the Attorney General pursuant to California Health and Safety Code Subsection 11362.81(d).

G. "Permittee". The person to whom either a Collective or Cooperative permit is issued by the City and who is identified as a primary caregiver in California Health and Safety Code Section 11362.7, subdivision (d) or (e).

H. "Person". An individual, partnership, co-partnership, firm, association, joint stock company, corporation, limited liability company, nonprofit mutual benefit association, trust or combination of the above in whatever form or character.

I. "Person with an Identification Card". As set forth in California Health and Safety Code Section 11362.5 et seq., and as amended from time to time.

J. "Physician". A licensed medical doctor including a doctor of osteopathic medicine as defined in the California Business and Professions Code.

K. "Primary Caregiver". As defined in subdivision (d) of California Health and Safety Code Section 11362.7, and as it may be amended from time to time.

L. "Qualified Patient". As defined in California Health and Safety Code Section 11362.5 et seq., and as it may be amended from time to time.

M. "School". An institution of learning for minors, whether public or private, offering a regular course of instruction required by the California Education Code. This definition includes an elementary school, middle, or junior high school, senior high school, or any special institution of education for persons under the age of eighteen years, whether public or private.

5.50.050 Severability.

If any part of this ordinance is held to be invalid or inapplicable to any situation by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

5.50.060 Collective or Cooperative permit required to operate.

It is unlawful for any person to engage in, conduct or carry on, or to permit to be engaged in, conducted or carried on, in or upon any premises in the City, the operation of a Collective or

Cooperative unless the person first obtains and continues to maintain in full force and effect a Collective or Cooperative Business Use Permit issued by the City.

5.50.070 Business license tax liability.

An operator of a Collective or Cooperative shall be required to apply for and obtain a Business Tax Certificate pursuant to Chapter 5.04 as a prerequisite to obtaining a permit pursuant to the terms of this Chapter, as required by the State Board of Equalization. Collective and Cooperative transactions shall be subject to sales tax, which applies to all retail sales of goods and merchandise including medical marijuana.

5.50.080 Imposition of Collective or Cooperative use permit fees.

Every application for a Collective or Cooperative use permit or renewal shall be accompanied by an application fee, in an amount established by resolution of the City Council from time to time at an amount calculated to recover the City's full cost of reviewing and issuing the Business Use Permit pursuant to this Chapter.

5.50.090 Limitations on the permitted location of a Collective or Cooperative.

A. Permissible zoning for Collectives or Cooperatives. A Collective or Cooperative is designated as a retail sales "drugs" "pharmacies" and/or "medical offices" business establishments pursuant to Title 17 of the Municipal Code, and may be located only within the C-1, C-2, MCR, and G-O zoned district areas of the City. If the Collective or Cooperative is located in C-1 or C-2 zoned district, a business license permit pursuant to MBMC 5.50 is required. If the Collective or Cooperative is located in the MCR district a business license permit pursuant to MBMC 5.50 and a Minor Use Permit pursuant to MBMC 17.24.110 will be required. If the Collective or Cooperative is located in the G-O zoned district a business license permit pursuant to MBMC 5.50 and a Minor Use Permit pursuant to MBMC 17.24.130 will be required if within 100' of or across the street from a residential zone.

B. Collectives or Cooperatives shall only be allowed to operate upon the granting of all permits as prescribed in the Morro Bay Municipal Code. The fact that an applicant possesses other types of State or City permits or licenses does not exempt the applicant from the requirement of obtaining a business license or minor use permit, if applicable, to operate a Collective or Cooperative .

C. Areas and zones where Collectives and Cooperatives are not permitted. Notwithstanding subparagraph (A) above or any other section of the Municipal Code, a Collective or Cooperative shall not be allowed or permitted in the following locations or zones:

1. On a parcel located within 500 feet of an existing school, public park, religious institution, licensed child care facility, youth center, or substance abuse rehabilitation center.

D. Maximum number of Collective/Cooperative permits. Notwithstanding the above, the City may not issue a total of more than two (2) Collective or Cooperative permits at any one time and no more than two (2) permitted Collectives or Cooperatives may legally operate within the City at any one time. No Permittee shall operate more than one Collective or Cooperative. The selection process for Collectives or Cooperatives shall be established by the City Council.

5.50.100 Operating requirements for Collectives or Cooperatives.

Collective or Cooperative operations shall be permitted and maintained only in compliance with the following day-to-day operational standards:

A. Criminal history. A Collective or Cooperative permit applicant, or any person exercising managerial authority over a Collective or Cooperative on behalf of the Collective or Cooperative applicant shall not have been convicted of a felony or be on probation or parole for the sale or distribution of a controlled substance. "Felony or be on probation or parole for the sale or distribution of a controlled substance" means a violation of a state or federal controlled substance law that was classified as a felony in the jurisdiction where the person was convicted. "Felony drug offense" does not include any of the following:

1. An offense for which the sentence, including any term of probation, incarceration, or supervised release, was completed ten or more years earlier.

2. An offense that involved conduct that would have been permitted under this chapter.

B. Minors. It is unlawful for any Collective or Cooperative Permittee, operator, or other person in charge of any Collective to employ any person who is not at least 21 years of age. Persons under the age of 18 shall not be allowed on the premises of a Collective unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian. The entrance to a Collective shall be clearly and legibly posted with a notice indicating that persons under the age of 18 are precluded from entering the premises unless they are a qualified patient or a primary caregiver, and they are in the presence of their parent or guardian at each visit.

C. Collective or Cooperative size and access. The following access restrictions shall apply to all Collectives and Cooperatives permitted by this Chapter:

1. The entrance area of the Collective or Cooperative building shall be strictly controlled; a viewer or video camera shall be installed in the door that allows maximum angle of view of the exterior and interior entrance. Adequate overnight security shall be maintained so as to prevent unauthorized entry.

2. Collective or Cooperative personnel shall be responsible for monitoring the real property of the Collective or Cooperative site (including the adjacent public sidewalk and rights-of-way) within which the Collective or Cooperative is operating for the purposes of discouraging loitering.

3. Only Collective or Cooperative staff, primary caregivers, qualified patients and persons with bona fide purposes shall be in the secured area of the Collective or Cooperative. Exceptions will be allowed for governmental tours.

4. Qualified patients or primary caregivers shall not visit the secured area of a Collective or Cooperative without first having obtained a valid written recommendation from their physician recommending use of medical marijuana. The Collective or Cooperative shall verify the qualified patient's doctor recommendation before entrance to the secure area.

5. All Restrooms shall remain locked and under the control of Collective or Cooperative management at all times.

D. Dispensing operations. The following restrictions shall apply to all dispensing operations by a Collective or Cooperative:

1. A Collective or Cooperative shall dispense only to qualified patients or a primary caregiver with a currently valid physician's approval or recommendation in compliance with the criteria in California Health and Safety Code Section 11362.5 et.seq. Collectives or Cooperatives shall require such person to be a resident of the State of California and provide valid official California government-issued identification, such as a Department of Motor Vehicles driver's license or State Identification Card.

2. Prior to dispensing medical marijuana, the Collective or Cooperative shall obtain verification from the recommending physician, that is in good standing with the American Medical Association, that the individual requesting medical marijuana is or remains a qualified patient pursuant to State Health & Safety Code Section 11362.5.

3. A Collective or Cooperative shall not dispense medical marijuana to an individual qualified patient or primary caregiver more than twice a day.

E. Consumption restrictions. The following medical marijuana consumption restrictions shall apply to all permitted Collectives or Cooperatives:

1. Marijuana shall not be consumed by patients on the premises of the Collective or Cooperative. The term "premises" includes the actual building, as well as any accessory structures, parking lot or parking areas, or other surroundings within 200 feet of the Collective's or Cooperative's entrance.

2. Collective or Cooperative operations shall not result in illegal redistribution or sale of medical marijuana obtained from the Collective or Cooperative, or use or distribution in any manner which violates state law.

F. Retail sales of other items by a Collective or Cooperative. With the approval of the City, a Collective or Cooperative may conduct or engage in the commercial sale of specific products, goods, or services in addition to the provision of medical marijuana on terms and conditions consistent with this chapter and applicable law.

1. A Collective or Cooperative shall meet all the operating criteria for the dispensing of medical marijuana as is required pursuant to California Health and Safety Code Section 11362.5 et seq.

G. Operations Plan. In connection with a permit application under this Chapter, the applicant shall provide, as part of the permit application, a detailed Operations Plan and, upon issuance of the Collective or Cooperative permit, shall operate the Collective or Cooperative in accordance with the Operations Plan as such plan is approved by the City. The Operations Plan shall include:

1. Floor plan. A Collective or Cooperative shall have a lobby waiting area at the entrance to the Collective or Cooperative to receive clients, and a separate and secure designated area for dispensing medical marijuana to qualified patients or designated caregivers. The primary entrance shall be located and maintained clear of barriers, landscaping and similar obstructions.

2. Storage. A Collective or Cooperative shall have suitable locked storage on premises, identified and approved as a part of the security plan, for after-hours storage of medical marijuana.

3. Security plans. A Collective or Cooperative shall provide adequate security on the premises, in accordance with a security plan, including provisions for adequate lighting and alarms, in order to insure the safety of persons and to protect the premises from theft.

4. Security cameras. Security surveillance cameras shall be installed to monitor the main entrance and exterior of the premises to discourage and to report loitering, crime, illegal or nuisance activities. Security video shall be maintained for a period of not less than 72 hours.

5. Alarm system. Professionally monitored robbery alarm and burglary alarm systems shall be installed and maintained in good working condition within the Collective or Cooperative at all times.

6. Emergency contact. A Collective or Cooperative shall provide the Chief of Police with the name, cell phone number, and facsimile number of an on-site community relations staff person to whom the City may provide notice of any operating problems associated with the Collective or Cooperative.

7. Operating hours. The hours of operation for an approved Collective or Cooperative shall be limited to between 8:00 a.m. to 8:00 p.m. or as specified within the Business License Use Permit.

H. Collective or Cooperative signage and notices. A notice shall be clearly and legibly posted in the Collective or Cooperative, and included in the qualified patients agreement, indicating that smoking, ingesting or consuming marijuana on the premises or in the vicinity of the Collective or Cooperative is prohibited. Signs on the premises shall not obstruct the entrance or windows. No interior illumination of any exterior signs or any interior signs shall be visible from the exterior. All exterior signs shall be approved by the City. No medical marijuana shall be visible from the building exterior.

I. Employee records. Each owner or operator of a Collective or Cooperative shall maintain a current register of the names of all volunteers and employees currently working at or employed by the Collective or Cooperative on-site at all times, and shall disclose such registration for inspection by the City Manager or designee, but only for the purposes of determining compliance with the requirements of this Chapter.

J. Patient records. A Collective or Cooperative shall maintain confidential health care records of all patients and primary caregivers using only the identification card number issued by the county, or its agent, pursuant to California Health and Safety Code Section 11362.71 et seq., (as a protection of the confidentiality of the cardholders) or a copy of the written recommendation from a physician or doctor of osteopathy stating the need for medical marijuana under state Health & Safety Code Section 11362.5. Such records shall be available for inspection at all times.

K. Inspection. City representatives may enter and inspect the property of every medical marijuana collective between the hours of ten o'clock (10:00) a.m. and eight o'clock (8:00) p.m., or at any reasonable time to ensure compliance and enforcement of the provisions of this chapter, except that the inspection and copying of private medical records shall be made available to the Police Department only pursuant to a properly executed search warrant, subpoena, or court order. It is unlawful for any property owner, landlord, lessee, medical marijuana collective member or management member or any other person having any responsibility over the operation of the medical marijuana collective to refuse to allow, impede, obstruct or interfere with an inspection.

L. Staff training. Collective or Cooperative staff shall receive appropriate training for their intended duties to ensure understanding of rules and procedures regarding dispensing in compliance with state and local law and this Chapter.

M. Site management. The operator of the establishment shall take all reasonable steps to discourage and correct objectionable conditions that constitute a nuisance in parking areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours if directly related to the patrons of the subject Collective or Cooperative. The operator shall take all reasonable steps to reduce loitering in public areas, sidewalks, alleys and areas surrounding the premises and adjacent properties during business hours. The operator shall provide patients with a list of the rules and regulations governing medical marijuana use and consumption within the City and recommendations on sensible marijuana etiquette.

N. Compliance with other requirements. The Collective or Cooperative operator shall comply with all provisions of all local and state regulations as well as any condition imposed on any permits issued pursuant to applicable laws, regulations or orders.

O. Display of permit. Every Collective or Cooperative shall display at all times during business hours the permit issued pursuant to the provisions of this Chapter for such

Collective or Cooperative in a conspicuous place so that the same may be readily seen by all persons entering the Collective or Cooperative.

P. Alcoholic beverages. No Collective or Cooperative shall hold or maintain a license from the State Division of Alcoholic Beverage Control for the sale of alcoholic beverages, or operate a business on the premises that sells alcoholic beverages. No alcoholic beverages shall be allowed or consumed on the premises.

Q. Non profit status. No Collective or Cooperative shall operate for a profit. Cash and in-kind contributions, reimbursements, and reasonable compensation provided by members towards the Collective's or Cooperative's actual expenses shall be allowed provided that they are in strict compliance with State law.

5.50.110 Screening Application for Competitive Selection of Preferred Applicant.

A. Any person seeking a medical marijuana use permit under this section shall submit a screening application to the City Manager no later than the deadline set forth in the notice of commencing competitive application process.

B. Each applicant shall submit the following information in the screening application, in a form acceptable to the City Manager:

1. The name, address, telephone number and chief executive of the applicant (the cooperative or collective organization to which the permit is to be issued);

2. The name, address and telephone number of the authorized agent for the applicant;

3. Documentation of the legal entity and organizational structure of the applicant organization, demonstrating that it is a collective or cooperative operating in conformance with the requirements of the medical marijuana laws;

4. Documentation of the experience and background of principals and management staff of the applicant, subject to verification by background check to be conducted by the City Manager;

5. Proposed plan of operation for the prospective medical marijuana to demonstrate compliance with the requirements of the medical marijuana laws and this section;

6. Demonstration of a recordkeeping system for operational records which will include continuing maintenance of membership records to document collective or cooperative organizational structure, and include documentation that the organization will operate on a not-for-profit basis;

7. Demonstration of a recordkeeping system for medical records which will allow for continuing maintenance of such records, including procedures to protect patient privacy, document physician recommendations, and primary caregiver and qualified patient status;

8. Demonstration of screening and training procedures for employees and volunteers, including maintenance of records, demonstrating the means of confirming identification, qualifications, and conducting criminal background checks for employees and volunteers;

9. A security plan proposal, indicating the methods and measures which would be taken to protect the premises, employees, clients, immediate neighbors, the medical marijuana product, and records files;

10. Acknowledgment by signature that the chief executive and authorized agent have read all regulations pertaining to the operation of a medical marijuana and any associated aggregated cultivation facility, including the medical marijuana laws, this section, the city's

business license regulations as contained in this code, and any additional administrative regulations promulgated by the City Manager in furtherance of the objectives of this section;

11. Certification of the accuracy of the information submitted, and agreement to comply with all requirements of the medical marijuana laws, this section, and the conditions of the use permit;

12. Agreement to hold harmless, indemnify and defend the City against claims and litigation arising from the issuance of the medical marijuana use permit, including any claims and litigation arising from the establishment, operation, or ownership of the medical marijuana or aggregated cultivation facility;

13. Such other information as the City Manager deems reasonably necessary to administer this section may be required.

C. Selection Process.

1. The City Manager is authorized to determine which applicant is the "preferred applicant" based on the demonstrated experience, training, capability, and plan to best fulfill the purposes and requirements of this section. The City Manager is authorized to establish conditions of approval for the determination of the preferred applicant, and the applicant is required to comply with the conditions of approval as a part of the application for the medical marijuana use permit.

2. All timely and complete applications shall be evaluated by the City Manager and a team of application reviewers (city staff and consultants selected by the City Manager). The City Manager and the application reviewers may interview one or more of the applicants, to the extent the City Manager determine it would assist in the evaluation process.

3. After consideration of input from the application reviewers, the City Manager shall make a determination of which applicant is the preferred applicant and the City Manager shall provide written notice of the preliminary determination to each applicant.

4. The preferred applicants, as determined by the City Manager, shall be the only entities authorized to submit an application for a medical marijuana use permit. The City Manager's determination regarding the selection of the preferred applicants shall be final and not subject to appeal.

D. Application for Medical Marijuana Use Permit. The preferred applicant, as determined by the City Manager, may submit an application for a medical marijuana use permit, which shall include all information necessary to evaluate compliance with this section for the proposed medical marijuana and any proposed aggregated cultivation facility. Each application for a medical marijuana use permit shall be made on a form provided by the City Manager, and shall include the following:

1. Diagrams, plans, tenant improvement plans and photographs of the intended premises sufficient to demonstrate location and intended improvements;

2. Documentation establishing that the premises meet all local building and safety code requirements;

3. A diagram of the premises showing and indicating the number and location of designated on-site parking spaces;

4. All information previously submitted for the screening application, supplemented and updated for the purposes of issuing the use permit for the specified locations of the medical marijuana and the aggregated cultivation facility, including compliance with any conditions of approval of the preferred applicant determination;

5. Acknowledgment by signature that the property owner, the permittee's chief executive officer, and the permittee's authorized agent have read, and will comply with, all regulations pertaining to the operation of a medical marijuana and any associated aggregated cultivation facility, including the medical marijuana laws, this section, the city's business license regulations as contained in this code, and any additional administrative regulations promulgated by the City Manager in furtherance of the objectives of this section;

6. Certification of the accuracy of the information submitted, and agreement to comply with all requirements of the medical marijuana laws, this section, and the conditions of the permit;

7. Agreement to hold harmless, indemnify and defend the city against claims and litigation arising from the issuance of the medical marijuana use permit, including any claims and litigation arising from the establishment, operation, or ownership of the medical marijuana or aggregated cultivation facility;

8. Acknowledgement and agreement that claims, requests, objections and arguments not timely raised in the medical marijuana use permit application are and shall be deemed waived;

9. Such other information as the City Manager deems reasonably necessary to administer this section.

E. Fees. Medical marijuana use permits shall be subject to the payment of the fees established by Council resolution based on the estimated reasonable costs incurred by the city for processing the application materials.

5.50.120 Suspension and revocation by City Council.

A. Any Collective or Cooperative permit issued under the terms of this Chapter may be suspended or revoked by the City Council when it shall appear to the Council that the Permittee has violated any of the requirements of this chapter or the Collective is operated in a manner that violates the provisions of this chapter, including the operational requirements of this Chapter, or in a manner which conflicts with state law.

B. Annual review of Collective or Cooperative operations. The City Manager is hereby authorized to conduct an annual review of the operation of each permitted Collective or Cooperative for full compliance with the operational requirements of this Chapter. The City Manager may initiate a permit suspension or revocation process for any Collective or Cooperative which is found not to be in compliance with the requirements of this Chapter or which is operating in a manner which constitutes a public nuisance.

C. Suspension or revocation—Written notice. Except as otherwise provided in this chapter, no permit shall be revoked or suspended by virtue of this chapter until written notice of the intent to consider revocation or suspension of the permit has been served upon the person to whom the permit was granted at least ten (10) days prior to the date set for such review hearing and the reasons for the proposed suspension or revocation have been provided to the Permittee in writing. Such notice shall contain a brief statement of the grounds to be relied upon for revoking or suspending such permit. Notice may be given either by personal delivery to the Permittee, or by depositing such notice in the U.S. mail in a sealed envelope, postage prepaid, (via regular mail and return receipt requested), addressed to the person to be notified at his or her address as it appears in his or her application for a Collective or Cooperative permit.

5.50.130 Transfer of Collective or Cooperative permits.

A. Permit—Site specific. A Permittee shall not operate under the authority of a Collective or Cooperative permit at any place other than the address of the Collective or Cooperative stated in the application for the permit. All Collective or Cooperative permits issued by the City pursuant to this chapter shall be non-transferable. For the purpose of this section, those Collectives and Cooperatives which operate "medical marijuana delivery services" as a regular part of business are deemed to operate from the address of the Collective or Cooperative.

B. Transfer of a permitted collective. A Permittee shall not transfer ownership or control of a Collective or Cooperative or attempt to transfer a Collective or Cooperative permit to another person unless and until the transferee obtains an amendment to the permit from the Staff Hearing Officer pursuant to the permitting requirements of this chapter stating that the transferee is now the Permittee. Such an amendment may be obtained only if the transferee files an application with the Public Services Department in accordance with all provisions of this chapter accompanied by the required application fee.

C. Request for Transfer with a Revocation or Suspension Pending. No Collective or Cooperative permit may be transferred (and no permission for a transfer may be issued) when the Public Services Department has notified in writing the Permittee that the permit has been or may be suspended or revoked and a notice of such suspension or revocation has been provided.

D. Transfer without Permission. Any attempt to transfer a permit either directly or indirectly in violation of this section is declared void, and the permit shall be deemed revoked.

SECTION TWO. This Ordinance shall take effect and be in full force and effect thirty (30) days from and after its passage and, before the expiration of fifteen (15) days after its passage, shall be published once in a newspaper of general circulation printed and published in the City of Morro Bay, or in the alternative, the City Clerk may cause to be published a summary of this Ordinance and a certified copy of the text of this Ordinance shall be posted in the office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post in the office of the City Clerk a certified copy of this Ordinance. Any publication of the Ordinance or summary or posting of the Ordinance shall include the names of the members of the City Council voting for and against the same.

INTRODUCED at a regular meeting of the City Council of the City of Morro Bay, held on the ____ day of _____________, 2011, by motion of Councilmember______________, seconded by Councilmember________________.

PASSED AND ADOPTED on the _____ day of________________, 2011 by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

____
WILLIAM YATES, MAYOR

ATTEST:

____
BRIDGETT KESSLING, CITY CLERK

APPROVED AS TO FORM:

____
ROBERT SCHULTZ, CITY ATTORNEY

Exhibit "D"

EDMUND G. BROWN JR.
Attorney General

DEPARTMENT OF JUSTICE
State of California

GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE

August 2008

In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana. In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statutes requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, § 11362.81(d).[1]) To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.

I. SUMMARY OF APPLICABLE LAW

A. California Penal Provisions Relating to Marijuana.

The possession, sale, cultivation, or transportation of marijuana is ordinarily a crime under California law. (See, e.g., § 11357 [possession of marijuana is a misdemeanor]; § 11358 [cultivation of marijuana is a felony]; Veh. Code, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; § 11359 [possession with intent to sell any amount of marijuana is a felony]; § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

B. Proposition 215 - The Compassionate Use Act of 1996.

On November 5, 1996, California voters passed Proposition 215, which decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) Proposition 215 was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana," and to "ensure that patients and their primary caregivers who obtain and use marijuana for

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1 Unless otherwise noted, all statutory references are to the Health & Safety Code.

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5(b)(1)(A)-(B).)

The Act further states that "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or verbal recommendation or approval of a physician." (§ 11362.5(d).) Courts have found an implied defense to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.)

C. Senate Bill 420 - The Medical Marijuana Program Act.

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP), became law. (§§ 11362.7-11362.83.) The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. Medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. (§§ 11362.71(e), 11362.78.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (§ 11362.71(b).)

Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable online or via telephone, they represent one of the best ways to ensure the security and non-diversion of marijuana grown for medical use.

In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana. (§§ 11362.7, 11362.77, 11362.775.)

D. Taxability of Medical Marijuana Transactions.

In February 2007, the California State Board of Equalization (BOE) issued a Special Notice confirming its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a Seller's Permit. (http://www.boe.ca.gov/news/pdf/medseller2007.pdf.) According to the Notice, having a Seller's Permit does not allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due. BOE further clarified its policy in a

June 2007 Special Notice that addressed several frequently asked questions concerning taxation of medical marijuana transactions. (http://www.boe.ca.gov/news/pdf/173.pdf.)

E. Medical Board of California.

The Medical Board of California licenses, investigates, and disciplines California physicians. (Bus. & Prof. Code, § 2000, et seq.) Although state law prohibits punishing a physician simply for recommending marijuana for treatment of a serious medical condition (§ 11362.5(c)), the Medical Board can and does take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. In a May 13, 2004 press release, the Medical Board clarified that these accepted standards are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

(http://www.mbc.ca.gov/board/media/releases_2004_05-13_marijuana.html.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates and prosecutes alleged licensing violations in conjunction with the Attorney General's Office.

F. The Federal Controlled Substances Act.

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812(b)(1).) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense. (*Id.* at §§ 841(a)(1), 844(a).)

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ----, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 371-373, 381-382.)

In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

II. DEFINITIONS

A. **Physician's Recommendation:** Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (§ 11362.5(d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

B. **Primary Caregiver:** A primary caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ 11362.5(e).) California courts have emphasized the consistency element of the patient-caregiver relationship. Although a "primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient," someone who merely maintains a source of marijuana does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7(d)(2).) Primary caregivers also may receive certain compensation for their services. (§ 11362.765(c) ["A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided . . . to enable [a patient] to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, . . . shall not, on the sole basis of that fact, be subject to prosecution" for possessing or transporting marijuana].)

C. **Qualified Patient:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (§ 11362.5(b)(1)(A).)

D. **Recommending Physician:** A recommending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards (as described by the Medical Board of California in its May 13, 2004 press release) that a reasonable and prudent physician would follow when recommending or approving medical marijuana for the treatment of his or her patient.

III. Guidelines Regarding Individual Qualified Patients and Primary Caregivers

A. State Law Compliance Guidelines.

1. **Physician Recommendation**: Patients must have a written or verbal recommendation for medical marijuana from a licensed physician. (§ 11362.5(d).)

2. **State of California Medical Marijuana Identification Card**: Under the MMP, qualified patients and their primary caregivers may voluntarily apply for a card issued by DPH identifying them as a person who is authorized to use, possess, or transport marijuana grown for medical purposes. To help law enforcement officers verify the cardholder's identity, each card bears a unique identification number, and a verification database is available online (www.calmmp.ca.gov). In addition, the cards contain the name of the county health department that approved the application, a 24-hour verification telephone number, and an expiration date. (§§ 11362.71(a); 11362.735(a)(3)-(4); 11362.745.)

3. **Proof of Qualified Patient Status**: Although verbal recommendations are technically permitted under Proposition 215, patients should obtain and carry written proof of their physician recommendations to help them avoid arrest. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from arrest if certain conditions are met (see section III.B.4, below). The next best forms of proof are a city- or county-issued patient identification card, or a written recommendation from a physician.

4. **Possession Guidelines**:

a) **MMP**:[2] Qualified patients and primary caregivers who possess a state-issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77(a).) But, if "a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77(b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medical marijuana for purposes of the MMP. (§ 11362.77(d).)

b) **Local Possession Guidelines:** Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess

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[2] On May 22, 2008, California's Second District Court of Appeal severed Health & Safety Code § 11362.77 from the MMP on the ground that the statute's possession guidelines were an unconstitutional amendment of Proposition 215, which does not quantify the marijuana a patient may possess. (See *People v. Kelly* (2008) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390.) The Third District Court of Appeal recently reached a similar conclusion in *People v. Phomphakdy* (July 31, 2008) --- Cal.Rptr.3d ----, 2008 WL 2931369. The California Supreme Court has granted review in *Kelly* and the Attorney General intends to seek review in *Phomphakdy*.

medical marijuana in amounts that exceed the MMP's possession guidelines. (§ 11362.77(c).)

c) **Proposition 215**: Qualified patients claiming protection under Proposition 215 may possess an amount of marijuana that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. **Enforcement Guidelines.**

1. **Location of Use**: Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79.)

2. **Use of Medical Marijuana in the Workplace or at Correctional Facilities:** The medical use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785(a); *Ross v. RagingWire Telecomms., Inc.* (2008) 42 Cal.4th 920, 933 [under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for marijuana use].)

3. **Criminal Defendants, Probationers, and Parolees:** Criminal defendants and probationers may request court approval to use medical marijuana while they are released on bail or probation. The court's decision and reasoning must be stated on the record and in the minutes of the court. Likewise, parolees who are eligible to use medical marijuana may request that they be allowed to continue such use during the period of parole. The written conditions of parole must reflect whether the request was granted or denied. (§ 11362.795.)

4. **State of California Medical Marijuana Identification Cardholders**: When a person invokes the protections of Proposition 215 or the MMP and he or she possesses a state medical marijuana identification card, officers should:

a) Review the identification card and verify its validity either by calling the telephone number printed on the card, or by accessing DPH's card verification website (http://www.calmmp.ca.gov); and

b) If the card is valid and not being used fraudulently, there are no other indicia of illegal activity (weapons, illicit drugs, or excessive amounts of cash), and the person is within the state or local possession guidelines, the individual should be released and the marijuana should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid state medical marijuana identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana." (§ 11362.71(e).) Further, a "state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78.)

5. **Non-Cardholders:** When a person claims protection under Proposition 215 or the MMP and only has a locally-issued (i.e., non-state) patient identification card, or a written (or verbal) recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medical-use claim:

a) Officers need not abandon their search or investigation. The standard search and seizure rules apply to the enforcement of marijuana-related violations. Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest.

b) Officers should review any written documentation for validity. It may contain the physician's name, telephone number, address, and license number.

c) If the officer reasonably believes that the medical-use claim is valid based upon the totality of the circumstances (including the quantity of marijuana, packaging for sale, the presence of weapons, illicit drugs, or large amounts of cash), and the person is within the state or local possession guidelines or has an amount consistent with their current medical needs, the person should be released and the marijuana should not be seized.

d) Alternatively, if the officer has probable cause to doubt the validity of a person's medical marijuana claim based upon the facts and circumstances, the person may be arrested and the marijuana may be seized. It will then be up to the person to establish his or her medical marijuana defense in court.

e) Officers are not obligated to accept a person's claim of having a verbal physician's recommendation that cannot be readily verified with the physician at the time of detention.

6. **Exceeding Possession Guidelines**: If a person has what appears to be valid medical marijuana documentation, but exceeds the applicable possession guidelines identified above, all marijuana may be seized.

7. **Return of Seized Medical Marijuana:** If a person whose marijuana is seized by law enforcement successfully establishes a medical marijuana defense in court, or the case is not prosecuted, he or she may file a motion for return of the marijuana. If a court grants the motion and orders the return of marijuana seized incident to an arrest, the individual or entity subject to the order must return the property. State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the CSA. (21 U.S.C. § 885(d).) Once the marijuana is returned, federal authorities are free to exercise jurisdiction over it. (21 U.S.C. §§ 812(c)(10), 844(a); *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes. The following are guidelines to help cooperatives and collectives operate within the law, and to help law enforcement determine whether they are doing so.

1. **Statutory Cooperatives:** A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (Corp. Code, § 12201, 12300.) No business may call itself a "cooperative" (or "co-op") unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. (*Id.* at § 12311(b).) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." (*Id.* at § 12201.) The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. (See *id.* at § 12200, et seq.) Agricultural cooperatives are likewise nonprofit corporate entities "since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." (Food & Agric. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002, et seq.) Cooperatives should not purchase marijuana from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.

2. **Collectives:** California law does not define collectives, but the dictionary defines them as "a business, farm, etc., jointly owned and operated by the members of a group." (*Random House Unabridged Dictionary*; Random House, Inc. © 2006.) Applying this definition, a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.

B. **Guidelines for the Lawful Operation of a Cooperative or Collective:** Collectives and cooperatives should be organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all state and local laws. The following are some suggested guidelines and practices for operating collective growing operations to help ensure lawful operation.

1. **Non-Profit Operation**: Nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana. (See, e.g., § 11362.765(a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].

2. **Business Licenses, Sales Tax, and Seller's Permits**: The State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit, and those engaging in transactions involving medical marijuana must obtain a Seller's Permit. Some cities and counties also require dispensing collectives and cooperatives to obtain business licenses.

3. **Membership Application and Verification**: When a patient or primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion of marijuana for non-medical use by having potential members complete a written membership application. The following application guidelines should be followed to help ensure that marijuana grown for medical use is not diverted to illicit markets:

   a) Verify the individual's status as a qualified patient or primary caregiver. Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any;

   b) Have the individual agree not to distribute marijuana to non-members;

   c) Have the individual agree not to use the marijuana for other than medical purposes;

   d) Maintain membership records on-site or have them reasonably available;

   e) Track when members' medical marijuana recommendation and/or identification cards expire; and

   f) Enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use.

4. **Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana**: Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

5. **Distribution and Sales to Non-Members are Prohibited**: State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

6. **Permissible Reimbursements and Allocations:** Marijuana grown at a collective or cooperative for medical purposes may be:

a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;

b) Provided in exchange for services rendered to the entity;

c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or

d) Any combination of the above.

7. **Possession and Cultivation Guidelines**: If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may aggregate the possession and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants. Similarly, collectives and cooperatives may cultivate and transport marijuana in aggregate amounts tied to its membership numbers. Any patient or primary caregiver exceeding individual possession guidelines should have supporting records readily available when:

a) Operating a location for cultivation;

b) Transporting the group's medical marijuana; and

c) Operating a location for distribution to members of the collective or cooperative.

8. **Security**: Collectives and cooperatives should provide adequate security to ensure that patients are safe and that the surrounding homes or businesses are not negatively impacted by nuisance activity such as loitering or crime. Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep accurate records and follow accepted cash handling practices, including regular bank runs and cash drops, and maintain a general ledger of cash transactions.

C. **Enforcement Guidelines**: Depending upon the facts and circumstances, deviations from the guidelines outlined above, or other indicia that marijuana is not for medical use, may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

1. **Storefront Dispensaries:** Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§ 11362.775.) It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash "donations" – are likely unlawful. (*Peron*, *supra*, 59 Cal.App.4th at p. 1400 [cannabis club owner was not the primary caregiver to thousands of patients where he did not consistently assume responsibility for their housing, health, or safety].)

2. **Indicia of Unlawful Operation:** When investigating collectives or cooperatives, law enforcement officers should be alert for signs of mass production or illegal sales, including (a) excessive amounts of marijuana, (b) excessive amounts of cash, (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes, (d) weapons, (e) illicit drugs, (f) purchases from, or sales or distribution to, non-members, or (g) distribution outside of California.

Exhibit "E"

What the Attorney General's Guidelines Mean for Medical Cannabis Dispensing Collectives in California

AmericansForSafeAccess

Advancing Legal Medical Marijuana Therapeutics and Research

Contents

Chapter 1

Summary

California Attorney General Jerry Brown published guidelines for legally qualified patients and state law enforcement in August 2008, which give specific instruction to medical cannabis (marijuana) patients and law enforcement about how to comply with California's medical cannabis laws. While these guidelines are not binding in court, they do represent the policy of the state's highest-ranking law enforcement officer as to what rights and responsibilities medical cannabis patients have under existing state law, and what police officers should do to uphold the law.

Publication of these guidelines is a major step forward in the implementation of California law, as they acknowledge that "a properly organized and operated collective of cooperative that dispenses medical marijuana through a storefront may be lawful under California law," provided the facility substantially complies with the guidelines. The purpose of this report is to help legal medical cannabis patients and their primary caregivers who operate collectives and cooperatives understand and comply with the Attorney General's guidelines.

Background and Significance

The guidelines published by Attorney General Jerry Brown signal a turning point in the effort to implement California's medical cannabis laws and are the culmination of years of persistent and strategic work by Americans for Safe Access (ASA). With these guidelines, California's highest ranking law enforcement official joins state voters, law makers, and courts in affirming the legality of medical cannabis – regardless of what federal law says.

Voters approved Proposition 215 in 1996, calling on state and federal officials to implement a plan for safe access to medical cannabis. They also asked the Attorney General to adopt guidelines like these to ensure safety and prevent abuse. Implementing our laws has been a sometimes-arduous process, with milestones like the adoption of Senate Bill 420 by the state legislature in 2003 and a landmark court victory for ASA against the California Highway Patrol in 2005. Since then, ASA has helped cities and counties all over the state adopt a patchwork of local regulations for patients' associations, facilitating the expansion of safe access throughout the state.

Despite our successes, progress on full implementation of California law has been stymied by the persistent misperception that federal law supercedes state law. The US Supreme Court ruled in *Gonzales v. Raich* (2005) that the federal government could enforce laws against medical cannabis in California, but declined to overturn Proposition 215 and questioned the very wisdom of federal interference in the state. Nevertheless, California law enforcement and some cities and counties continue to use federal law as an excuse to resist implementing our voter approved medical cannabis law.

In 2007, ASA won a major victory, when the California Fourth District Court of Appeals ruled in *Garden Grove v. Superior Court* that federal law does not preempt state law and that local law enforcement has an obligation to uphold state law. Specifically, law enforcement cannot use federal law as an excuse for not returning wrongfully confiscated medicine. This year, the state appellate court ruled in *County of San Diego v. San Diego NORML* that counties must move forward with the medical cannabis ID card program created under Senate Bill 420, again rejecting the argument that federal law trumps state law. With law enforcement and elected officials on notice that our state law must be upheld, the Attorney General's guidelines finally point the way to full implementation.

Staff at the Attorney General's office asked ASA to help develop and refine these guidelines. Their publication represents a major victory in our California Campaign and a quantum leap in defending and expanding patients' rights. Much of what the Attorney General published closely follows existing state law and its interpretation is clear, and the implications for qualified patients are discussed briefly below.

There is still unfinished work to be done in harmonizing federal law with California's medical cannabis laws. ASA opened the first office in Washington, DC, dedicated exclusively to medical cannabis advocacy in 2006. Our staff is working on Capitol Hill and within the Administration to improve the federal government's understanding about the therapeutic uses of cannabis and the immediate and long-term needs of our members. Having unanimous support for medical cannabis from voters, lawmakers, state courts, and the Attorney General in California makes a tremendous difference in that ongoing work.

Information for Patients

This report primarily concerns the significance of the Attorney General's guidelines for medical cannabis collectives and cooperatives. However, the guidelines also discuss patients' rights and responsibilities under the law. In the guidelines, the Attorney General instructs law enforcement not to arrest or seize the medicine of patients who possess less than eight ounces of cannabis and six mature or twelve immature cannabis plants, and who present a valid doctor's recommendation or state-authorized medical cannabis ID card. The Attorney General also requires police officers to return cannabis that was improperly seized. In addition, the guidelines place no limit on the number of collectives to which a legal patient or caregiver may belong.

Although the guidelines are not legally binding on state police, they do represent the legal opinion of the state's highest ranking law enforcement official and should give instruction to police officers statewide as to the status of the law. Patients and primary caregivers who need additional information about the Attorney General's guidelines, or have had medicine or plants wrongfully confiscated in California should contact ASA at www.AmericansForSafeAccess.org/LegalSupport or call our toll free Patient Hotline at (888) 929-4367 to report the incident.

What Is a Medical Cannabis Collective or Cooperative?

California Health and Safety Code Section 11362.775 allows qualified patients and their primary caregivers to associate together collectively and cooperatively to grow medicine for the patient-members' personal medical use. In its simplest form, a medical cannabis collective or cooperative is a member owned or operated garden where two or more patients and their caregivers, where applicable, grow medicine together. However, the large majority of medical cannabis patients can not cultivate their medicine, alone or in an association, nor do they have a caregiver who can grow it for them.

Most of California's legal patients obtain their medicine from a storefront facility operated by a medical cannabis collective or cooperative, sometimes referred to as a "dispensary" or "cannabis club." The medicine provided by a dispensing collective or cooperative is cultivated by members of the association, sometimes in a central location and, more commonly, in numerous smaller gardens operated by individual members at locations other than the storefront. The association receives medicine from the members who grow it, and provides medicine to members in need. Thus, the collective or cooperative operates as a closed circuit, isolated from the illicit market in cannabis. There are hundreds of these associations operating storefront facilities in California as of August 2008. An increasing number of facilities offer additional services for their patient membership, including such services as: massage, acupuncture, legal trainings, free meals, or counseling.

The legal status of medical cannabis collectives and cooperatives is evolving in step with California law, and the Attorney General's guidelines are an important part of this process. Cities and counties have adopted a patchwork of ordinances regulating facilities, and statewide regulation may be in the future. In the meantime, collective and cooperative operators must be diligent about staying informed and in compliance with changing laws and local regulations. Call ASA toll free at (888) 929-4367 to find out if there is a local alliance of medical cannabis collectives and cooperatives in your community that can help you stay current, or to find out why and how to form one.

About Americans for Safe Access (ASA)

ASA is the largest national member-based organization of patients, medical professionals, scientists and concerned citizens promoting safe and legal access to cannabis for therapeutic uses and research. ASA works in partnership with state, local and national legislators to overcome barriers and create policies that improve access to cannabis for patients and researchers. We have more than 40,000 active members with chapters and affiliates in more than forty states.

ASA provides legal training for and medical information to patients, attorneys, health and medical professionals and policymakers throughout the United States. We also organize media support for court cases, rapid response to law enforcement raids, and capacity-building for advocates. Our successful lobbying, media and legal campaigns have resulted in important court precedents, new sentencing standards, and more compassionate community guidelines. You can read more about ASA campaigns, projects and programs online at www.AmericansForSafeAccess.org/WhatWeDo or by calling our toll free Patient Hotline at (888) 929-4367.

ASA

Chapter 2

This chapter deals in detail with the Attorney General's guidelines for the formation and operation of a medial cannabis collective or cooperative. Some of what you read here may be modified by litigation or updated with feedback from professionals in the medical cannabis field. Please email info@AmericansForSafeAccess.org or call toll free (888) 929-4367 for updates or with input.

ASA strongly recommends that patients and caregivers consult with a qualified and experienced attorney and accounting professional before opening a medical cannabis collective or cooperative.

Business Forms

It is unclear whether or not lawmakers intended to specify a formal structure for a patients' group when they adopted California Health and Safety Code 11362.775 authorizing patients and caregivers to "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." The guidelines, however, recognize two organizational structures for patients' associations that are legally growing or distributing medicine: collective and cooperative.

A cooperative can refer to a grower cooperative or a consumer cooperative as described and organized under California Corporations Code Sections 12201 and 12300. These types of cooperatives are statutory entities, which must be duly incorporated as cooperatives and follow strict operational rules. These operational rules include, in part, electing a Board of Directors and reporting financial contributions from members. Patients and caregivers who wish to form a statutory grower or consumer cooperative should consult with a qualified and experienced attorney to be sure they organize and operate under the law.

A collective is the more typical type of patients' association recognized under the guidelines. The term "collective" is not defined under state law, and can refer to any membership-based association, regardless of its formal organization. The Attorney General describes a medical cannabis collective as "an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues." Because the term collective does not imply a specific legal structure, the guidelines state that "as a practical matter [the collective] might have to organize as *some form of business* to carry out its activities." [italics added]

The definition of a collective in the guidelines leaves broad organizational latitude as to the legal entity that will carry out the activities of the patient and caregiver collective. Operators can use any common business form, including a sole proprietorship, corporation, partnership, limited liability company, or nonprofit corporation. It is important that the collective operators follow all the usual procedures for establishing and operating whatever business form they choose. It is prudent to consult with an attorney and accountant before establishing a business to carry out the activities of the collective, and to maintain a working relationship with both to ensure legal operation on an ongoing basis.

Non-profit Operation

California Health and Safety Code Section 11362.765(a) says that nothing in the law authorizes the cultivation of medical cannabis for profit. The Attorney General's guidelines are very brief on this topic, stating "Nothing in Proposition 215 or [Senate Bill 420] authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana." There is no reason to assume that this brief passage from the guidelines mandates the establishment of a statutory nonprofit corporation as described in California Corporations Code Section 5000, *et seq*. However, operators may *chose* to organize a medical cannabis collective as a California nonprofit corporation, as discussed in greater detail below.

Regardless of the organizational structure, a medical cannabis collective should operate in a "not-for-profit" manner to comply with the Attorney General's guidelines. **Not-for-profit** operation describes the behavior of a business or association that is not operated for a commercial purpose, or to generate profits for its owners. Any business, regardless of its formal structure, can operate in a not-for-profit fashion by reinvesting excess revenue (after salaries and other overhead) in services for members, advocacy for patients' rights, or other noncommercial activity.

Operating in a not-for-profit manner does not mean that patients and caregivers who own or operate a collective can not be paid a reasonable wage for their services. Patients operating not-for-profit collectives should be aware, however, that the perception of excessive profits is what motivates this provision of the guidelines. Paying reasonable salaries is acceptable, but other indicia of excessive profits should be avoided – bonuses, dividends, conspicuous spending, etc.

The term not-for-profit is sometimes confused with the term nonprofit. A **nonprofit corporation** is a specific statutory entity organized under California Corporation Code Section 5000, *et seq*., to carry on a non-commercial activity. Nonprofit corporations include churches, schools, some hospitals, social clubs, and service organizations. The principal differences between a nonprofit corporation and a for-profit business for these purposes are that (1) a nonprofit has no owners or shareholders, only an elected Board of Directors (can be self-electing); and (2) the proceeds of a nonprofit (not including salaries paid) may never inure to the benefit of any private party.

Some nonprofits are exempt from federal and state taxes because they do educational, religious, or charitable work. The Internal Revenue Service will not recognize providing medical cannabis as a tax-exempt activity, and state tax-exemption is contingent on federal approval. Therefore, a medical cannabis collective organized as a nonprofit corporation will report and pay tax like a traditional C-Corporation. It is important to remember, however, that a corporation is still a legitimate nonprofit organization under California law, even without tax-exempt status.

Many collective operators choose to incorporate their collectives as **California Nonprofit Mutual Benefit Corporations**, as described under California Corporations Code 7110, *et seq*. Doing so gives the collective a bona fide nonprofit identity, something that resonates with elected officials, law enforcement, media, and neighbors. This is a sensible choice for most operators, and increasingly the norm for new facilities. Creating and operating a nonprofit corporation is more difficult than doing so with a commercial business model, and may present special issues around taxation and transfers in ownership. Operators should seek the advice of a qualified business attorney with experience in nonprofit law.

Business Licenses, Sales Tax, and Seller's Permits

Medical cannabis collectives and cooperatives should obtain all necessary licenses and permits, and pay all taxes due. Licensing and permitting rules vary from one jurisdiction to another. It is the collective operator's responsibility to know what local licenses or permits are needed for a storefront facility that provides medicine to members. ASA strongly recommends working with a qualified and experienced land use attorney if there is any uncertainty in a given city or county.

Over the objection of ASA, the California Board of Equalization (BOE) has determined that medical cannabis transactions are subject to sales tax. Every collective or cooperative should complete Form BOE-400-SPA to apply for a California Seller's Permit, and collect and pay sales tax as required by state law. You can download a copy of Form BOE-400-SPA online at www.boe.ca.gov or visit a BOE field office near you. Medical cannabis collectives and cooperatives may obtain a "Waiver for Incomplete Application" from a BOE field office if they do not wish to disclose what product is sold or the identities of the member-cultivators from whom they obtain medication.

The BOE is aggressively enforcing this policy, and the consequences for failing to pay can be severe for patient-operators. ASA strongly advises that operators seek the assistance of a qualified professional if they are unclear on how to comply with sales tax requirements or receive a notice from the BOE.

Membership Application and Verification

A medical cannabis dispensing collective or cooperative is a membership-based organization. Associations can not make a credible claim to be a collective or cooperative if they do not have a process through which patients and caregivers' legal status is verified and recorded. Best practices dictates that the collective will review an original copy of the doctor's letter of recommendation, verify the letter with the doctor or staff, and check with the medical board to be sure the doctor is duly licensed to practice medicine in California. Most verification of patients and doctors can be completed on the telephone and online, so there is no reason that a patient can not be verified before joining an association and receiving services. There are a variety of online verification options for collectives and cooperatives, which are particularly useful on weekend or in the evening when doctor's offices are closed.

The guidelines require collectives and cooperatives to maintain membership records that are reasonably available, but not necessarily on site. Digital records used on site can be secured using a variety of safety options, including encryption. Paper records not needed for daily operation can be stored off-site, perhaps with an attorney, and only made available to law enforcement following due process of law (typically a subpoena or search warrant) or after consultation with the collective's attorney.

The membership forms used to enroll new members should include a signed statement in which the member agrees not to redistribute medicine to anyone else or use the medicine for any non-medical purpose. The collective must use due-diligence in tracking expiration dates and in enforcing the rules of the facility. For a detailed explanation of best practices in registering new members and keeping records, see "Chapter 10. Registering Members" in the Appendix.

Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Cannabis

Medical cannabis collectives and cooperatives may only acquire medicine from their registered members, and provide it to other registered members for their personal medical use. Additionally, the Attorney General's guidelines anticipate that medicine destined for a collective will be transported by a registered member of that collective. These restrictions are designed to create a closed circuit of medicine inside the collective's membership, which is completely isolated from the illicit market. The guidelines do not authorize medical cannabis brokers or middlemen to buy commercial quantities of cannabis on the illicit market and then provide it wholesale to collectives. The guidelines also do not authorize collectives to provide medicine to members for the purpose of reselling it or to distribute it to other collectives.

The guidelines recommend that collectives and cooperatives keep records of transactions when they acquire or provide medicine. This may give some operators pause, as these records could be used as evidence in a federal case. However, a savvy operator can keep detailed operational records, which are necessary for business operation and tax purposes already, without incriminating anyone. Incoming and outgoing transactions can be recorded using a unique transaction or purchase order number that simply specifies that the transaction involved a duly registered member. Virtually every commercial point-of-sale system generates unique transaction and purchase order numbers. Smaller facilities can accomplish the same goal using off-the-shelf business forms available at any office supply store.

It is important to remember that transaction records and other financial documents need not be stored on-site, where they are subject to confiscation in a law enforcement raid. The records should be made available to law enforcement only following due process of law (typically a subpoena or search warrant) or after consultation with the collective's attorney.

Distribution and Sales to Non-members Prohibited

It should go without saying that collectives must take adequate steps to prevent medication from being diverted to non-medical use. Patient-operators must only provide medicine to registered members whose legal status has been verified, and diligently enforce non-diversion polices at their facilities. There is no gray zone on this issue. Medical cannabis provided at collectives and cooperatives must stay within the registered membership of that association and be used for the member's personal medical need.

It is the responsibility of the collective or cooperative operator to ensure that staff is trained to spot signs of diversion of medicine and respond to abuses. Signs of diversion might include, but are not limited to, frequent visits to the facility, acquiring relatively large quantities of medicine, comments indicating that medicine is intended for someone else, etc. Operators must take steps to correct suspicious behavior or exclude patients or caregivers from membership if they violate the facility rules.

Permissible Reimbursements and Allocations

The Attorney General's guidelines authorize collectives and cooperatives to be reimbursed for medication in four ways: (1) medication can be given to members for free, (2) members can trade labor for medication, (3) members can pay the collective a reasonable reimbursement to cover cost of the medicine and overhead, or (4) the member and facility can arrange any combination of the other three options. Which one or what combination of reimbursement options a collective uses is at the discretion of the operator, and no collective is obligated to distribute medicine for free or exchange labor for medicine under these guidelines. Collectives and cooperatives must collect and pay sales tax on any money received in exchange for medicine. ASA advises collective operators to consult with a qualified tax-attorney if you intend to exchange labor for medicine to avoid in unintended tax liabilities.

Possession and Cultivation Guidelines

The Attorney General's guidelines recognize that collectives and cooperatives can possess an aggregate quantity of medicine or cannabis plants to supply their members, based on the bar-to-arrest thresholds established under California Health and Safety Code Section 11362.77(a). Under that chapter, individual patients can possess up to eight ounces of dried cannabis (or the conversion thereof), and six mature plants or twelve immature plants. Therefore, a collective or cooperative could possess an amount of cannabis equal to the number of registered members multiplied by eight ounces. The same aggregate principal applies to cannabis plants.

Using aggregate possession limits to establish the maximum possession for medicine or plants may mean that a collective or cooperative could possess a substantial amount of either at any one time. Operators should remember that large amounts of medicine and large numbers of plants may be a security risk, or lead state law enforcement to misunderstand the nature of the facility (see "Enforcement Guidelines below). Furthermore, all possession and cultivation of cannabis remains illegal under federal law, and stiff mandatory minimum sentences and sentencing guidelines may apply if you are charged with possession or cultivation under federal law, where a defense under state medical cannabis law is unavailable. To avoid the most severe federal sentencing guidelines, collectives and patient-members should not cultivate more than 100 pants at any one location, or possess more than 100 kilograms of cannabis at one time.

Recent court decisions have called into question the bar-to-arrest thresholds established in Senate Bill 420, because courts and law enforcement have traditionally treated these thresholds as *de facto* possession and cultivation limits for patients. At this time, it is possible that the thresholds established by California Health and Safety Code Sections 11362.77(a) will be overturned as an unconstitutional amendment to a voter initiative. However, the final disposition of *People v. Kelly* (2008) and other similar cases in the state Courts of Appeal is far from clear at this time. What this means for aggregate possession limits at collectives is still uncertain.

Collectives, cooperatives, or individual patients who grow or transport medicine should have documentation establishing for how many patients they are doing so. This documentation does not necessarily have to be on-site or in possession of the transporter. The records should be made available to law enforcement only following due process of law (typically a subpoena or search warrant) or after consultation with the collective's attorney. A member detained or arrested while transporting medicine should refuse consent to a search, and assert his or her right to remain silent and speak with an attorney.

Security

The Attorney General's guidelines require collectives and cooperatives to maintain adequate security to protect patients and the community. Safety for patients and the community must be a top priority at these facilities, so a compliant association will adopt a *security culture* to ensure safety. Security culture refers to a set of practices and strategies that work together to maintain safety. Security culture may involve the following elements:

- Employing professional, trained security personnel
- Staying alert to detect problems before they occur
- Educating patients to be sure they know the rules
- Implementing policies to prevent diversion
- Restricting access to the facility to authorized persons
- Using appropriate security technology and equipment to monitor and secure the facility during hours of operation and overnight
- Maintaining communication with local law enforcement
- Training staff to prevent and respond to emergencies
- Educating staff and members as to their rights and responsibilities under the law

Some of the ASA Services for Collectives described in the Appendix may be useful in security culture training for staff at collectives and cooperatives.

Enforcement Guidelines: Storefront Dispensaries

One of the most important aspects of the Attorney General's guidelines for medical cannabis is that they specifically recognize that patient collectives and cooperatives authorized under state law can maintain storefronts to provide medicine to their members. The guidelines state: "It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law" provided that the association substantially complies with the guidelines.

The recognition that storefront collectives and cooperatives can be legal is a watershed moment for California. By adhering to some basic operational guidelines, patients' associations can demonstrate compliance with the Attorney General's interpretation of the law, an important cue for local law enforcement and local government. This is a huge victory for patients and providers, but is also a boon for state law enforcement officers, who have been challenged in dealing with the relatively rare instances of abuse surrounding medical cannabis facilities. Giving local law enforcement clarity of what is legal and empowering them to address illegal activity may ultimately serve to reduce instances of local cooperation and instigation of federal raids in California.

The Attorney General specifies that collectives operating outside the guidelines may be subject to arrest and criminal prosecution. Specifically, the guidelines cite the example of an organization that merely has the client designate the business or operator as a primary caregiver before selling cannabis, without abiding by the letter of the law reflected in the guidelines. The Attorney General did not intend that these guidelines be used as a cue for a crackdown on lawful collectives, but those who operate outside the provision of the guidelines risk legal consequences.

Enforcement Guidelines: Indicia of Unlawful Operation

The guidelines spell out certain criteria law enforcement might consider when deciding if a collective or cooperative is legal under state law. Operators should make it a priority to avoid all indicia of unlawful operation, especially those listed in the guidelines:

- *Possession of excessive amounts of medicine, plants, or cash.* What constitutes excessive is unclear under current case law. Operators are advised to keep fewer than 100 plants and an amount of cannabis necessary to serve patients in a single day whenever possible.
- *Violating local and state laws, including licensing and permitting ordinances and applicable tax laws.* Operators should consult with an accountant as to their liabilities under state and federal tax law. Be especially careful to display a valid California Seller's Permit, and to collect and pay sales tax.
- *The presence of any weapons or illegal drugs. Operators and staff should never possess weapons or illegal drugs at the facility.* Doing so may result in a sentence enhancement or additional charges being filed in a criminal case. Furthermore, weapons and illegal drugs create a significant public relations problem for the collective and the grassroots campaign for medical cannabis rights. The legal issues surround contracted security personnel carrying weapons at a facility have not been explored in court. Operators should follow local ordinances, where applicable. In general, armed guards are undesirable at medical cannabis facilities.
- *Acquiring or providing medicine to anyone who is not a duly registered member.* Operators and staff must not acquire medicine or provide medicine outside of the duly registered membership or the collective or cooperative. Doing so violates state law and makes the association vulnerable to local police raids.
- *Any inter-state activity acquisition of distribution of medicine.* All medicine acquired and provided at a medical cannabis collective or cooperative should be grown by registered members who are legally entitled to do so inside the state of California. No medicine can come from outside California, and it is never legal to distribute medicine outside of the state.

Operators should be aware that other factors can influence a police officer's evaluation of an association, and subjective interpretation may still lead to inappropriate law enforcement activity. ASA strongly recommends that operators, staff, and patients at collectives and cooperatives know and assert their constitutional rights when dealing with law enforcement. You can read more about your constitutional rights to refuse an unlawful search, to remain silent when questioned, or to have an attorney present during questioning at www.AmericansForSafeAccess.org/KnowYourRights There is a list of services ASA offers to medical cannabis patients, collectives, and cooperatives, including "Know Your Rights" and "Raid Training," in the Appendix.

ASA also asks operators, staff, and collective members to report law enforcement encounters online at www.AmericansForSafeAccess.org/LegalSupport or by calling our toll free Patient Hotline at (888) 929-4367.

Chapter 3

Where To Get Help

Most of California's medical cannabis collectives and cooperatives will find it easy to comply with the Attorney General's guidelines. However, some facilities may need assistance of further guidance than what is provided in this report. It is very important that operators get professional advice from an experienced business attorney and an accountant about the complicated legal issues surrounding collectives and cooperatives.

ASA is always available to answer questions for patients and primary caregivers who are trying to operate medical cannabis collectives and cooperatives in an ethical and compassionate manner. You can find a wealth of information on our Internet web site at www.AmericansForSafeAccess.org Use the search box or the URL's below to find documents of particular interest to operators. Email info@AmericansForSafeAccess.org or call toll free (888) 929-4367 if you need help locating any of the documents of have other questions.

Background and information about the Attorney General's Guidelines
www.AmericansForSafeAccess.org/AGGuidelines

Report: Medical Cannabis Dispensing Collectives and Local Regulation
www.AmericansForSafeAccess.org/DispensaryReport

Legal Information about Medical Cannabis
www.AmericansForSafeAccess.org/Legal

Free Legal Support Services
www.AmericansForSafeAccess.org/LegalSupport

Free California Legal Manual
www.AmericansForSafeAccess.org/LegalManual

Know Your Rights Information
www.AmericansForSafeAccess.org/KnowYourRights

Protect Dispensing Collectives and Cooperatives
www.AmericansForSafeAccess.org/ProtectMCDC

ASA Emergency Response to DEA Raids at Collectives and Cooperatives
www.AmericansForSafeAccess.org/EmergencyResponse

ASA Campaigns, Projects, and Programs
www.AmericansForSafeAccess.org/WhatWeDo

Join ASA
www.AmericansForSafeAccess.org/Join

ASA hosts a semi-annual symposium for medical cannabis operators, and will soon launch a statewide tour to talk with patients and caregivers about the Attorney General's guidelines and what we are doing to protect and expand patients' rights in California. Be sure that you are signed up on our mailing list to stay informed about coming events.

You may also wan to check with the ASA office to find out if there is a local alliance of collectives and cooperatives in your community. ASA helped seed these autonomous local alliances in cities all over California hopes of promoting communication between facilities and encouraging the development of community-based safety and operational standards. Call our office at (888) 929-4367 to find out if you have a local alliance, or to get information about starting one in your community.

What You Can Do To Protect Your Collective and Cooperative

The most obvious thing you can do to protect your collective or cooperative is to closely abide by the provisions of California law represented in the Attorney General's guidelines. Doing so may help you avoid legal pitfalls ranging from unlawful diversion of medicine to unexpected tax liabilities. Better still, obeying the guidelines can help build credibility and rapport with local law enforcement and elected officials. Because entanglements with local police and government can lead to federal interference, this may help you avoid a federal raid, too.

The Attorney General's guidelines represent the culmination of a lot of hard work by ASA staff and our allies to fully implement California law. ASA is still working hard to protect and expand patients' rights, using litigation, legislation, and public education. We are also blazing new trails in Washington, DC, where we are the only organization in our nation's Capitol working exclusively to advance safe and legal access to cannabis for therapeutic use and research. Doors are opening to us there, and we are confident we will succeed in harmonizing federal law with the laws of California and the other eleven states that allow medical cannabis.

Perhaps one of the most important things you can do today to protect safe access to medical cannabis in your community is to join ASA and make a one-time or monthly donation to support our work. We are making progress implementing state law and changing federal policy, but we need your help to keeping fighting. Please visit www.AmericansForSafeAccess.org/Join or call us on our toll free Patient Hotline at (888) 929-4367 today.

Exhibit "F"

WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION'S
TASK FORCE ON MARIJUANA DISPENSARIES

ACKNOWLEDGMENTS

Beyond any question, this White Paper is the product of a major cooperative effort among representatives of numerous law enforcement agencies and allies who share in common the goal of bringing to light the criminal nexus and attendant societal problems posed by marijuana dispensaries that until now have been too often hidden in the shadows. The critical need for this project was first recognized by the California Police Chiefs Association, which put its implementation in the very capable hands of CPCA's Executive Director Leslie McGill, City of Modesto Chief of Police Roy Wasden, and City of El Cerrito Chief of Police Scott Kirkland to spearhead. More than 30 people contributed to this project as members of CPCA's Medical Marijuana Dispensary Crime/Impact Issues Task Force, which has been enjoying the hospitality of Sheriff John McGinnis at regular meetings held at the Sacramento County Sheriff's Department's Headquarters Office over the past three years about every three months. The ideas for the White Paper's components came from this group, and the text is the collaborative effort of numerous persons both on and off the task force. Special mention goes to Riverside County District Attorney Rod Pacheco and Riverside County Deputy District Attorney Jacqueline Jackson, who allowed their Office's fine White Paper on Medical Marijuana: History and Current Complications to be utilized as a partial guide, and granted permission to include material from that document. Also, Attorneys Martin Mayer and Richard Jones of the law firm of Jones & Mayer are thanked for preparing the pending legal questions and answers on relevant legal issues that appear at the end of this White Paper. And, I thank recently retired San Bernardino County Sheriff Gary Penrod for initially assigning me to contribute to this important work.

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Dennis Tilton, Editor

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INTRODUCTION

Proposition 215, an initiative authorizing the limited possession, cultivation, and use of marijuana by patients and their care providers for certain medicinal purposes recommended by a physician without subjecting such persons to criminal punishment, was passed by California voters in 1996. This was supplemented by the California State Legislature's enactment in 2003 of the Medical Marijuana Program Act (SB 420) that became effective in 2004. The language of Proposition 215 was codified in California as the Compassionate Use Act, which added section 11362.5 to the California Health & Safety Code. Much later, the language of Senate Bill 420 became the Medical Marijuana Program Act (MMPA), and was added to the California Health & Safety Code as section 11362.7 *et seq.* Among other requirements, it purports to direct all California counties to set up and administer a voluntary identification card system for medical marijuana users and their caregivers. Some counties have already complied with the mandatory provisions of the MMPA, and others have challenged provisions of the Act or are awaiting outcomes of other counties' legal challenges to it before taking affirmative steps to follow all of its dictates. And, with respect to marijuana dispensaries, the reaction of counties and municipalities to these nascent businesses has been decidedly mixed. Some have issued permits for such enterprises. Others have refused to do so within their jurisdictions. Still others have conditioned permitting such operations on the condition that they not violate any state or federal law, or have reversed course after initially allowing such activities within their geographical borders by either limiting or refusing to allow any further dispensaries to open in their community. This White Paper explores these matters, the apparent conflicts between federal and California law, and the scope of both direct and indirect adverse impacts of marijuana dispensaries in local communities. It also recounts several examples that could be emulated of what some governmental officials and law enforcement agencies have already instituted in their jurisdictions to limit the proliferation of marijuana dispensaries and to mitigate their negative consequences.

FEDERAL LAW

Except for very limited and authorized research purposes, federal law through the Controlled Substances Act absolutely prohibits the use of marijuana for any legal purpose, and classifies it as a banned Schedule I drug. It cannot be legally prescribed as medicine by a physician. And, the federal regulation supersedes any state regulation, so that under federal law California medical marijuana statutes do not provide a legal defense for cultivating or possessing marijuana—even with a physician's recommendation for medical use.

CALIFORNIA LAW

Although California law generally prohibits the cultivation, possession, transportation, sale, or other transfer of marijuana from one person to another, since late 1996 after passage of an initiative (Proposition 215) later codified as the Compassionate Use Act, it has provided a limited affirmative defense to criminal prosecution for those who cultivate, possess, or use limited amounts of marijuana for medicinal purposes as qualified patients with a physician's recommendation or their designated primary caregiver or cooperative. Notwithstanding these limited exceptions to criminal culpability, California law is notably silent on any such available defense for a storefront marijuana dispensary, and California Attorney General Edmund G. Brown, Jr. has recently issued guidelines that generally find marijuana dispensaries to be unprotected and illegal drug-trafficking enterprises except in the rare instance that one can qualify as a true cooperative under California law. A primary caregiver must consistently and regularly assume responsibility for the housing, health, or safety of an authorized medical marijuana user, and nowhere does California law authorize cultivating or providing marijuana—medical or non-medical—for profit.

California's Medical Marijuana Program Act (Senate Bill 420) provides further guidelines for mandated county programs for the issuance of identification cards to authorized medical marijuana users on a voluntary basis, for the chief purpose of giving them a means of certification to show law enforcement officers if such persons are investigated for an offense involving marijuana. This system is currently under challenge by the Counties of San Bernardino and San Diego and Sheriff Gary Penrod, pending a decision on review by the U.S. Supreme Court, as is California's right to permit any legal use of marijuana in light of federal law that totally prohibits any personal cultivation, possession, sale, transportation, or use of this substance whatsoever, whether for medical or non-medical purposes.

PROBLEMS POSED BY MARIJUANA DISPENSARIES

Marijuana dispensaries are commonly large money-making enterprises that will sell marijuana to most anyone who produces a physician's written recommendation for its medical use. These recommendations can be had by paying unscrupulous physicians a fee and claiming to have most any malady, even headaches. While the dispensaries will claim to receive only donations, no marijuana will change hands without an exchange of money. These operations have been tied to organized criminal gangs, foster large grow operations, and are often multi-million-dollar profit centers.

Because they are repositories of valuable marijuana crops and large amounts of cash, several operators of dispensaries have been attacked and murdered by armed robbers both at their storefronts and homes, and such places have been regularly burglarized. Drug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts of their operations. To repel store invasions, firearms are often kept on hand inside dispensaries, and firearms are used to hold up their proprietors. These dispensaries are either linked to large marijuana grow operations or encourage home grows by buying marijuana to dispense. And, just as destructive fires and unhealthful mold in residential neighborhoods are often the result of large indoor home grows designed to supply dispensaries, money laundering also naturally results from dispensaries' likely unlawful operations.

LOCAL GOVERNMENTAL RESPONSES

Local governmental bodies can impose a moratorium on the licensing of marijuana dispensaries while investigating this issue; can ban this type of activity because it violates federal law; can use zoning to control the dispersion of dispensaries and the attendant problems that accompany them in unwanted areas; and can condition their operation on not violating any federal or state law, which is akin to banning them, since their primary activities will always violate federal law as it now exists—and almost surely California law as well.

LIABILITY

While highly unlikely, local public officials, including county supervisors and city council members, could potentially be charged and prosecuted for aiding and abetting criminal acts by authorizing and licensing marijuana dispensaries if they do not qualify as "cooperatives" under California law, which would be a rare occurrence. Civil liability could also result.

ENFORCEMENT OF MARIJUANA LAWS

While the Drug Enforcement Administration has been very active in raiding large-scale marijuana dispensaries in California in the recent past, and arresting and prosecuting their principals under federal law in selective cases, the new U.S. Attorney General, Eric Holder, Jr., has very recently announced a major change of federal position in the enforcement of federal drug laws with respect to marijuana dispensaries. It is to target for prosecution only marijuana dispensaries that are exposed as fronts for drug trafficking. It remains to be seen what standards and definitions will be used to determine what indicia will constitute a drug trafficking operation suitable to trigger investigation and enforcement under the new federal administration.

Some counties, like law enforcement agencies in the County of San Diego and County of Riverside, have been aggressive in confronting and prosecuting the operators of marijuana dispensaries under state law. Likewise, certain cities and counties have resisted granting marijuana dispensaries business licenses, have denied applications, or have imposed moratoria on such enterprises. Here, too, the future is uncertain, and permissible legal action with respect to marijuana dispensaries may depend on future court decisions not yet handed down.

Largely because the majority of their citizens have been sympathetic and projected a favorable attitude toward medical marijuana patients, and have been tolerant of the cultivation and use of marijuana, other local public officials in California cities and counties, especially in Northern California, have taken a "hands off" attitude with respect to prosecuting marijuana dispensary operators or attempting to close down such operations. But, because of the life safety hazards caused by ensuing fires that have often erupted in resultant home grow operations, and the violent acts that have often shadowed dispensaries, some attitudes have changed and a few political entities have reversed course after having previously licensed dispensaries and authorized liberal permissible amounts of marijuana for possession by medical marijuana patients in their jurisdictions. These "patients" have most often turned out to be young adults who are not sick at all, but have secured a physician's written recommendation for marijuana use by simply paying the required fee demanded for this document without even first undergoing a physical examination. Too often "medical marijuana" has been used as a smokescreen for those who want to legalize it and profit off it, and storefront dispensaries established as cover for selling an illegal substance for a lucrative return.

WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION

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INTRODUCTION

In November of 1996, California voters passed Proposition 215. The initiative set out to make marijuana available to people with certain illnesses. The initiative was later supplemented by the Medical Marijuana Program Act. Across the state, counties and municipalities have varied in their responses to medical marijuana. Some have allowed businesses to open and provide medical marijuana. Others have disallowed all such establishments within their borders. Several once issued business licenses allowing medical marijuana stores to operate, but no longer do so. This paper discusses the legality of both medical marijuana and the businesses that make it available, and more specifically, the problems associated with medical marijuana and marijuana dispensaries, under whatever name they operate.

FEDERAL LAW

Federal law clearly and unequivocally states that all marijuana-related activities are illegal. Consequently, all people engaged in such activities are subject to federal prosecution. The United States Supreme Court has ruled that this federal regulation supersedes any state's regulation of marijuana – even California's. (*Gonzales v. Raich* (2005) 125 S.Ct. 2195, 2215.) "The Supremacy Clause unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." (*Gonzales v. Raich, supra.*) Even more recently, the 9th Circuit Court of Appeals found that there is no fundamental right under the United States Constitution to even use medical marijuana. (*Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 866.)

In *Gonzales v. Raich,* the High Court declared that, despite the attempts of several states to partially legalize marijuana, it continues to be wholly illegal since it is classified as a Schedule I drug under federal law. As such, there are no exceptions to its illegality. (21 USC secs. 812(c), 841(a)(1).) Over the past thirty years, there have been several attempts to have marijuana reclassified to a different schedule which would permit medical use of the drug. All of these attempts have failed. (*See Gonzales v. Raich* (2005) 125 S.Ct. 2195, fn 23.) The mere categorization of marijuana as "medical" by some states fails to carve out any legally recognized exception regarding the drug. Marijuana, in any form, is neither valid nor legal.

Clearly the United States Supreme Court is the highest court in the land. Its decisions are final and binding upon all lower courts. The Court invoked the United States Supremacy Clause and the Commerce Clause in reaching its decision. The Supremacy Clause declares that all laws made in pursuance of the Constitution shall be the "supreme law of the land" and shall be legally superior to any conflicting provision of a state constitution or law. [1] The Commerce Clause states that "the

Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2]

Gonzales v. Raich addressed the concerns of two California individuals growing and using marijuana under California's medical marijuana statute. The Court explained that under the Controlled Substances Act marijuana is a Schedule I drug and is strictly regulated.[3] "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment."[4] (21 USC sec. 812(b)(1).) The Court ruled that the Commerce Clause is applicable to California individuals growing and obtaining marijuana for their own personal, medical use. Under the Supremacy Clause, the federal regulation of marijuana, pursuant to the Commerce Clause, supersedes any state's regulation, including California's. The Court found that the California statutes did not provide any federal defense if a person is brought into federal court for cultivating or possessing marijuana.

Accordingly, there is no federal exception for the growth, cultivation, use or possession of marijuana and all such activity remains illegal.[5] California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 do not create an exception to this federal law. All marijuana activity is absolutely illegal and subject to federal regulation and prosecution. This notwithstanding, on March 19, 2009, U.S. Attorney General Eric Holder, Jr. announced that under the new Obama Administration the U.S. Department of Justice plans to target for prosecution only those marijuana dispensaries that use medical marijuana dispensing as a front for dealers of illegal drugs.[6]

CALIFORNIA LAW

Generally, the possession, cultivation, possession for sale, transportation, distribution, furnishing, and giving away of marijuana is unlawful under California state statutory law. (See Cal. Health & Safety Code secs. 11357-11360.) But, on November 5, 1996, California voters adopted Proposition 215, an initiative statute authorizing the medical use of marijuana.[7] The initiative added California Health and Safety code section 11362.5, which allows "seriously ill Californians the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . . ."[8] The codified section is known as the Compassionate Use Act of 1996.[9] Additionally, the State Legislature passed Senate Bill 420 in 2003. It became the Medical Marijuana Program Act and took effect on January 1, 2004.[10] This act expanded the definitions of "patient" and "primary caregiver"[11] and created guidelines for identification cards.[12] It defined the amount of marijuana that "patients," and "primary caregivers" can possess.[13] It also created a limited affirmative defense to criminal prosecution for qualifying individuals that collectively gather to cultivate medical marijuana,[14] as well as to the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana for a person who qualifies as a "patient," a "primary caregiver," or as a member of a legally recognized "cooperative," as those terms are defined within the statutory scheme. Nevertheless, there is no provision in any of these laws that authorizes or protects the establishment of a "dispensary" or other storefront marijuana distribution operation.

Despite their illegality in the federal context, the medical marijuana laws in California are specific. The statutes craft narrow affirmative defenses for particular individuals with respect to enumerated marijuana activity. All conduct, and people engaging in it, that falls outside of the statutes' parameters remains illegal under California law. Relatively few individuals will be able to assert the affirmative defense in the statute. To use it a person must be a "qualified patient," "primary caregiver," or a member of a "cooperative." Once they are charged with a crime, if a person can prove an applicable legal status, they are entitled to assert this statutory defense.

Former California Attorney General Bill Lockyer has also spoken about medical marijuana, and strictly construed California law relating to it. His office issued a bulletin to California law enforcement agencies on June 9, 2005. The office expressed the opinion that *Gonzales v. Raich* did not address the validity of the California statutes and, therefore, had no effect on California law. The office advised law enforcement to not change their operating procedures. Attorney General Lockyer made the recommendation that law enforcement neither arrest nor prosecute "individuals within the legal scope of California's Compassionate Use Act." Now the current California Attorney General, Edmund G. Brown, Jr., has issued guidelines concerning the handling of issues relating to California's medical marijuana laws and marijuana dispensaries. The guidelines are much tougher on storefront dispensaries—generally finding them to be unprotected, illegal drug-trafficking enterprises if they do not fall within the narrow legal definition of a "cooperative"—than on the possession and use of marijuana upon the recommendation of a physician.

When California's medical marijuana laws are strictly construed, it appears that the decision in *Gonzales v. Raich* does affect California law. However, provided that federal law does not preempt California law in this area, it does appear that the California statutes offer some legal protection to "individuals within the legal scope of" the acts. The medical marijuana laws speak to patients, primary caregivers, and true collectives. These people are expressly mentioned in the statutes, and, if their conduct comports to the law, they may have some state legal protection for specified marijuana activity. Conversely, all marijuana establishments that fall outside the letter and spirit of the statutes, including dispensaries and storefront facilities, are not legal. These establishments have no legal protection. Neither the former California Attorney General's opinion nor the current California Attorney General's guidelines present a contrary view. Nevertheless, without specifically addressing marijuana dispensaries, Attorney General Brown has sent his deputies attorney general to defend the codified Medical Marijuana Program Act against court challenges, and to advance the position that the state's regulations promulgated to enforce the provisions of the codified Compassionate Use Act (Proposition 215), including a statewide database and county identification card systems for marijuana patients authorized by their physicians to use marijuana, are all valid.

1. Conduct

California Health and Safety Code sections 11362.765 and 11362.775 describe the conduct for which the affirmative defense is available. If a person qualifies as a "patient," "primary caregiver," or is a member of a legally recognized "cooperative," he or she has an affirmative defense to possessing a defined amount of marijuana. Under the statutes no more than eight ounces of dried marijuana can be possessed. Additionally, either six mature or twelve immature plants may be possessed.[15] If a person claims patient or primary caregiver status, and possesses more than this amount of marijuana, he or she can be prosecuted for drug possession. The qualifying individuals may also cultivate, plant, harvest, dry, and/or process marijuana, but only while still strictly observing the permitted amount of the drug. The statute may also provide a limited affirmative defense for possessing marijuana for sale, transporting it, giving it away, maintaining a marijuana house, knowingly providing a space where marijuana can be accessed, and creating a narcotic nuisance.[16]

However, for anyone who cannot lay claim to the appropriate status under the statutes, all instances of marijuana possession, cultivation, planting, harvesting, drying, processing, possession for the purposes of sales, completed sales, giving away, administration, transportation, maintaining of marijuana houses, knowingly providing a space for marijuana activity, and creating a narcotic nuisance continue to be illegal under California law.

2. Patients and Cardholders

A dispensary obviously is not a patient or cardholder. A "qualified patient" is an individual with a physician's recommendation that indicates marijuana will benefit the treatment of a qualifying illness. (Cal. H&S Code secs. 11362.5(b)(1)(A) and 11362.7(f).) Qualified illnesses include cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or *any other illness for which marijuana provides relief.*[17] A physician's recommendation that indicates medical marijuana will benefit the treatment of an illness is required before a person can claim to be a medical marijuana patient. Accordingly, such proof is also necessary before a medical marijuana affirmative defense can be claimed.

A "person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card issued by the State Department of Health Services. (Cal. H&S Code secs. 11362.7(c) and 11362.7(g).)

3. Primary Caregivers

The only person or entity authorized to receive compensation for services provided to patients and cardholders is a primary caregiver. (Cal. H&S Code sec. 11362.77(c).) However, nothing in the law authorizes any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.765(a).) It is important to note that it is almost impossible for a storefront marijuana business to gain true primary caregiver status. Businesses that call themselves "cooperatives," but function like storefront dispensaries, suffer this same fate. In *People v. Mower,* the court was very clear that the defendant had to prove he was a primary caregiver in order to raise the medical marijuana affirmative defense. Mr. Mower was prosecuted for supplying two people with marijuana.[18] He claimed he was their primary caregiver under the medical marijuana statutes. This claim required him to prove he "**consistently** had assumed responsibility for either one's **housing, health, or safety**" before he could assert the defense.[19] (Emphasis added.)

The key to being a primary caregiver is not simply that marijuana is provided for a patient's health; the responsibility for the health must be consistent; it must be independent of merely providing marijuana for a qualified person; and such a primary caregiver-patient relationship must begin before or contemporaneously with the time of assumption of responsibility for assisting the individual with marijuana. (*People v. Mentch* (2008) 45 Cal.4th 274, 283.) Any relationship a storefront marijuana business has with a patient is much more likely to be transitory than consistent, and to be wholly lacking in providing for a patient's health needs beyond just supplying him or her with marijuana.

A "primary caregiver" is an individual or facility that has "consistently assumed responsibility for the housing, health, or safety of a patient" over time. (Cal. H&S Code sec. 11362.5(e).) "Consistency" is the key to meeting this definition. A patient can elect to patronize any dispensary that he or she chooses. The patient can visit different dispensaries on a single day or any subsequent day. The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. But, in light of the holding in *People v. Mentch*, *supra*, to qualify as a primary caregiver, more aid to a person's health must occur beyond merely dispensing marijuana to a given customer.

Additionally, if more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. And, in most circumstances the primary caregiver must be at least 18 years of age.

The courts have found that the act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. (*See People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390: "One maintaining a source of marijuana supply, from which all members of the public qualified as permitted medicinal users may or may not discretionarily elect to make purchases, does not thereby become the party 'who has consistently assumed responsibility for the housing, health, or safety' of that purchaser as section 11362.5(e) requires.")

The California Legislature had the opportunity to legalize the existence of dispensaries when setting forth what types of facilities could qualify as "primary caregivers." Those included in the list clearly show the Legislature's intent to restrict the definition to one involving a significant and long-term commitment to the patient's health, safety, and welfare. The only facilities which the Legislature authorized to serve as "primary caregivers" are clinics, health care facilities, residential care facilities, home health agencies, and hospices which actually provide medical care or supportive services to qualified patients. (Cal. H&S Code sec. 11362.7(d)(1).) Any business that cannot prove that its relationship with the patient meets these requirements is not a primary caregiver. Functionally, the business is a drug dealer and is subject to prosecution as such.

4. Cooperatives and Collectives

According to the California Attorney General's recently issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, unless they meet stringent requirements, dispensaries also cannot reasonably claim to be cooperatives or collectives. In passing the Medical Marijuana Program Act, the Legislature sought, in part, to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation programs. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 881.) The Act added section 11362.775, which provides that "Patients and caregivers who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions" for the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana. However, there is no authorization for any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.77(a).) If a dispensary is only a storefront distribution operation open to the general public, and there is no indication that it has been involved with growing or cultivating marijuana for the benefit of members as a non-profit enterprise, it will not qualify as a cooperative to exempt it from criminal penalties under California's marijuana laws.

Further, the common dictionary definition of "collectives" is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; capital investment receives either no return or a limited return; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy, or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[20] Marijuana businesses, of any kind, do not normally meet this legal definition.

Based on the foregoing, it is clear that virtually all marijuana dispensaries are not legal enterprises under either federal or state law.

LAWS IN OTHER STATES

Besides California, at the time of publication of this White Paper, thirteen other states have enacted medical marijuana laws on their books, whereby to some degree marijuana recommended or prescribed by a physician to a specified patient may be legally possessed. These states are Alaska, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. And, possession of marijuana under one ounce has now been decriminalized in Massachusetts.[21]

STOREFRONT MARIJUANA DISPENSARIES AND COOPERATIVES

Since the passage of the Compassionate Use Act of 1996, many storefront marijuana businesses have opened in California.[22] Some are referred to as dispensaries, and some as cooperatives; but it is how they operate that removes them from any umbrella of legal protection. These facilities operate as if they are pharmacies. Most offer different types and grades of marijuana. Some offer baked goods that contain marijuana.[23] Monetary donations are collected from the patient or primary caregiver when marijuana or food items are received. The items are not technically sold since that would be a criminal violation of the statutes.[24] These facilities are able to operate because they apply for and receive business licenses from cities and counties.

Federally, all existing storefront marijuana businesses are subject to search and closure since they violate federal law.[25] Their mere existence violates federal law. Consequently, they have no right to exist or operate, and arguably cities and counties in California have no authority to sanction them.

Similarly, in California there is no apparent authority for the existence of these storefront marijuana businesses. The Medical Marijuana Program Act of 2004 allows *patients* and *primary caregivers* to grow and cultivate marijuana, and no one else.[26] Although California Health and Safety Code section 11362.775 offers some state legal protection for true collectives and cooperatives, no parallel protection exists in the statute for any storefront business providing any narcotic.

The common dictionary definition of collectives is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; *capital investment receives either no return or a limited return*; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[27] Marijuana businesses, of any kind, do not meet this legal definition.

Actual medical dispensaries are commonly defined as offices in hospitals, schools, or other institutions from which medical supplies, preparations, and treatments are dispensed. Hospitals, hospices, home health care agencies, and the like are specifically included in the code as primary caregivers as long as they have "consistently assumed responsibility for the housing, health, or safety" of a patient.[28] Clearly, it is doubtful that any of the storefront marijuana businesses currently existing in California can claim that status. Consequently, they are not primary caregivers and are subject to prosecution under both California and federal laws.

HOW EXISTING DISPENSARIES OPERATE

Despite their clear illegality, some cities do have existing and operational dispensaries. Assuming, *arguendo*, that they may operate, it may be helpful to review the mechanics of the business. The former Green Cross dispensary in San Francisco illustrates how a typical marijuana dispensary works.[29]

A guard or employee may check for medical marijuana cards or physician recommendations at the entrance. Many types and grades of marijuana are usually available. Although employees are neither pharmacists nor doctors, sales clerks will probably make recommendations about what type of marijuana will best relieve a given medical symptom. Baked goods containing marijuana may be available and sold, although there is usually no health permit to sell baked goods. The dispensary will give the patient a form to sign declaring that the dispensary is their "primary caregiver" (a process fraught with legal difficulties). The patient then selects the marijuana desired and is told what the "contribution" will be for the product. The California Health & Safety Code specifically prohibits the sale of marijuana to a patient, so "contributions" are made to reimburse the dispensary for its time and care in making "product" available. However, if a calculation is made based on the available evidence, it is clear that these "contributions" can easily add up to millions of dollars per year. That is a very large cash flow for a "non-profit" organization denying any participation in the retail sale of narcotics. Before its application to renew its business license was denied by the City of San Francisco, there were single days that Green Cross sold $45,000 worth of marijuana. On Saturdays, Green Cross could sell marijuana to forty-three patients an hour. The marijuana sold at the dispensary was obtained from growers who brought it to the store in backpacks. A medium-sized backpack would hold approximately $16,000 worth of marijuana. Green Cross used many different marijuana growers.

It is clear that dispensaries are running as if they are businesses, not legally valid cooperatives. Additionally, they claim to be the "primary caregivers" of patients. This is a spurious claim. As discussed above, the term "primary caregiver" has a very specific meaning and defined legal qualifications. A primary caregiver is an individual who has "consistently assumed responsibility for the housing, health, or safety of a patient." [30] The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. If more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. In most circumstances the primary caregiver must be at least 18 years of age.

It is almost impossible for a storefront marijuana business to gain true primary caregiver status. A business would have to prove that it "**consistently** had assumed responsibility for [a patient's] **housing, health, or safety**."[31] The key to being a primary caregiver is not simply that marijuana is provided for a patient's health: the responsibility for the patient's health must be **consistent**.

As seen in the Green Cross example, a storefront marijuana business's relationship with a patient is most likely transitory. In order to provide a qualified patient with marijuana, a storefront marijuana business must create an instant "primary caregiver" relationship with him. The very fact that the relationship is instant belies any consistency in their relationship and the requirement that housing, health, or safety is consistently provided. Courts have found that a patient's act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. The consistent relationship demanded by the statute is mere fiction if it can be achieved between an individual and a business that functions like a narcotic retail store.

ADVERSE SECONDARY EFFECTS OF MARIJUANA DISPENSARIES AND SIMILIARLY OPERATING COOPERATIVES

Of great concern are the adverse secondary effects of these dispensaries and storefront cooperatives. They are many. Besides flouting federal law by selling a prohibited Schedule I drug under the Controlled Substances Act, marijuana dispensaries attract or cause numerous ancillary social problems as byproducts of their operation. The most glaring of these are other criminal acts.

ANCILLARY CRIMES

A. ARMED ROBBERIES AND MURDERS

Throughout California, many violent crimes have been committed that can be traced to the proliferation of marijuana dispensaries. These include armed robberies and murders. For example, as far back as 2002, two home occupants were shot in Willits, California in the course of a home-invasion robbery targeting medical marijuana.[32] And, a series of four armed robberies of a marijuana dispensary in Santa Barbara, California occurred through August 10, 2006, in which thirty dollars and fifteen baggies filled with marijuana on display were taken by force and removed from the premises in the latest holdup. The owner said he failed to report the first three robberies because "medical marijuana is such a controversial issue." [33]

On February 25, 2004, in Mendocino County two masked thugs committed a home invasion robbery to steal medical marijuana. They held a knife to a 65-year-old man's throat, and though he fought back, managed to get away with large amounts of marijuana. They were soon caught, and one of the men received a sentence of six years in state prison.[34] And, on August 19, 2005, 18-year-old Demarco Lowrey was "shot in the stomach" and "bled to death" during a gunfight with the business owner when he and his friends attempted a takeover robbery of a storefront marijuana business in the City of San Leandro, California. The owner fought back with the hooded home invaders, and a gun battle ensued. Demarco Lowery was hit by gunfire and "dumped outside the emergency entrance of Children's Hospital Oakland" after the shootout.[35] He did not survive.[36]

Near Hayward, California, on September 2, 2005, upon leaving a marijuana dispensary, a patron of the CCA Cannabis Club had a gun put to his head as he was relieved of over $250 worth of pot. Three weeks later, another break-in occurred at the Garden of Eden Cannabis Club in September of 2005.[37]

Another known marijuana-dispensary-related murder occurred on November 19, 2005. Approximately six gun- and bat-wielding burglars broke into Les Crane's home in Laytonville, California while yelling, "This is a raid." Les Crane, who owned two storefront marijuana businesses, was at home and shot to death. He received gunshot wounds to his head, arm, and abdomen.[38] Another man present at the time was beaten with a baseball bat. The murderers left the home after taking an unknown sum of U.S. currency and a stash of processed marijuana.[39]

Then, on January 9, 2007, marijuana plant cultivator Rex Farrance was shot once in the chest and killed in his own home after four masked intruders broke in and demanded money. When the homeowner ran to fetch a firearm, he was shot dead. The robbers escaped with a small amount of cash and handguns. Investigating officers counted 109 marijuana plants in various phases of cultivation inside the house, along with two digital scales and just under 4 pounds of cultivated marijuana.[40]

More recently in Colorado, Ken Gorman, a former gubernatorial candidate and dispenser of marijuana who had been previously robbed over twelve times at his home in Denver, was found murdered by gunshot inside his home. He was a prominent proponent of medical marijuana and the legalization of marijuana.[41]

B. BURGLARIES

In June of 2007, after two burglarizing youths in Bellflower, California were caught by the homeowner trying to steal the fruits of his indoor marijuana grow, he shot one who was running away, and killed him.[42] And, again in January of 2007, Claremont Councilman Corey Calaycay went on record calling marijuana dispensaries "crime magnets" after a burglary occurred in one in Claremont, California.[43]

On July 17, 2006, the El Cerrito City Council voted to ban all such marijuana facilities. It did so after reviewing a nineteen-page report that detailed a rise in crime near these storefront dispensaries in other cities. The crimes included robberies, assaults, burglaries, murders, and attempted murders.[44] Even though marijuana storefront businesses do not currently exist in the City of Monterey Park, California, it issued a moratorium on them after studying the issue in August of 2006.[45] After allowing these establishments to operate within its borders, the City of West Hollywood, California passed a similar moratorium. The moratorium was "prompted by incidents of armed burglary at some of the city's eight existing pot stores and complaints from neighbors about increased pedestrian and vehicle traffic and noise . . . ."[46]

C. TRAFFIC, NOISE, AND DRUG DEALING

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,[47] as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marijuana centers regularly attract marijuana growers, drug users, and drug traffickers.[48] Sharing just purchased marijuana outside dispensaries also regularly takes place.[49]

Rather than the "seriously ill," for whom medical marijuana was expressly intended,[50] "'perfectly healthy' young people frequenting dispensaries" are a much more common sight.[51] Patient records seized by law enforcement officers from dispensaries during raids in San Diego County, California in December of 2005 "showed that 72 percent of patients were between 17 and 40 years old . . . ."[52] Said one admitted marijuana trafficker, "The people I deal with are the same faces I was dealing with 12 years ago but now, because of Senate Bill 420, they are supposedly legit. I can totally see why cops are bummed."[53]

Reportedly, a security guard sold half a pound of marijuana to an undercover officer just outside a dispensary in Morro Bay, California.[54] And, the mere presence of marijuana dispensaries encourages illegal growers to plant, cultivate, and transport ever more marijuana, in order to supply and sell their crops to these storefront operators in the thriving medical marijuana dispensary market, so that the national domestic marijuana yield has been estimated to be 35.8 billion dollars, of which a 13.8 billion dollar share is California grown.[55] It is a big business. And, although the operators of some dispensaries will claim that they only accept monetary contributions for the products they dispense, and do not sell marijuana, a patron will not receive any marijuana until an amount of money acceptable to the dispensary has changed hands.

D. ORGANIZED CRIME, MONEY LAUNDERING, AND FIREARMS VIOLATIONS

Increasingly, reports have been surfacing about organized crime involvement in the ownership and operation of marijuana dispensaries, including Asian and other criminal street gangs and at least one member of the Armenian Mafia.[56] The dispensaries or "pot clubs" are often used as a front by organized crime gangs to traffic in drugs and launder money. One such gang whose territory included San Francisco and Oakland, California reportedly ran a multi-million dollar business operating ten warehouses in which vast amounts of marijuana plants were grown.[57] Besides seizing over 9,000 marijuana plants during surprise raids on this criminal enterprise's storage facilities, federal officers also confiscated three firearms,[58] which seem to go hand in hand with medical marijuana cultivation and dispensaries.[59]

Marijuana storefront businesses have allowed criminals to flourish in California. In the summer of 2007, the City of San Diego cooperated with federal authorities and served search warrants on several marijuana dispensary locations. In addition to marijuana, many weapons were recovered, including a stolen handgun and an M-16 assault rifle.[60] The National Drug Intelligence Center reports that marijuana growers are employing armed guards, using explosive booby traps, and murdering people to shield their crops. Street gangs of all national origins are involved in transporting and distributing marijuana to meet the ever increasing demand for the drug.[61] Active Asian gangs have included members of Vietnamese organized crime syndicates who have migrated from Canada to buy homes throughout the United States to use as grow houses.[62]

Some or all of the processed harvest of marijuana plants nurtured in these homes then wind up at storefront marijuana dispensaries owned and operated by these gangs. Storefront marijuana businesses are very dangerous enterprises that thrive on ancillary grow operations.

Besides fueling marijuana dispensaries, some monetary proceeds from the sale of harvested marijuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal business operations like prostitution, extortion, and drug trafficking.[63] Money from residential grow operations is also sometimes traded by criminal gang members for firearms, and used to buy drugs, personal vehicles, and additional houses for more grow operations,[64] and along with the illegal income derived from large-scale organized crime-related marijuana production operations comes widespread income tax evasion.[65]

E. POISONINGS

Another social problem somewhat unique to marijuana dispensaries is poisonings, both intentional and unintentional. On August 16, 2006, the Los Angeles Police Department received two such reports. One involved a security guard who ate a piece of cake extended to him from an operator of a marijuana clinic as a "gift," and soon afterward felt dizzy and disoriented.[66] The second incident concerned a UPS driver who experienced similar symptoms after accepting and eating a cookie given to him by an operator of a different marijuana clinic.[67]

OTHER ADVERSE SECONDARY IMPACTS IN THE IMMEDIATE VICINITY OF DISPENSARIES

Other adverse secondary impacts from the operation of marijuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marijuana to arriving patrons; marijuana smoking in public and in front of children in the vicinity of dispensaries; loitering and nuisances; acquiring marijuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries; the sale at dispensaries of other illegal drugs besides marijuana; an increase in traffic accidents and driving under the influence arrests in which marijuana is implicated; and the failure of marijuana dispensary operators to report robberies to police.[68]

SECONDARY ADVERSE IMPACTS IN THE COMMUNITY AT LARGE

A. UNJUSTIFIED AND FICTITIOUS PHYSICIAN RECOMMENDATIONS

California's legal requirement under California Health and Safety Code section 11362.5 that a physician's recommendation is required for a patient or caregiver to possess medical marijuana has resulted in other undesirable outcomes: wholesale issuance of recommendations by unscrupulous physicians seeking a quick buck, and the proliferation of forged or fictitious physician recommendations. Some doctors link up with a marijuana dispensary and take up temporary residence in a local hotel room where they advertise their appearance in advance, and pass out medical marijuana use recommendations to a line of "patients" at "about $150 a pop."[69] Other individuals just make up their own phony doctor recommendations,[70] which are seldom, if ever, scrutinized by dispensary employees for authenticity. Undercover DEA agents sporting fake medical marijuana recommendations were readily able to purchase marijuana from a clinic.[71] Far too often, California's medical marijuana law is used as a smokescreen for healthy pot users to get their desired drug, and for proprietors of marijuana dispensaries to make money off them, without suffering any legal repercussions.[72]

On March 11, 2009, the Osteopathic Medical Board of California adopted the proposed decision revoking Dr. Alfonso Jimenez's Osteopathic Physician's and Surgeon's Certificate and ordering him to pay $74,323.39 in cost recovery. Dr. Jimenez operated multiple marijuana clinics and advertised his services extensively on the Internet. Based on information obtained from raids on marijuana dispensaries in San Diego, in May of 2006, the San Diego Police Department ran two undercover operations on Dr. Jimenez's clinic in San Diego. In January of 2007, a second undercover operation was conducted by the Laguna Beach Police Department at Dr. Jimenez's clinic in Orange County. Based on the results of the undercover operations, the Osteopathic Medical Board charged Dr. Jimenez with gross negligence and repeated negligent acts in the treatment of undercover operatives posing as patients. After a six-day hearing, the Administrative Law Judge (ALJ) issued her decision finding that Dr. Jimenez violated the standard of care by committing gross negligence and repeated negligence in care, treatment, and management of patients when he, among other things, issued medical marijuana recommendations to the undercover agents without conducting adequate medical examinations, failed to gain proper informed consent, and failed to consult with any primary care and/or treating physicians or obtain and review prior medical records before issuing medical marijuana recommendations. The ALJ also found Dr. Jimenez engaged in dishonest behavior by preparing false and/or misleading medical records and disseminating false and misleading advertising to the public, including representing himself as a "Cannabis Specialist" and "Qualified Medical Marijuana Examiner" when no such formal specialty or qualification existed. Absent any requested administrative agency reconsideration or petition for court review, the decision was to become effective April 24, 2009.

B. PROLIFERATION OF GROW HOUSES IN RESIDENTIAL AREAS

In recent years the proliferation of grow houses in residential neighborhoods has exploded. This phenomenon is country wide, and ranges from the purchase for purpose of marijuana grow operations of small dwellings to "high priced McMansions . . . ."[73] Mushrooming residential marijuana grow operations have been detected in California, Connecticut, Florida, Georgia, New Hampshire, North Carolina, Ohio, South Carolina, and Texas.[74] In 2007 alone, such illegal operations were detected and shut down by federal and state law enforcement officials in 41 houses in California, 50 homes in Florida, and 11 homes in New Hampshire.[75] Since then, the number of residences discovered to be so impacted has increased exponentially. Part of this recent influx of illicit residential grow operations is because the "THC-rich 'B.C. bud' strain" of marijuana originally produced in British Columbia "can be grown only in controlled indoor environments," and the Canadian market is now reportedly saturated with the product of "competing Canadian gangs," often Asian in composition or outlaw motorcycle gangs like the Hells Angels.[76] Typically, a gutted house can hold about 1,000 plants that will each yield almost half a pound of smokable marijuana; this collectively nets about 500 pounds of usable marijuana per harvest, with an average of three to four harvests per year.[77] With a street value of $3,000 to $5,000 per pound" for high-potency marijuana, and such multiple harvests, "a successful grow house can bring in between $4.5 million and $10 million a year . . . ."[78] The high potency of hydroponically grown marijuana can command a price as much as six times higher than commercial grade marijuana.[79]

C. LIFE SAFETY HAZARDS CREATED BY GROW HOUSES

In Humboldt County, California, structure fires caused by unsafe indoor marijuana grow operations have become commonplace. The city of Arcata, which sports four marijuana dispensaries, was the site of a house fire in which a fan had fallen over and ignited a fire; it had been turned into a grow house by its tenant. Per Arcata Police Chief Randy Mendosa, altered and makeshift "no code" electrical service connections and overloaded wires used to operate high-powered grow lights and fans are common causes of the fires. Large indoor marijuana growing operations can create such excessive draws of electricity that PG&E power pole transformers are commonly blown. An average 1,500-square-foot tract house used for growing marijuana can generate monthly electrical bills from $1,000 to $3,000 per month. From an environmental standpoint, the carbon footprint from greenhouse gas emissions created by large indoor marijuana grow operations should be a major concern for every community in terms of complying with Air Board AB-32 regulations, as well as other greenhouse gas reduction policies. Typically, air vents are cut into roofs, water seeps into carpeting, windows are blacked out, holes are cut in floors, wiring is jury-rigged, and electrical circuits are overloaded to operate grow lights and other apparatus. When fires start, they spread quickly.

The May 31, 2008 edition of the *Los Angeles Times* reported, "Law enforcement officials estimate that as many as 1,000 of the 7,500 homes in this Humboldt County community are being used to cultivate marijuana, slashing into the housing stock, spreading building-safety problems and sowing neighborhood discord." Not surprisingly, in this bastion of liberal pot possession rules that authorized the cultivation of up to 99 plants for medicinal purpose, most structural fires in the community of Arcata have been of late associated with marijuana cultivation.[80] Chief of Police Mendosa clarified that the actual number of marijuana grow houses in Arcata has been an ongoing subject of public debate. Mendosa added, "We know there are numerous grow houses in almost every neighborhood in and around the city, which has been the source of constant citizen complaints." House fires caused by grower-installed makeshift electrical wiring or tipped electrical fans are now endemic to Humboldt County.[81]

Chief Mendosa also observed that since marijuana has an illicit street value of up to $3,000 per pound, marijuana grow houses have been susceptible to violent armed home invasion robberies. Large-scale marijuana grow houses have removed significant numbers of affordable houses from the residential rental market. When property owners discover their rentals are being used as grow houses, the residences are often left with major structural damage, which includes air vents cut into roofs and floors, water damage to floors and walls, and mold. The June 9, 2008 edition of the *New York Times* shows an unidentified Arcata man tending his indoor grow; the man claimed he can make $25,000 every three months by selling marijuana grown in the bedroom of his rented house.[82] Claims of ostensible medical marijuana growing pursuant to California's medical marijuana laws are being advanced as a mostly false shield in an attempt to justify such illicit operations.

Neither is fire an uncommon occurrence at grow houses elsewhere across the nation. Another occurred not long ago in Holiday, Florida.[83] To compound matters further, escape routes for firefighters are often obstructed by blocked windows in grow houses, electric wiring is tampered with to steal electricity, and some residences are even booby-trapped to discourage and repel unwanted intruders.[84]

D. INCREASED ORGANIZED GANG ACTIVITIES

Along with marijuana dispensaries and the grow operations to support them come members of organized criminal gangs to operate and profit from them. Members of an ethnic Chinese drug gang were discovered to have operated 50 indoor grow operations in the San Francisco Bay area, while Cuban-American crime organizations have been found to be operating grow houses in Florida and elsewhere in the South. A Vietnamese drug ring was caught operating 19 grow houses in Seattle and Puget Sound, Washington.[85] In July of 2008, over 55 Asian gang members were indicted for narcotics trafficking in marijuana and ecstasy, including members of the Hop Sing Gang that had been actively operating marijuana grow operations in Elk Grove and elsewhere in the vicinity of Sacramento, California.[86]

E. EXPOSURE OF MINORS TO MARIJUANA

Minors who are exposed to marijuana at dispensaries or residences where marijuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it. In grow houses, children are exposed to dangerous fire and health conditions that are inherent in indoor grow operations.[87] Dispensaries also sell marijuana to minors.[88]

F. IMPAIRED PUBLIC HEALTH

Indoor marijuana grow operations emit a skunk-like odor,[89] and foster generally unhealthy conditions like allowing chemicals and fertilizers to be placed in the open, an increased carbon dioxide level within the grow house, and the accumulation of mold, [90] all of which are dangerous to any children or adults who may be living in the residence,[91] although many grow houses are uninhabited.

G. LOSS OF BUSINESS TAX REVENUE

When business suffers as a result of shoppers staying away on account of traffic, blight, crime, and the undesirability of a particular business district known to be frequented by drug users and traffickers, and organized criminal gang members, a city's tax revenues necessarily drop as a direct consequence.

H. DECREASED QUALITY OF LIFE IN DETERIORATING NEIGHBORHOODS, BOTH BUSINESS AND RESIDENTIAL

Marijuana dispensaries bring in the criminal element and loiterers, which in turn scare off potential business patrons of nearby legitimate businesses, causing loss of revenues and deterioration of the affected business district. Likewise, empty homes used as grow houses emit noxious odors in residential neighborhoods, project irritating sounds of whirring fans,[92] and promote the din of vehicles coming and going at all hours of the day and night. Near harvest time, rival growers and other uninvited enterprising criminals sometimes invade grow houses to beat "clip crews" to the site and rip off mature plants ready for harvesting. As a result, violence often erupts from confrontations in the affected residential neighborhood.[93]

ULTIMATE CONCLUSIONS REGARDING ADVERSE SECONDARY EFFECTS

On balance, any utility to medical marijuana patients in care giving and convenience that marijuana dispensaries may appear to have on the surface is enormously outweighed by a much darker reality that is punctuated by the many adverse secondary effects created by their presence in communities, recounted here. These drug distribution centers have even proven to be unsafe for their own proprietors.

POSSIBLE LOCAL GOVERNMENTAL RESPONSES TO MARIJUANA DISPENSARIES

A. IMPOSED MORATORIA BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While in the process of investigating and researching the issue of licensing marijuana dispensaries, as an interim measure city councils may enact date-specific moratoria that expressly prohibit the presence of marijuana dispensaries, whether for medical use or otherwise, and prohibiting the sale of marijuana in any form on such premises, anywhere within the incorporated boundaries of the city until a specified date. Before such a moratorium's date of expiration, the moratorium may then either be extended or a city ordinance enacted completely prohibiting or otherwise restricting the establishment and operation of marijuana dispensaries, and the sale of all marijuana products on such premises.

County supervisors can do the same with respect to marijuana dispensaries sought to be established within the unincorporated areas of a county. Approximately 80 California cities, including the cities of Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill, and 6 counties, including Contra Costa County, have enacted moratoria banning the existence of marijuana dispensaries. In a novel approach, the City of Arcata issued a moratorium on any new dispensaries in the downtown area, based on no agricultural activities being permitted to occur there.[94]

B. IMPOSED BANS BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While the Compassionate Use Act of 1996 permits seriously ill persons to legally obtain and use marijuana for medical purposes upon a physician's recommendation, it is silent on marijuana dispensaries and does not expressly authorize the sale of marijuana to patients or primary caregivers.

Neither Proposition 215 nor Senate Bill 420 specifically authorizes the dispensing of marijuana in any form from a storefront business. And, no state statute presently exists that expressly permits the licensing or operation of marijuana dispensaries.[95] Consequently, approximately 39 California cities, including the Cities of Concord and San Pablo, and 2 counties have prohibited marijuana dispensaries within their respective geographical boundaries, while approximately 24 cities, including the City of Martinez, and 7 counties have allowed such dispensaries to do business within their jurisdictions. Even the complete prohibition of marijuana dispensaries within a given locale cannot be found to run afoul of current California law with respect to permitted use of marijuana for medicinal purposes, so long as the growing or use of medical marijuana by a city or county resident in conformance with state law is not proscribed.[96]

In November of 2004, the City of Brampton in Ontario, Canada passed The Grow House Abatement By-law, which authorized the city council to appoint inspectors and local police officers to inspect suspected grow houses and render safe hydro meters, unsafe wiring, booby traps, and any violation of the Fire Code or Building Code, and remove discovered controlled substances and ancillary equipment designed to grow and manufacture such substances, at the involved homeowner's cost.[97] And, after state legislators became appalled at the proliferation of for-profit residential grow operations, the State of Florida passed the Marijuana Grow House Eradication act (House Bill 173) in June of 2008. The governor signed this bill into law, making owning a house for the purpose of cultivating, packaging, and distributing marijuana a third-degree felony; growing 25 or more marijuana plants a second-degree felony; and growing "25 or more marijuana plants in a home with children present" a first-degree felony.[98] It has been estimated that approximately 17,500 marijuana grow operations were active in late 2007.[99] To avoid becoming a dumping ground for organized crime syndicates who decide to move their illegal grow operations to a more receptive legislative environment, California and other states might be wise to quickly follow suit with similar bills, for it may already be happening.[100]

C. IMPOSED RESTRICTED ZONING AND OTHER REGULATION BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

If so inclined, rather than completely prohibit marijuana dispensaries, through their zoning power city and county officials have the authority to restrict owner operators to locate and operate so-called "medical marijuana dispensaries" in prescribed geographical areas of a city or designated unincorporated areas of a county, and require them to meet prescribed licensing requirements before being allowed to do so. This is a risky course of action though for would-be dispensary operators, and perhaps lawmakers too, since federal authorities do not recognize any lawful right for the sale, purchase, or use of marijuana for medical use or otherwise anywhere in the United States, including California. Other cities and counties have included as a condition of licensure for dispensaries that the operator shall "violate no federal or state law," which puts any applicant in a "Catch-22" situation since to federal authorities any possession or sale of marijuana is automatically a violation of federal law.

Still other municipalities have recently enacted or revised comprehensive ordinances that address a variety of medical marijuana issues. For example, according to the City of Arcata Community

Development Department in Arcata, California, in response to constant citizen complaints from what had become an extremely serious community problem, the Arcata City Council revised its Land Use Standards for Medical Marijuana Cultivation and Dispensing. In December of 2008, City of Arcata Ordinance #1382 was enacted. It includes the following provisions:

"**Categories:**
1. Personal Use
2. Cooperatives or Collectives

Medical Marijuana for Personal Use: An individual qualified patient shall be allowed to cultivate medical marijuana within his/her private residence in conformance with the following standards:

1. Cultivation area shall not exceed 50 square feet and not exceed ten feet (10') in height.
    - a. Cultivation lighting shall not exceed 1200 watts;
    - b. Gas products (CO_2, butane, etc.) for medical marijuana cultivation or processing is prohibited.
    - c. Cultivation and sale is prohibited as a Home Occupation (sale or dispensing is prohibited).
    - d. Qualified patient shall reside in the residence where the medical marijuana cultivation occurs;
    - e. Qualified patient shall not participate in medical marijuana cultivation in any other residence.
    - f. Residence kitchen, bathrooms, and primary bedrooms shall not be used primarily for medical marijuana cultivation;
    - g. Cultivation area shall comply with the California Building Code § 1203.4 Natural Ventilation or § 402.3 Mechanical Ventilation.
    - h. The medical marijuana cultivation area shall not adversely affect the health or safety of the nearby residents.
2. City Zoning Administrator my approve up to 100 square foot:
    - a. Documentation showing why the 50 square foot cultivation area standard is not feasible.
    - b. Include written permission from the property owner.
    - c. City Building Official must inspect for California Building Code and Fire Code.
    - d. At a minimum, the medical marijuana cultivation area shall be constructed with a 1-hour firewall assembly of green board.
    - e. Cultivation of medical marijuana for personal use is limited to detached single family residential properties, or the medical marijuana cultivation area shall be limited to a garage or self-contained outside accessory building that is secured, locked, and fully enclosed.

Medical Marijuana Cooperatives or Collectives.

1. Allowed with a Conditional Use Permit.
2. In Commercial, Industrial, and Public Facility Zoning Districts.
3. Business form must be a cooperative or collective.
4. Existing cooperative or collective shall be in full compliance within one year.
5. Total number of medical marijuana cooperatives or collectives is limited to four and ultimately two.
6. Special consideration if located within
    - a. A 300 foot radius from any existing residential zoning district,
    - b. Within 500 feet of any other medical marijuana cooperative or collective.

c. Within 500 feet from any existing public park, playground, day care, or school.

7. Source of medical marijuana.
   a. Permitted Cooperative or Collective. On-site medical marijuana cultivation shall not exceed twenty-five (25) percent of the total floor area, but in no case greater than 1,500 square feet and not exceed ten feet (10') in height.
   b. Off-site Permitted Cultivation. Use Permit application and be updated annually.
   c. Qualified Patients. Medical marijuana acquired from an individual qualified patient shall received no monetary remittance, and the qualified patient is a member of the medical marijuana cooperative or collective. Collective or cooperative may credit its members for medical marijuana provided to the collective or cooperative, which they may allocate to other members.

8. Operations Manual at a minimum include the following information:
   a. Staff screening process including appropriate background checks.
   b. Operating hours.
   c. Site, floor plan of the facility.
   d. Security measures located on the premises, including but not limited to, lighting, alarms, and automatic law enforcement notification.
   e. Screening, registration and validation process for qualified patients.
   f. Qualified patient records acquisition and retention procedures.
   g. Process for tracking medical marijuana quantities and inventory controls including on-site cultivation, processing, and/or medical marijuana products received from outside sources.
   h. Measures taken to minimize or offset energy use from the cultivation or processing of medical marijuana.
   i. Chemicals stored, used and any effluent discharged into the City's wastewater and/or storm water system.

9. Operating Standards.
   a. No dispensing medical marijuana more than twice a day.
   b. Dispense to an individual qualified patient who has a valid, verified physician's recommendation. The medical marijuana cooperative or collective shall verify that the physician's recommendation is current and valid.
   c. Display the client rules and/or regulations at each building entrance.
   d. Smoking, ingesting or consuming medical marijuana on the premises or in the vicinity is prohibited.
   e. Persons under the age of eighteen (18) are precluded from entering the premises.
   f. No on-site display of marijuana plants.
   g. No distribution of live plants, starts and clones on through Use Permit.
   h. Permit the on-site display or sale of marijuana paraphernalia only through the Use Permit.
   i. Maintain all necessary permits, and pay all appropriate taxes. Medical marijuana cooperatives or collectives shall also provide invoices to vendors to ensure vendor's tax liability responsibility;
   j. Submit an "Annual Performance Review Report" which is intended to identify effectiveness of the approved Use Permit, Operations Manual, and Conditions of Approval, as well as the identification and implementation of additional procedures as deemed necessary.
   k. Monitoring review fees shall accompany the "Annual Performance Review Report" for costs associated with the review and approval of the report.

10. Permit Revocation or Modification. A use permit may be revoked or modified for non-compliance with one or more of the items described above."

LIABILITY ISSUES

With respect to issuing business licenses to marijuana storefront facilities a very real issue has arisen: counties and cities are arguably aiding and abetting criminal violations of federal law. Such actions clearly put the counties permitting these establishments in very precarious legal positions. Aiding and abetting a crime occurs when someone commits a crime, the person aiding that crime knew the criminal offender intended to commit the crime, and the person aiding the crime intended to assist the criminal offender in the commission of the crime.

The legal definition of aiding and abetting could be applied to counties and cities allowing marijuana facilities to open. A county that has been informed about the *Gonzales v. Raich* decision knows that all marijuana activity is federally illegal. Furthermore, such counties know that individuals involved in the marijuana business are subject to federal prosecution. When an individual in California cultivates, possesses, transports, or uses marijuana, he or she is committing a federal crime.

A county issuing a business license to a marijuana facility knows that the people there are committing federal crimes. The county also knows that those involved in providing and obtaining marijuana are intentionally violating federal law.

This very problem is why some counties are re-thinking the presence of marijuana facilities in their communities. There is a valid fear of being prosecuted for aiding and abetting federal drug crimes. Presently, two counties have expressed concern that California's medical marijuana statutes have placed them in such a precarious legal position. Because of the serious criminal ramifications involved in issuing business permits and allowing storefront marijuana businesses to operate within their borders, San Diego and San Bernardino Counties filed consolidated lawsuits against the state seeking to prevent the State of California from enforcing its medical marijuana statutes which potentially subject them to criminal liability, and squarely asserting that California medical marijuana laws are preempted by federal law in this area. After California's medical marijuana laws were all upheld at the trial level, California's Fourth District Court of Appeal found that the State of California could mandate counties to adopt and enforce a voluntary medical marijuana identification card system, and the appellate court bypassed the preemption issue by finding that San Diego and San Bernardino Counties lacked standing to raise this challenge to California's medical marijuana laws. Following this state appellate court decision, independent petitions for review filed by the two counties were both denied by the California Supreme Court.

Largely because of the quandary that county and city peace officers in California face in the field when confronted with alleged medical marijuana with respect to enforcement of the total federal criminal prohibition of all marijuana, and state exemption from criminal penalties for medical marijuana users and caregivers, petitions for a writ of certiorari were then separately filed by the two counties seeking review of this decision by the United States Supreme Court in the consolidated cases of *County of San Diego, County of San Bernardino, and Gary Penrod, as Sheriff of the County of San Bernardino v. San Diego Norml, State of California, and Sandra Shewry, Director of the California Department of Health Services in her official capacity*, Ct.App. Case No. D-5-333.) The High Court has requested the State of California and other interested parties to file responsive briefs to the two counties' and Sheriff Penrod's writ petitions before it decides whether to grant or deny review of these consolidated cases. The petitioners would then be entitled to file a reply to any filed response. It is anticipated that the U.S. Supreme Court will formally grant or deny review of these consolidated cases in late April or early May of 2009.

In another case, *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, although the federal preemption issue was not squarely raised or addressed in its decision, California's Fourth District Court of Appeal found that public policy considerations allowed a city standing to challenge a state trial court's order directing the return by a city police department of seized medical marijuana to a person determined to be a patient. After the court-ordered return of this federally banned substance was upheld at the intermediate appellate level, and not accepted for review by the California Supreme Court, a petition for a writ of certiorari was filed by the City of Garden Grove to the U.S. Supreme Court to consider and reverse the state appellate court decision. But, that petition was also denied. However, the case of *People v. Kelly* (2008) 163 Cal.App.4th 124—in which a successful challenge was made to California's Medical Marijuana Program's maximum amounts of marijuana and marijuana plants permitted to be possessed by medical marijuana patients (Cal. H&S Code sec. 11362.77 *et seq.*), which limits were found at the court of appeal level to be without legal authority for the state to impose—has been accepted for review by the California Supreme Court on the issue of whether this law was an improper amendment to Proposition 215's Compassionate Use Act of 1996.

A SAMPLING OF EXPERIENCES WITH MARIJUANA DISPENSARIES

1. MARIJUANA DISPENSARIES-THE SAN DIEGO STORY

After the passage of Proposition 215 in 1996, law enforcement agency representatives in San Diego, California met many times to formulate a comprehensive strategy of how to deal with cases that may arise out of the new law. In the end it was decided to handle the matters on a case-by-case basis. In addition, questionnaires were developed for patient, caregiver, and physician interviews. At times patients without sales indicia but large grows were interviewed and their medical records reviewed in making issuing decisions. In other cases where sales indicia and amounts supported a finding of sales the cases were pursued. At most, two cases a month were brought for felony prosecution.

In 2003, San Diego County's newly elected District Attorney publicly supported Prop. 215 and wanted her newly created Narcotics Division to design procedures to ensure patients were not caught up in case prosecutions. As many already know, law enforcement officers rarely arrest or seek prosecution of a patient who merely possesses personal use amounts. Rather, it is those who have sales amounts in product or cultivation who are prosecuted. For the next two years the District Attorney's Office proceeded as it had before. But, on the cases where the patient had too many plants or product but not much else to show sales—the DDAs assigned to review the case would interview and listen to input to respect the patient's and the DA's position. Some cases were rejected and others issued but the case disposition was often generous and reflected a "sin no more" view.

All of this changed after the passage of SB 420. The activists and pro-marijuana folks started to push the envelope. Dispensaries began to open for business and physicians started to advertise their availability to issue recommendations for the purchase of medical marijuana. By spring of 2005 the first couple of dispensaries opened up—but they were discrete. This would soon change. By that summer, 7 to 10 dispensaries were open for business, and they were selling marijuana openly. In fact, the local police department was doing a small buy/walk project and one of its target dealers said he was out of pot but would go get some from the dispensary to sell to the undercover officer (UC); he did. It was the proliferation of dispensaries and ancillary crimes that prompted the San Diego Police Chief (the Chief was a Prop. 215 supporter who sparred with the Fresno DEA in his prior job over this issue) to authorize his officers to assist DEA.

The Investigation

San Diego DEA and its local task force (NTF) sought assistance from the DA's Office as well as the U.S. Attorney's Office. Though empathetic about being willing to assist, the DA's Office was not sure how prosecutions would fare under the provisions of SB 420. The U.S. Attorney had the easier road but was noncommittal. After several meetings it was decided that law enforcement would work on using undercover operatives (UCs) to buy, so law enforcement could see exactly what was happening in the dispensaries.

The investigation was initiated in December of 2005, after NTF received numerous citizen complaints regarding the crime and traffic associated with "medical marijuana dispensaries." The City of San Diego also saw an increase in crime related to the marijuana dispensaries. By then approximately 20 marijuana dispensaries had opened and were operating in San Diego County, and investigations on 15 of these dispensaries were initiated.

During the investigation, NTF learned that all of the business owners were involved in the transportation and distribution of large quantities of marijuana, marijuana derivatives, and marijuana food products. In addition, several owners were involved in the cultivation of high grade marijuana. The business owners were making significant profits from the sale of these products and not properly reporting this income.

Undercover Task Force Officers (TFO's) and SDPD Detectives were utilized to purchase marijuana and marijuana food products from these businesses. In December of 2005, thirteen state search warrants were executed at businesses and residences of several owners. Two additional follow-up search warrants and a consent search were executed the same day. Approximately 977 marijuana plants from seven indoor marijuana grows, 564.88 kilograms of marijuana and marijuana food products, one gun, and over $58,000 U.S. currency were seized. There were six arrests made during the execution of these search warrants for various violations, including outstanding warrants, possession of marijuana for sale, possession of psilocybin mushrooms, obstructing a police officer, and weapons violations. However, the owners and clerks were not arrested or prosecuted at this time—just those who showed up with weapons or product to sell.

Given the fact most owners could claim mistake of law as to selling (though not a legitimate defense, it could be a jury nullification defense) the DA's Office decided not to file cases at that time. It was hoped that the dispensaries would feel San Diego was hostile ground and they would do business elsewhere. Unfortunately this was not the case. Over the next few months seven of the previously targeted dispensaries opened, as well as a slew of others. Clearly prosecutions would be necessary.

To gear up for the re-opened and new dispensaries prosecutors reviewed the evidence and sought a second round of UC buys wherein the UC would be buying for themselves and they would have a second UC present at the time acting as UC1's caregiver who also would buy. This was designed to show the dispensary was not the caregiver. There is no authority in the law for organizations to act as primary caregivers. Caregivers must be individuals who care for a marijuana patient. A primary caregiver is defined by Proposition 215, as codified in H&S Code section 11362.5(e), as, "For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." The goal was to show that the stores were only selling marijuana, and not providing care for the hundreds who bought from them.

In addition to the caregiver-controlled buys, another aim was to put the whole matter in perspective for the media and the public by going over the data that was found in the raided dispensary records, as well as the crime statistics. An analysis of the December 2005 dispensary records showed a breakdown of the purported illness and youthful nature of the patients. The charts and other PR aspects played out after the second take down in July of 2006.

The final attack was to reveal the doctors (the gatekeepers for medical marijuana) for the fraud they were committing. UCs from the local PD went in and taped the encounters to show that the pot docs did not examine the patients and did not render care at all; rather they merely sold a medical MJ recommendation whose duration depended upon the amount of money paid.

In April of 2006, two state and two federal search warrants were executed at a residence and storage warehouse utilized to cultivate marijuana. Approximately 347 marijuana plants, over 21 kilograms of marijuana, and $2,855 U.S. currency were seized.

Due to the pressure from the public, the United States Attorney's Office agreed to prosecute the owners of the businesses with large indoor marijuana grows and believed to be involved in money laundering activities. The District Attorney's Office agreed to prosecute the owners in the other investigations.

In June of 2006, a Federal Grand Jury indicted six owners for violations of Title 21 USC, sections 846 and 841(a)(1), Conspiracy to Distribute Marijuana; sections 846 and 841(a), Conspiracy to Manufacture Marijuana; and Title 18 USC, Section 2, Aiding and Abetting.

In July of 2006, 11 state and 11 federal search warrants were executed at businesses and residences associated with members of these businesses. The execution of these search warrants resulted in the arrest of 19 people, seizure of over $190,000 in U.S. currency and other assets, four handguns, one rifle, 405 marijuana plants from seven grows, and over 329 kilograms of marijuana and marijuana food products.

Following the search warrants, two businesses reopened. An additional search warrant and consent search were executed at these respective locations. Approximately 20 kilograms of marijuana and 32 marijuana plants were seized.

As a result, all but two of the individuals arrested on state charges have pled guilty. Several have already been sentenced and a few are still awaiting sentencing. All of the individuals indicted federally have also pled guilty and are awaiting sentencing.

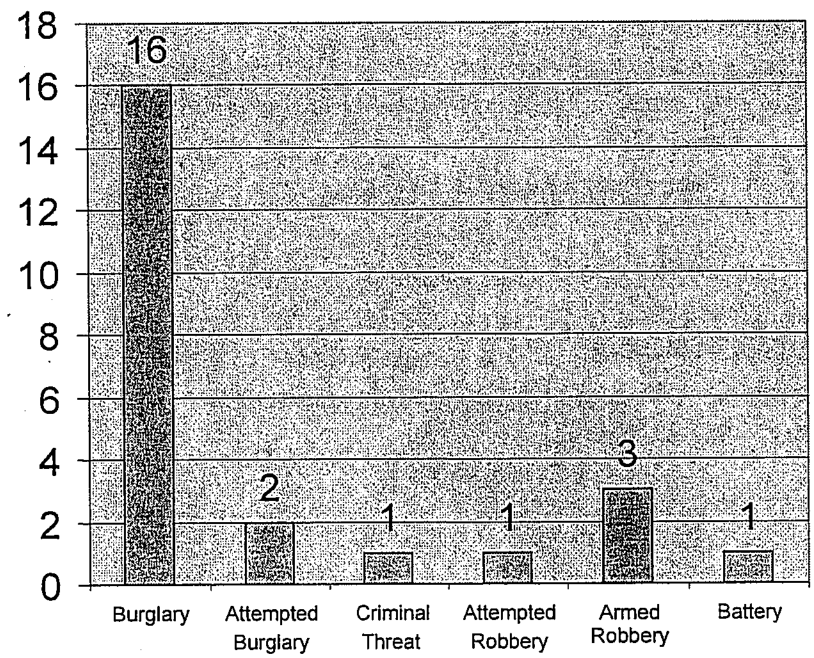
After the July 2006 search warrants a joint press conference was held with the U.S. Attorney and District Attorney, during which copies of a complaint to the medical board, photos of the food products which were marketed to children, and the charts shown below were provided to the media.

Directly after these several combined actions, there were no marijuana distribution businesses operating in San Diego County. Law enforcement agencies in the San Diego region have been able to successfully dismantle these businesses and prosecute the owners. As a result, medical marijuana advocates have staged a number of protests demanding DEA allow the distribution of marijuana. The closure of these businesses has reduced crime in the surrounding areas.

The execution of search warrants at these businesses sent a powerful message to other individuals operating marijuana distribution businesses that they are in violation of both federal law **and** California law.

Press Materials:

Reported Crime at Marijuana Dispensaries
From January 1, 2005 through June 23, 2006



Information showing the dispensaries attracted crime:

The marijuana dispensaries were targets of violent crimes because of the amount of marijuana, currency, and other contraband stored inside the businesses. From January 1, 2005 through June 23, 2006, 24 violent crimes were reported at marijuana dispensaries. An analysis of financial records seized from the marijuana dispensaries showed several dispensaries were grossing over $300,000 per month from selling marijuana and marijuana food products. The majority of customers purchased marijuana with cash.

Crime statistics inadequately reflect the actual number of crimes committed at the marijuana dispensaries. These businesses were often victims of robberies and burglaries, but did not report the crimes to law enforcement on account of fear of being arrested for possession of marijuana in excess of Prop. 215 guidelines. NTF and the San Diego Police Department (SDPD) received numerous citizen complaints regarding every dispensary operating in San Diego County.

Because the complaints were received by various individuals, the exact number of complaints was not recorded. The following were typical complaints received:

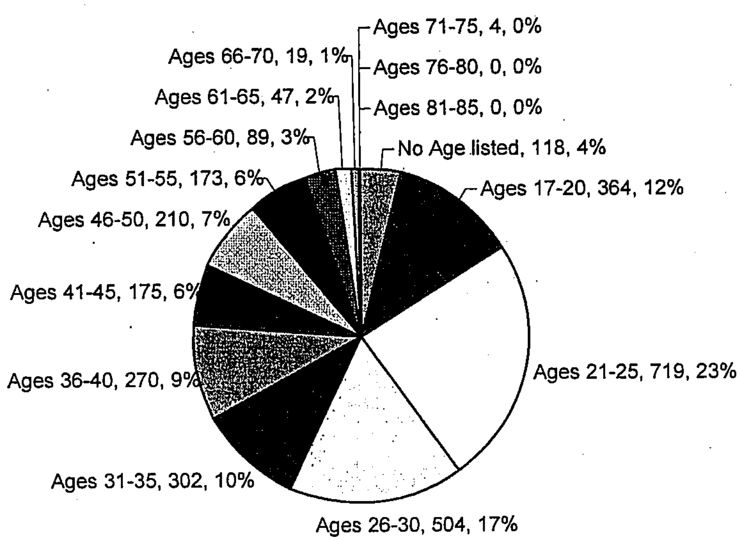
- high levels of traffic going to and from the dispensaries
- people loitering in the parking lot of the dispensaries
- people smoking marijuana in the parking lot of the dispensaries

- vandalism near dispensaries
- threats made by dispensary employees to employees of other businesses
- citizens worried they may become a victim of crime because of their proximity to dispensaries

In addition, the following observations (from citizen activists assisting in data gathering) were made about the marijuana dispensaries:

- Identification was not requested for individuals who looked under age 18
- Entrance to business was not refused because of lack of identification
- Individuals were observed loitering in the parking lots
- Child-oriented businesses and recreational areas were situated nearby
- Some businesses made no attempt to verify a submitted physician's recommendation

Dispensary Patients By Age



An analysis of patient records seized during search warrants at several dispensaries show that 52% of the customers purchasing marijuana were between the ages of 17 to 30. 63% of primary caregivers purchasing marijuana were between the ages of 18 through 30. Only 2.05% of customers submitted a physician's recommendation for AIDS, glaucoma, or cancer.

Why these businesses were deemed to be criminal--not compassionate:

The medical marijuana businesses were deemed to be criminal enterprises for the following reasons:

- Many of the business owners had histories of drug and violence-related arrests.
- The business owners were street-level marijuana dealers who took advantage of Prop. 215 in an attempt to legitimize marijuana sales for profit.
- Records, or lack of records, seized during the search warrants showed that all the owners were not properly reporting income generated from the sales of marijuana. Many owners were involved in money laundering and tax evasion.
- The businesses were selling to individuals without serious medical conditions.
- There are no guidelines on the amount of marijuana which can be sold to an individual. For

example, an individual with a physician's recommendation can go to as many marijuana distribution businesses and purchase as much marijuana as he/she wants.

- California law allows an individual to possess 6 mature or 12 immature plants per qualified person. However, the San Diego Municipal Code states a "caregiver" can only provide care to 4 people, including themselves; this translates to 24 mature or 48 immature plants total. Many of these dispensaries are operating large marijuana grows with far more plants than allowed under law. Several of the dispensaries had indoor marijuana grows inside the businesses, with mature and/or immature marijuana plants over the limits.
- State law allows a qualified patient or primary caregiver to possess no more than eight ounces of dried marijuana per qualified patient. However, the San Diego Municipal Code allows primary caregivers to possess no more than two pounds of processed marijuana. Under either law, almost every marijuana dispensary had over two pounds of processed marijuana during the execution of the search warrants.
- Some marijuana dispensaries force customers to sign forms designating the business as their primary caregiver, in an attempt to circumvent the law.

2. EXPERIENCES WITH MARIJUANA DISPENSARIES IN RIVERSIDE COUNTY

There were some marijuana dispensaries operating in the County of Riverside until the District Attorney's Office took a very aggressive stance in closing them. In Riverside, anyone that is not a "qualified patient" or "primary caregiver" under the Medical Marijuana Program Act who possesses, sells, or transports marijuana is being prosecuted.

Several dispensary closures illustrate the impact this position has had on marijuana dispensaries. For instance, the Palm Springs Caregivers dispensary (also known as Palm Springs Safe Access Collective) was searched after a warrant was issued. All materials inside were seized, and it was closed down and remains closed. The California Caregivers Association was located in downtown Riverside. Very shortly after it opened, it was also searched pursuant to a warrant and shut down. The CannaHelp dispensary was located in Palm Desert. It was searched and closed down early in 2007. The owner and two managers were then prosecuted for marijuana sales and possession of marijuana for the purpose of sale. However, a judge granted their motion to quash the search warrant and dismissed the charges. The District Attorney's Office then appealed to the Fourth District Court of Appeal. Presently, the Office is waiting for oral arguments to be scheduled.

Dispensaries in the county have also been closed by court order. The Healing Nations Collective was located in Corona. The owner lied about the nature of the business in his application for a license. The city pursued and obtained an injunction that required the business to close. The owner appealed to the Fourth District Court of Appeal, which ruled against him. (*City of Corona v. Ronald Naulls et al.*, Case No. E042772.)

3. MEDICAL MARIJUANA DISPENSARY ISSUES IN CONTRA COSTA COUNTY CITIES AND IN OTHER BAY AREA COUNTIES

Several cities in Contra Costa County, California have addressed this issue by either banning dispensaries, enacting moratoria against them, regulating them, or taking a position that they are simply not a permitted land use because they violate federal law. Richmond, El Cerrito, San Pablo, Hercules, and Concord have adopted permanent ordinances banning the establishment of marijuana dispensaries. Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill have imposed moratoria against dispensaries. Clayton, San Ramon, and Walnut Creek have not taken any formal action regarding the establishment of marijuana dispensaries but have indicated that marijuana dispensaries are not a permitted use in any of their zoning districts as a violation of federal law. Martinez has adopted a permanent ordinance regulating the establishment of marijuana dispensaries.

The Counties of Alameda, Santa Clara, and San Francisco have enacted permanent ordinances regulating the establishment of marijuana dispensaries. The Counties of Solano, Napa, and Marin have enacted neither regulations nor bans. A brief overview of the regulations enacted in neighboring counties follows.

A. Alameda County

Alameda County has a nineteen-page regulatory scheme which allows the operation of three permitted dispensaries in unincorporated portions of the county. Dispensaries can only be located in commercial or industrial zones, or their equivalent, and may not be located within 1,000 feet of other dispensaries, schools, parks, playgrounds, drug recovery facilities, or recreation centers. Permit issuance is controlled by the Sheriff, who is required to work with the Community Development Agency and the Health Care Services agency to establish operating conditions for each applicant prior to final selection. Adverse decisions can be appealed to the Sheriff and are ruled upon by the same panel responsible for setting operating conditions. That panel's decision may be appealed to the Board of Supervisors, whose decision is final (subject to writ review in the Superior Court per CCP sec. 1094.5). Persons violating provisions of the ordinance are guilty of a misdemeanor.

B. Santa Clara County

In November of 1998, Santa Clara County passed an ordinance permitting dispensaries to exist in unincorporated portions of the county with permits first sought and obtained from the Department of Public Health. In spite of this regulation, neither the County Counsel nor the District Attorney's Drug Unit Supervisor believes that Santa Clara County has had *any* marijuana dispensaries in operation at least through 2006.

The only permitted activities are the on-site cultivation of medical marijuana and the distribution of medical marijuana/medical marijuana food stuffs. No retail sales of any products are permitted at the dispensary. Smoking, ingestion or consumption is also prohibited on site. All doctor recommendations for medical marijuana must be verified by the County's Public Health Department.

C. San Francisco County

In December of 2001, the Board of Supervisors passed Resolution No. 012006, declaring San Francisco to be a "Sanctuary for Medical Cannabis." City voters passed Proposition S in 2002, directing the city to explore the possibility of establishing a medical marijuana cultivation and distribution program run by the city itself.

San Francisco dispensaries must apply for and receive a permit from the Department of Public Health. They may only operate as a collective or cooperative, as defined by California Health and Safety Code section 11362.7 (see discussion in section 4, under "California Law" above), and may only sell or distribute marijuana to members. Cultivation, smoking, and making and selling food products may be allowed. Permit applications are referred to the Departments of Planning, Building Inspection, and Police. Criminal background checks are required but exemptions could still allow the operation of dispensaries by individuals with prior convictions for violent felonies or who have had prior permits suspended or revoked. Adverse decisions can be appealed to the Director of

Public Health and the Board of Appeals. It is unclear how many dispensaries are operating in the city at this time.

D. Crime Rates in the Vicinity of MariCare

Sheriff's data have been compiled for "Calls for Service" within a half-mile radius of 127 Aspen Drive, Pacheco. However, in research conducted by the El Cerrito Police Department and relied upon by Riverside County in recently enacting its ban on dispensaries, it was recognized that not all crimes related to medical marijuana take place in or around a dispensary. Some take place at the homes of the owners, employees, or patrons. Therefore, these statistics cannot paint a complete picture of the impact a marijuana dispensary has had on crime rates.

The statistics show that the overall number of calls decreased (3,746 in 2005 versus 3,260 in 2006). However, there have been **increases** in the numbers of crimes which appear to be related to a business which is an attraction to a criminal element. Reports of commercial burglaries increased (14 in 2005, 24 in 2006), as did reports of residential burglaries (13 in 2005, 16 in 2006) and miscellaneous burglaries (5 in 2005, 21 in 2006).

Tender Holistic Care (THC marijuana dispensary formerly located on N. Buchanan Circle in Pacheco) was forcibly burglarized on June 11, 2006. $4,800 in cash was stolen, along with marijuana, hash, marijuana food products, marijuana pills, marijuana paraphernalia, and marijuana plants. The total loss was estimated to be $16,265.

MariCare was also burglarized within two weeks of opening in Pacheco. On April 4, 2006, a window was smashed after 11:00 p.m. while an employee was inside the business, working late to get things organized. The female employee called "911" and locked herself in an office while the intruder ransacked the downstairs dispensary and stole more than $200 worth of marijuana. Demetrio Ramirez indicated that since they were just moving in, there wasn't much inventory.

Reports of vehicle thefts increased (4 in 2005, 6 in 2006). Disturbance reports increased in nearly all categories (Fights: 5 in 2005, 7 in 2006; Harassment: 4 in 2005, 5 in 2006; Juveniles: 4 in 2005, 21 in 2006; Loitering: 11 in 2005, 19 in 2006; Verbal: 7 in 2005, 17 in 2006). Littering reports increased from 1 in 2005 to 5 in 2006. Public nuisance reports increased from 23 in 2005 to 26 in 2006.

These statistics reflect the complaints and concerns raised by nearby residents. Residents have reported to the District Attorney's Office, as well as to Supervisor Piepho's office, that when calls are made to the Sheriff's Department, the offender has oftentimes left the area before law enforcement can arrive. This has led to less reporting, as it appears to local residents to be a futile act and residents have been advised that law enforcement is understaffed and cannot always timely respond to all calls for service. As a result, Pacheco developed a very active, visible Neighborhood Watch program. The program became much more active in 2006, according to Doug Stewart. Volunteers obtained radios and began frequently receiving calls directly from local businesses and residents who contacted them **instead** of law enforcement. It is therefore significant that there has still been an increase in many types of calls for law enforcement service, although the overall number of calls has decreased.

Other complaints from residents included noise, odors, smoking/consuming marijuana in the area, littering and trash from the dispensary, loitering near a school bus stop and in the nearby church parking lot, observations that the primary patrons of MariCare appear to be individuals under age 25, and increased traffic. Residents observed that the busiest time for MariCare appeared to be from 4:00 p.m. to 6:00 p.m. On a typical Friday, 66 cars were observed entering MariCare's facility; 49 of these were observed to contain additional passengers. The slowest time appeared to be from 1:00 p.m. to 3:00 p.m. On a typical Saturday, 44 cars were counted during this time, and 29 of these were observed to have additional passengers. MariCare has claimed to serve 4,000 "patients."

E. Impact of Proposed Ordinance on MedDelivery Dispensary, El Sobrante

It is the position of Contra Costa County District Attorney Robert J. Kochly that a proposed ordinance should terminate operation of the dispensary in El Sobrante because the land use of that business would be inconsistent with both state and federal law. However, the Community Development Department apparently believes that MedDelivery can remain as a "legal, non-conforming use."

F. Banning Versus Regulating Marijuana Dispensaries in Unincorporated Contra Costa County

It is simply bad public policy to allow the proliferation of any type of business which is illegal and subject to being raided by federal and/or state authorities. In fact, eight locations associated with the New Remedies dispensary in San Francisco and Alameda Counties were raided in October of 2006, and eleven Southern California marijuana clinics were raided by federal agents on January 18, 2007. The Los Angeles head of the federal Drug Enforcement Administration told CBS News after the January raids that "Today's enforcement operations show that these establishments are nothing more than drug-trafficking organizations bringing criminal activities to our neighborhoods and drugs near our children and schools." A Lafayette, California resident who owned a business that produced marijuana-laced foods and drinks for marijuana clubs was sentenced in federal court to five years and 10 months behind bars as well as a $250,000 fine. Several of his employees were also convicted in that case.

As discussed above, there is absolutely no exception to the federal prohibition against marijuana cultivation, possession, transportation, use, and distribution. Neither California's voters nor its Legislature authorized the existence or operation of marijuana dispensing businesses when given the opportunity to do so. These enterprises cannot fit themselves into the few, narrow exceptions that were created by the Compassionate Use Act and Medical Marijuana Program Act.

Further, the presence of marijuana dispensing businesses contributes substantially to the existence of a secondary market for illegal, street-level distribution of marijuana. This fact was even recognized by the United States Supreme Court: "The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." (*Gonzales v. Raich*, *supra,* 125 S.Ct. at p. 2214.)

As outlined below, clear evidence has emerged of such a secondary market in Contra Costa County.

- In September of 2004, police responded to reports of two men pointing a gun at cars in the parking lot at Monte Vista High School during an evening football game/dance. Two 19-year-old Danville residents were located in the parking lot (which was full of vehicles and pedestrians) and in possession of a silver Airsoft pellet pistol designed to replicate a real Walther semi-automatic handgun. Marijuana, hash, and hash oil with typical dispensary packaging and labeling were also located in the car, along with a gallon bottle of tequila (1/4 full), a bong with burned residue, and rolling papers. The young men admitted to having consumed an unknown amount of tequila at the park next to the school and that they both pointed the gun at passing cars "as a joke." They fired several BBs at a wooden fence in the park when there were people in the area. The owner of the vehicle admitted that the marijuana was his and that he was **not** a medicinal marijuana user. He was able to buy marijuana from his friend "Brandon," who used a Proposition 215 card to purchase from a cannabis club in Hayward.

- In February of 2006, Concord police officers responded to a report of a possible drug sale in progress. They arrested a high school senior for two outstanding warrants as he came to buy marijuana from the cannabis club located on Contra Costa Boulevard. The young man explained that he had a cannabis club card that allowed him to purchase marijuana, and admitted that he planned to re-sell some of the marijuana to friends. He also admitted to possession of nearly 7 grams of cocaine which was recovered. A 21-year-old man was also arrested on an outstanding warrant. In his car was a marijuana grinder, a baggie of marijuana, rolling papers, cigars, and a "blunt" (hollowed out cigar filled with marijuana for smoking) with one end burned. The 21-year-old admitted that he did **not** have a physician's recommendation for marijuana.

- Also in February of 2006, a 17-year-old Monte Vista High School senior was charged with felony furnishing of marijuana to a child, after giving a 4-year-old boy a marijuana-laced cookie. The furnishing occurred on campus, during a child development class.

- In March of 2006, police and fire responded to an explosion at a San Ramon townhouse and found three young men engaged in cultivating and manufacturing "honey oil" for local pot clubs. Marijuana was also being sold from the residence. Honey oil is a concentrated form of cannabis chemically extracted from ground up marijuana with extremely volatile **butane** and a special "honey oil" extractor tube. The butane extraction operation ***exploded*** with such force that it blew the garage door partially off its hinges. Sprinklers in the residence kept the fire from spreading to the other homes in the densely packed residential neighborhood. At least one of the men was employed by Ken Estes, owner of the Dragonfly Holistic Solutions pot clubs in Richmond, San Francisco, and Lake County. They were making the "honey oil" with marijuana and butane that they brought up from one of Estes' San Diego pot clubs after it was shut down by federal agents.

- Also in March of 2006, a 16-year-old El Cerrito High School student was arrested after selling pot cookies to fellow students on campus, many of whom became ill. At least four required hospitalization. The investigation revealed that the cookies were made with a butter obtained outside a marijuana dispensary (a secondary sale). Between March of 2004 and May of 2006, the El Cerrito Police Department conducted seven investigations at the high school and junior high school, resulting in the arrest of eight juveniles for selling or possessing with intent to sell marijuana on or around the school campuses.

- In June of 2006, Moraga police officers made a traffic stop for suspected driving under the influence of alcohol. The car was seen drifting over the double yellow line separating north and southbound traffic lanes and driving in the bike lane. The 20-year-old driver denied having consumed any alcohol, as he was the "designated driver." When asked about his bloodshot, watery, and droopy eyes, the college junior explained that he had smoked marijuana earlier (confirmed by blood tests). The young man had difficulty performing field sobriety tests, slurred his speech, and was ultimately arrested for driving under the influence. He was in possession of a falsified California Driver's License, marijuana, hash, a marijuana pipe, a scale, and $12,288. The marijuana was in packaging from the Compassionate Collective of Alameda County, a Hayward dispensary. He explained that he buys the marijuana at "Pot Clubs," sells some, and keeps the rest. He only sells to close friends. About $3,000 to $4,000 of the cash was from playing high-stakes poker, but the rest was earned selling marijuana while a freshman at Arizona State University. The 18-year-old passenger had half an ounce of marijuana in her purse and produced a doctor's recommendation to a marijuana club in Oakland, the authenticity of which could not be confirmed.

Another significant concern is the proliferation of marijuana usage at community schools. In February of 2007, the Healthy Kids Survey for Alameda and Contra Costa Counties found that youthful substance abuse is more common in the East Bay's more affluent areas. These areas had higher rates of high school juniors who admitted having been high from drugs. The regional manager of the study found that the affluent areas had higher alcohol and marijuana use rates. *USA Today* recently reported that the percentage of 12th Grade students who said they had used marijuana has increased since 2002 (from 33.6% to 36.2% in 2005), and that marijuana was the most-used illicit drug among that age group in 2006. KSDK News Channel 5 reported that high school students are finding easy access to medical marijuana cards and presenting them to school authorities as a legitimate excuse for getting high. School Resource Officers for Monte Vista and San Ramon Valley High Schools in Danville have reported finding marijuana in prescription bottles and other packaging from Alameda County dispensaries. Marijuana has also been linked to psychotic illnesses.[101] A risk factor was found to be starting marijuana use in adolescence.

For all of the above reasons, it is advocated by District Attorney Kochly that a ban on land uses which violate state or federal law is the most appropriate solution for the County of Contra Costa.

4. SANTA BARBARA COUNTY

According to Santa Barbara County Deputy District Attorney Brian Cota, ten marijuana dispensaries are currently operating within Santa Barbara County. The mayor of the City of Santa Barbara, who is an outspoken medical marijuana supporter, has stated that the police must place marijuana **behind** every other police priority. This has made it difficult for the local District Attorney's Office. Not many marijuana cases come to it for filing. The District Attorney's Office would like more regulations placed on the dispensaries. However, the majority of Santa Barbara County political leaders and residents are very liberal and do not want anyone to be denied access to medical marijuana if they say they need it. Partly as a result, no dispensaries have been prosecuted to date.

5. SONOMA COUNTY

Stephan R. Passalocqua, District Attorney for the County of Sonoma, has recently reported the following information related to distribution of medical marijuana in Sonoma County. In 1997, the Sonoma County Law Enforcement Chiefs Association enacted the following medical marijuana guidelines: a qualified patient is permitted to possess three pounds of marijuana and grow 99 plants in a 100-square-foot canopy. A qualified caregiver could possess or grow the above-mentioned amounts for each qualified patient. These guidelines were enacted after Proposition 215 was overwhelmingly passed by the voters of California, and after two separate unsuccessful prosecutions in Sonoma County. Two Sonoma County juries returned "not guilty" verdicts for three defendants who possessed substantially large quantities of marijuana (60 plants in one case and over 900 plants in the other) where they asserted a medical marijuana defense. These verdicts, and the attendant publicity, demonstrated that the community standards are vastly different in Sonoma County compared to other jurisdictions.

On November 6, 2006, and authorized by Senate Bill 420, the Sonoma County Board of Supervisors specifically enacted regulations that allow a qualified person holding a valid identification card to possess up to three pounds of dried cannabis a year and cultivate 30 plants per qualified patient. No individual from any law enforcement agency in Sonoma County appeared at the hearing, nor did any representative publicly oppose this resolution.

With respect to the *People v. Sashon Jenkins* case, the defendant provided verified medical recommendations for five qualified patients prior to trial. At the time of arrest, Jenkins said that he had a medical marijuana card and was a care provider for multiple people, but was unable to provide specific documentation. Mr. Jenkins had approximately 10 pounds of dried marijuana and was growing 14 plants, which number of plants is consistent with the 2006 Sonoma County Board of Supervisors' resolution.

At a preliminary hearing held In January of 2007, the defense called five witnesses who were proffered as Jenkins' "patients" and who came to court with medical recommendations. Jenkins also testified that he was their caregiver. After the preliminary hearing, the assigned prosecutor conducted a thorough review of the facts and the law, and concluded that a Sonoma County jury would not return a "guilty" verdict in this case. Hence, no felony information was filed. With respect to the return of property issue, the prosecuting deputy district attorney never agreed to release the marijuana despite dismissing the case.

Other trial dates are pending in cases where medical marijuana defenses are being alleged. District Attorney Passalacqua has noted that, given the overwhelming passage of proposition 215, coupled with at least one United States Supreme Court decision that has not struck it down to date, these factors present current challenges for law enforcement, but that he and other prosecutors will continue to vigorously prosecute drug dealers within the boundaries of the law.

6. ORANGE COUNTY

There are 15 marijuana dispensaries in Orange County, and several delivery services. Many of the delivery services operate out of the City of Long Beach in Los Angeles County. Orange County served a search warrant on one dispensary, and closed it down. A decision is being made whether or not to file criminal charges in that case. It is possible that the United States Attorney will file on that dispensary since it is a branch of a dispensary that the federal authorities raided in San Diego County.

The Orange County Board of Supervisors has ordered a study by the county's Health Care Department on how to comply with the Medical Marijuana Program Act. The District Attorney's Office's position is that any activity under the Medical Marijuana Program Act beyond the mere issuance of identification cards violates federal law. The District Attorney's Office has made it clear to County Counsel that if any medical marijuana provider does not meet a strict definition of "primary caregiver" that person will be prosecuted.

PENDING LEGAL QUESTIONS

Law enforcement agencies throughout the state, as well as their legislative bodies, have been struggling with how to reconcile the Compassionate Use Act ("CUA"), Cal. Health & Safety Code secs. 11362.5, et seq., with the federal Controlled Substances Act ("CSA"), 21 U.S.C. sec. 801, et seq., for some time. Pertinent questions follow.

QUESTION

1. **Is it possible for a storefront marijuana dispensary to be legally operated under the Compassionate Use Act of 1996 (Health & Saf. Code sec. 11362.5) and the Medical Marijuana Program Act (Health & Saf. Code secs. 11362.7-11362.83?**

ANSWER

1. **Storefront marijuana dispensaries may be legally operated under the CUA and the Medical Marijuana Program Act ("MMPA"), Cal. Health & Safety Code secs. 11362.7-11362.83, as long as they are "cooperatives" under the MMPA.**

ANALYSIS

The question posed does not specify what services or products are available at a "storefront" marijuana dispensary. The question also does not specify the business structure of a "dispensary." A "dispensary" is often commonly used nowadays as a generic term for a facility that distributes medical marijuana.

The term "dispensary" is also used specifically to refer to marijuana facilities that are operated more like a retail establishment, that are open to the public and often "sell" medical marijuana to qualified patients or caregivers. By use of the term "store front dispensary," the question may be presuming that this type of facility is being operated. For purposes of this analysis, we will assume that a "dispensary" is a generic term that does not contemplate any particular business structure.[1] Based on that assumption, a "dispensary" might provide "assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person" and be within the permissible limits of the CUA and the MMPA. (Cal. Health & Safety Code sec. 11362.765 (b)(3).)

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[1] As the term "dispensary" is commonly used and understood, marijuana dispensaries would *not* be permitted under the CUA or the MMPA, since they "sell" medical marijuana and are not operated as true "cooperatives."

The CUA permits a "patient" or a "patient's primary caregiver" to possess or cultivate marijuana for personal medical purposes with the recommendation of a physician. (Cal. Health & Safety Code sec. 11362.5 (d).) Similarly, the MMPA provides that "patients" or designated "primary caregivers" who have voluntarily obtained a valid medical marijuana identification card shall not be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in specified quantities. (Cal. Health & Safety Code sec. 11362.71 (d) & (e).) A "storefront dispensary" would not fit within either of these categories.

However, the MMPA also provides that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who *associate* within the State of California in order collectively or *cooperatively* to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under section 11357 [possession], 11358 [planting, harvesting or processing], 11359 [possession for sale], 11360 [unlawful transportation, importation, sale or gift], 11366 [opening or maintaining place for trafficking in controlled substances], 11366.5 [providing place for manufacture or distribution of controlled substance; Fortifying building to suppress law enforcement entry], or 11570 [Buildings or places deemed nuisances subject to abatement]." (Cal. Health & Safety Code sec. 11362.775.) (Emphasis added).)

Since medical marijuana cooperatives are permitted pursuant to the MMPA, a "storefront dispensary" that would qualify as a cooperative *would* be permissible under the MMPA. (Cal. Health & Safety Code sec. 11362.775. See also *People v. Urziceanu* (2005) 132 Cal. App. 4th 747 (finding criminal defendant was entitled to present defense relating to operation of medical marijuana cooperative).) In granting a re-trial, the appellate court in *Urziceanu* found that the defendant could present evidence which might entitle him to a defense under the MMPA as to the operation of a medical marijuana cooperative, including the fact that the "cooperative" verified physician recommendations and identities of individuals seeking medical marijuana and individuals obtaining medical marijuana paid membership fees, reimbursed defendant for his costs in cultivating the medical marijuana by way of donations, and volunteered at the "cooperative." (*Id.* at p. 785.)

Whether or not "sales" are permitted under *Urziceanu* and the MMPA is unclear. The *Urziceanu* Court did note that the incorporation of section 11359, relating to marijuana "sales," in section 11362.775, allowing the operation of cooperatives, "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." Whether "reimbursement" may be in the form only of donations, as were the facts presented in *Urziceanu*, or whether "purchases" could be made for medical marijuana, it does seem clear that a medical marijuana "cooperative" may not make a "profit," but may be restricted to being reimbursed for actual costs in providing the marijuana to its members and, if there are any "profits," these may have to be reinvested in the "cooperative" or shared by its members in order for a dispensary to be truly considered to be operating as a "cooperative."[2] If these requirements are satisfied as to a "storefront" dispensary, then it will be permissible under the MMPA. Otherwise, it will be a violation of both the CUA and the MMPA.

QUESTION

2. If the governing body of a city, county, or city and county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, can an individual board or council member be found to be acting illegally and be subject to federal criminal charges, including aiding and abetting, or state criminal charges?

ANSWER

2. If a city, county, or city and county authorizes and regulates marijuana dispensaries, individual members of the legislative bodies may be held criminally liable under state or federal law.[3]

ANALYSIS

A. *Federal Law*

Generally, legislators of federal, state, and local legislative bodies are absolutely immune from liability for legislative acts. (U.S. Const., art. I, sec. 6 (Speech and Debate Clause, applicable to members of Congress); Fed. Rules Evid., Rule 501 (evidentiary privilege against admission of legislative acts); *Tenney v. Brandhove* (1951) 341 U.S. 367 (legislative immunity applicable to state legislators); *Bogan v. Scott-Harris* (1998) 523 U.S. 44 (legislative immunity applicable to local legislators).) However, while federal legislators are absolutely immune from *both* criminal *and* civil liability for purely legislative acts, local legislators are *only* immune from *civil* liability under federal law. (*United States v. Gillock* (1980) 445 U.S. 360.)

Where the United States Supreme Court has held that federal regulation of marijuana by way of the CSA, including any "medical" use of marijuana, is within Congress' Commerce Clause power, federal law stands as a bar to local action in direct violation of the CSA. (*Gonzales v. Raich* (2005) 545 U.S. 1.) In fact, the CSA itself provides that federal regulations do not

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[2] A "cooperative" is defined as follows: An enterprise or organization that is owned or managed jointly by those who use its facilities or services. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, by Houghton Mifflin Company (4th Ed. 2000).

[3] Indeed, the same conclusion would seem to result from the adoption by state legislators of the MMPA itself, in authorizing the issuance of medical marijuana identification cards. (Cal. Health & Safety Code secs. 11362.71, et seq.)

exclusively occupy the field of drug regulation "unless there is a positive conflict between that provision of this title [the CSA] and that state law so that the two cannot consistently stand together." (21 U.S.C. sec. 903.)

Based on the above provisions, then, legislative action by local legislators *could* subject the individual legislators to federal criminal liability. Most likely, the only violation of the CSA that could occur as a result of an ordinance approved by local legislators authorizing and regulating medical marijuana would be aiding and abetting a violation of the CSA.

The elements of the offense of aiding and abetting a criminal offense are: (1) specific intent to facilitate commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of an offense.. (*United States v. Raper* (1982) 676 F.2d 841; *United States v. Staten* (1978) 581 F.2d 878.)

Criminal aiding and abetting liability, under 18 U.S.C. section 2, requires proof that the defendants in some way associated themselves with the illegal venture; that they participated in the venture as something that they wished to bring about; and that they sought by their actions to make the venture succeed. (*Central Bank, N.A. v. First Interstate Bank, N.A.* (1994) 511 U.S. 164.) Mere furnishing of company to a person engaged in a crime does not render a companion an aider or abettor. (*United States v. Garguilo* (2d Cir. 1962) 310 F.2d 249.) In order for a defendant to be an aider and abettor he must know that the activity condemned by law is actually occurring and must intend to help the perpetrator. (*United States v. McDaniel* (9th Cir. 1976) 545 F.2d 642.) To be guilty of aiding and abetting, the defendant must willfully seek, by some action of his own, to make a criminal venture succeed. (*United States v. Ehrenberg* (E.D. Pa. 1973) 354 F. Supp. 460 *cert. denied* (1974) 94 S. Ct. 1612.)

The question, as posed, may presume that the local legislative body has acted in a manner that affirmatively supports marijuana dispensaries. As phrased by Senator Kuehl, the question to be answered by the Attorney General's Office assumes that a local legislative body has adopted an ordinance that "authorizes" medical marijuana facilities. What if a local public entity adopts an ordinance that explicitly indicates that it does *not* authorize, legalize, or permit any dispensary that is in violation of federal law regarding controlled substances? If the local public entity grants a permit, regulates, or imposes locational requirements on marijuana dispensaries with the announced understanding that it does not thereby allow any *illegal* activity and that dispensaries are required to comply with all applicable laws, including federal laws, then the public entity should be entitled to expect that all laws will be obeyed.

It would seem that a public entity is not intentionally acting to encourage or aid acts in violation of the CSA merely because it has adopted an ordinance which regulates dispensaries; even the issuance of a "permit," if it is expressly *not* allowing violations of federal law, cannot necessarily support a charge or conviction of aiding and abetting violation of the CSA. A public entity should be entitled to presume that dispensaries will obey all applicable laws and that lawful business will be conducted at dispensaries. For instance, dispensaries could very well *not* engage in actual medical marijuana distribution, but instead engage in education and awareness activities as to the medical effects of marijuana; the sale of other, legal products that aid in the suffering of ailing patients; or even activities directed at effecting a change in the federal laws relating to regulation of marijuana as a Schedule I substance under the CSA.

These are examples of legitimate business activities, and First Amendment protected activities at that, in which dispensaries could engage relating to medical marijuana, but *not* apparently in violation of the CSA. Public entities should be entitled to presume that legitimate activities can and will be engaged in by dispensaries that are permitted and/or regulated by local regulations. In fact, it seems counterintuitive that local public entities within the state should be expected to be the watchdogs of federal law; in the area of controlled substances, at least, local public entities do not have an affirmative obligation to discern whether businesses are violating federal law.

The California Attorney General's Office will note that the State Board of Equalization ("BOE") has already done precisely what has been suggested in the preceding paragraph. In a special notice issued by the BOE this year, it has indicated that sellers of medical marijuana must obtain a seller's permit. (See http://www.boe.ca.gov/news/pdf/medseller2007.pdf (Special Notice: Important Information for Sellers of Medical Marijuana).) As the Special Notice explicitly indicates to medical marijuana facilities, "[h]aving a seller's permit does not mean you have authority to make unlawful sales. The permit only provides a way to remit any sales and use taxes due. The permit states, 'NOTICE TO PERMITTEE: You are required to obey all federal and state laws that regulate or control your business. This permit does not allow you to do otherwise.'"

The above being said, however, there is no guarantee that criminal charges would not actually be brought by the federal government or that persons so charged could not be successfully prosecuted. It does seem that arguments contrary to the above conclusions could be persuasive in convicting local legislators. By permitting and/or regulating marijuana dispensaries by local ordinance, some legitimacy and credibility may be granted by governmental issuance of permits or authorizing and allowing dispensaries to exist or locate within a jurisdiction.[4]

All of this discussion, then, simply demonstrates that individual board or council members can, indeed, be found criminally liable under federal law for the adoption of an ordinance authorizing and regulating marijuana dispensaries that promote the use of marijuana as medicine. The actual likelihood of prosecution, and its potential success, may depend on the particular facts of the regulation that is adopted.

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[4] Of course, the question arises as to how far any such liability be taken. Where can the line be drawn between any permit or regulation adopted specifically with respect to marijuana dispensaries and other permits or approvals routinely, and often *ministerially*, granted by local public entities, such as building permits or business licenses, which are discussed *infra*? If local public entities are held responsible for adopting an ordinance authorizing and/or regulating marijuana dispensaries, cannot local public entities also be subject to liability for providing general public services for the illegal distribution of "medical" marijuana? Could a local public entity that knew a dispensary was distributing "medical" marijuana in compliance with state law be criminally liable if it provided electricity, water, and trash services to that dispensary? How can such actions really be distinguished from the adoption of an ordinance that authorizes and/or regulates marijuana dispensaries?

B. *State Law*

Similarly, under California law, aside from the person who directly commits a criminal offense, no other person is guilty as a principal unless he aids and abets. (*People v. Dole* (1898) 122 Cal. 486; *People v. Stein* (1942) 55 Cal. App. 2d 417.) A person who innocently aids in the commission of the crime cannot be found guilty. (*People v. Fredoni* (1910) 12 Cal. App. 685.)

To authorize a conviction as an aider and abettor of crime, it must be shown not only that the person so charged aided and assisted in the commission of the offense, but also that he abetted the act— that is, that he criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act. (*People v. Terman* (1935) 4 Cal. App. 2d 345.) To "abet" another in commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of the offense. (*People v. Best* (1941) 43 Cal. App. 2d 100.) "Abet" implies knowledge of the wrongful purpose of the perpetrator of the crime. (*People v. Stein, supra.*)

To be guilty of an offense committed by another person, the accused must not only aid such perpetrator by assisting or supplementing his efforts, but must, with knowledge of the wrongful purpose of the perpetrator, abet by inciting or encouraging him. (*People v. Le Grant* (1946) 76 Cal. App. 2d 148, 172; *People v. Carlson* (1960) 177 Cal. App. 2d 201.)

The conclusion under state law aiding and abetting would be similar to the analysis above under federal law. Similar to federal law immunities available to local legislators, discussed above, state law immunities provide some protection for local legislators. Local legislators are certainly immune from civil liability relating to legislative acts; it is unclear, however, whether they would also be immune from criminal liability. (*Steiner v. Superior Court*, 50 Cal.App.4th 1771 (assuming, but finding no California authority relating to a "criminal" exception to absolute immunity for legislators under state law).)[5] Given the apparent state of the law, local legislators could only be certain that they would be immune from civil liability and could not be certain that

[5] Although the *Steiner* Court notes that "well-established federal law supports the exception," when federal case authority is applied in a state law context, there may be a different outcome. Federal authorities note that one purpose supporting criminal immunity as to federal legislators from federal prosecution is the separation of powers doctrine, which does not apply in the context of *federal* criminal prosecution of *local* legislators. However, if a state or county prosecutor brought criminal charges against a local legislator, the separation of powers doctrine may bar such prosecution. (Cal. Const., art. III, sec. 3.) As federal authorities note, bribery, or other criminal charges that do not depend upon evidence of, and cannot be said to further, any legislative acts, can still be prosecuted against legislators. (See *Bruce v. Riddle* (4th Cir. 1980) 631 F.2d 272, 279 ["Illegal acts such as bribery are obviously not in aid of legislative activity and legislators can claim no immunity for illegal acts."]; *United States v. Brewster*, 408 U.S. 501 [indictment for bribery not dependent upon how legislator debated, voted, or did anything in chamber or committee; prosecution need only show acceptance of money for promise to vote, not carrying through of vote by legislator]; *United States v. Swindall* (11th Cir. 1992) 971 F.2d

they would be at all immune from criminal liability under state law. However, there would not be any criminal violation if an ordinance adopted by a local public entity were in compliance with the CUA and the MMPA. An ordinance authorizing and regulating medical marijuana would not, by virtue solely of its subject matter, be a violation of state law; only if the ordinance itself permitted some activity inconsistent with state law relating to medical marijuana would there be a violation of state law that could subject local legislators to criminal liability under state law.

QUESTION

3. If the governing body of a city, city and county, or county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, and subsequently a particular dispensary is found to be violating state law regarding sales and trafficking of marijuana, could an elected official on the governing body be guilty of state criminal charges?

ANSWER

3. After adoption of an ordinance authorizing or regulating marijuana dispensaries, elected officials could not be found criminally liable under state law for the subsequent violation of state law by a particular dispensary.

ANALYSIS

Based on the state law provisions referenced above relating to aiding and abetting, it does not seem that a local public entity would be liable for any actions of a marijuana dispensary in violation of state law. Since an ordinance authorizing and/or regulating marijuana dispensaries would necessarily only be authorizing and/or regulating to the extent already *permitted* by state law, local elected officials could not be found to be aiding and abetting a *violation* of state law. In fact, the MMPA clearly contemplates local regulation of dispensaries. (Cal. Health & Safety Code sec. 11362.83 ("Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.").) Moreover, as discussed above, there may be legislative immunity applicable to the legislative acts of individual elected officials in adopting an ordinance, especially where it is consistent with state law regarding marijuana dispensaries that dispense crude marijuana as medicine.

1531, 1549 [evidence of legislative acts was essential element of proof and thus immunity applies].) Therefore, a criminal prosecution that relates *solely* to legislative acts cannot be maintained under the separation of powers rationale for legislative immunity.

QUESTION

4. Does approval of such an ordinance open the jurisdictions themselves to civil or criminal liability?

ANSWER

4. Approving an ordinance authorizing or regulating marijuana dispensaries may subject the jurisdictions to civil or criminal liability.

ANALYSIS

Under federal law, criminal liability is created solely by statute. (*Dowling v. United States* (1985) 473 U.S. 207, 213.) Although becoming more rare, municipalities have been, and still may be, criminally prosecuted for violations of federal law, where the federal law provides not just a penalty for imprisonment, but a penalty for monetary sanctions. (See Green, Stuart P., *The Criminal Prosecution of Local Governments*, 72 N.C. L. Rev. 1197 (1994) (discussion of history of municipal criminal prosecution).)

The CSA prohibits persons from engaging in certain acts, including the distribution and possession of Schedule I substances, of which marijuana is one. (21 U.S.C. sec. 841.) A person, for purposes of the CSA, includes "any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or other legal entity." (21 C.F.R. sec. 1300.01 (34). See also 21 C.F.R. sec. 1301.02 ("Any term used in this part shall have the definition set forth in section 102 of the Act (21 U.S.C. 802) or part 1300 of this chapter.").) By its very terms, then, the CSA may be violated by a local public entity. If the actions of a local public entity otherwise satisfy the requirements of aiding and abetting a violation of the CSA, as discussed above, then local public entities may, indeed, be subject to criminal prosecution for a violation of federal law.

Under either federal or state law, local public entities would not be subject to civil liability for the mere adoption of an ordinance, a legislative act. As discussed above, local legislators are absolutely immune from civil liability for legislative acts under both federal and state law. In addition, there is specific immunity under state law relating to any issuance or denial of permits.

QUESTION

5. Does the issuance of a business license to a marijuana dispensary involve any additional civil or criminal liability for a city or county and its elected governing body?

ANSWER

5. Local public entities will likely *not* be liable for the issuance of business licenses to marijuana dispensaries that plan to dispense crude marijuana as medicine.

ANALYSIS

Business licenses are imposed by cities within the State of California oftentimes solely for revenue purposes, but are permitted by state law to be imposed for revenue, regulatory, or for both revenue and regulatory purposes. (Cal. Gov. Code sec. 37101.) Assuming a business license ordinance is for revenue purposes only, it seems that a local public entity would not have any liability for the mere collection of a tax, whether on legal or illegal activities. However, any liability that would attach would be analyzed the same as discussed above. In the end, a local public entity could hardly be said to have aided and abetted the distribution or possession of marijuana in violation of the CSA by its mere collection of a generally applicable tax on all business conducted within the entity's jurisdiction.

OVERALL FINDINGS

All of the above further exemplifies the catch-22 in which local public entities are caught, in trying to reconcile the CUA and MMPA, on the one hand, and the CSA on the other. In light of the existence of the CUA and the MMPA, and the resulting fact that medical marijuana *is* being used by individuals in California, local public entities have a need and desire to regulate the location and operation of medical marijuana facilities within their jurisdiction.[6] [102]

However, because of the divergent views of the CSA and California law regarding whether there is any accepted "medical" use of marijuana, state and local legislators, as well as local public entities themselves, could be subject to criminal liability for the adoption of statutes or ordinances furthering the possession, cultivation, distribution, transportation (and other act prohibited under the CSA) as to marijuana. Whether federal prosecutors would pursue federal criminal charges against state and/or local legislators or local public entities remains to be seen. But, based on past practices of locally based U.S. Attorneys who have required seizures of large amounts of marijuana before federal filings have been initiated, this can probably be considered unlikely.

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[6] Several compilations of research regarding the impacts of marijuana dispensaries have been prepared by the California Police Chiefs Association and highlight some of the practical issues facing local public entities in regulating these facilities. Links provided are as follows: "Riverside County Office of the District Attorney," [White Paper, Medical Marijuana: History and Current Complications, September 2006];"Recent Information Regarding Marijuana and Dispensaries [El Cerrito Police Department Memorandum, dated January 12, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Marijuana Memorandum" [El Cerrito Police Department Memorandum, dated April 18, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Law Enforcement Concerns to Medical Marijuana Dispensaries" [Impacts of Medical Marijuana Dispensaries on communities between 75,000 and 100,000 population: Survey and council agenda report, City of Livermore].

CONCLUSIONS

In light of the United States Supreme Court's decision and reasoning in *Gonzales v. Raich*, the United States Supremacy Clause renders California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 suspect. No state has the power to grant its citizens the right to violate federal law. People have been, and continue to be, federally prosecuted for marijuana crimes. The authors of this White Paper conclude that medical marijuana is not legal under federal law, despite the current California scheme, and wait for the United States Supreme Court to ultimately rule on this issue.

Furthermore, storefront marijuana businesses are prey for criminals and create easily identifiable victims. The people growing marijuana are employing illegal means to protect their valuable cash crops. Many distributing marijuana are hardened criminals.[103] Several are members of stepped criminal street gangs and recognized organized crime syndicates, while others distributing marijuana to the businesses are perfect targets for thieves and robbers. They are being assaulted, robbed, and murdered. Those buying and using medical marijuana are also being victimized. Additionally, illegal so-called "medical marijuana dispensaries" have the potential for creating liability issues for counties and cities. All marijuana dispensaries should generally be considered illegal and should not be permitted to exist and engage in business within a county's or city's borders. Their presence poses a clear violation of federal and state law; they invite more crime; and they compromise the health and welfare of law-abiding citizens.

ENDNOTES

[1] U.S. Const.. art. VI, cl. 2.
[2] U.S. Const., art. I, sec. 8, cl. 3.
[3] *Gonzales v. Raich* (2005) 125 S.Ct. 2195 at p. 2204.
[4] *Gonzales v. Raich*. See also *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 121 S.Ct. 1711, 1718.
[5] *Gonzales v. Raich* (2005) 125 S.Ct. 2195; see also *United States v. Oakland Cannabis Buyers' Cooperative* 121 S.Ct. 1711.
[6] Josh Meyer & Scott Glover, "U.S. won't prosecute medical pot sales," *Los Angeles Times*, 19 March 2009, available at http://www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story
[7]See *People v. Mower* (2002) 28 Cal.4th 457, 463.
[8] Health and Safety Code section 11362.5(b) (1) (A). All references hereafter to the Health and Safety Code are by section number only.
[9] H&S Code sec. 11362.5(a).
[10] H&S Code sec. 11362.7 *et. seq.*
[11] H&S Code sec. 11362.7.
[12] H&S Code secs. 11362.71–11362.76.
[13] H&S Code sec. 11362.77.
[14] H&S Code secs. 11362.765 and 11362.775; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 at p. 786.
[15] H&S Code sec. 11362.77; whether or not this section violates the California Constitution is currently under review by the California Supreme Court. See *People v. Kelly* (2008) 82 Cal.Rptr.3d 167 and *People v. Phomphakdy* (2008) 85 Cal.Rptr. 3d 693.
[16] H&S Code secs. 11357, 11358, 11359, 11360, 11366, 11366.5, and 11570.
[17] H&S Code sec. 11362.7(h) gives a more comprehensive list – AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, and any other chronic or persistent medical symptom that either substantially limits the ability of a person to conduct one or more life activities (as defined in the ADA) or may cause serious harm to the patient's safety or physical or mental health if not alleviated.
[18] *People v.* Mower (2002) 28 Cal.4th 457 at p. 476.
[19] *Id.* Emphasis added.
[20] Packel, *Organization and Operation of Cooperatives*, 5th ed. (Philadelphia: American Law Institute, 1970), 4-5.
[21] Sam Stanton, "Pot Clubs, Seized Plants, New President—Marijuana's Future Is Hazy," *Sacramento Bee*, 7 December 2008, 19A.
[22] For a statewide list, see http://canorml.org/prop/cbclist.html.
[23] Laura McClure, "Fuming Over the Pot Clubs," *California Lawyer Magazine*, June 2006.
[24] H&S Code sec. 11362.765(c); see, e.g., *People v. Urziceanu*, 132 Cal.App.4th 747 at p. 764.
[25] *Gonzales v. Raich, supra,* 125 S.Ct. at page 2195.
[26] *People v. Urziceanu* (2005) 132 Cal.App.4th 747; see also H&S Code sec. 11362.765.
[27] Israel Packel, 4-5. Italics added.
[28] H&S Code sec. 11362.7(d)(1).
[29] See, e.g., McClure, "Fuming Over Pot Clubs," *California Lawyer Magazine*, June 2006.
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AGENDA NO:	**D-1**
Meeting Date:	**04/26/11**

Council Report

TO: **Mayor and City Council** **DATE: April 20, 2011**

FROM: **Mayor William Yates, Councilmember Carla Borchard**

SUBJECT: **Enforcement of Regulations Prohibiting A-Frame Signs**

RECOMMENDATION:
Immediate enforcement of Morro Bay Municipal Code Section 17.68.030 prohibiting A-frame signs and rescinding the A-frame sign exception.

DISCUSSION:
A-frame signs in Morro Bay, particularly on the Embarcadero, have become a visual blight, an impediment to pedestrian traffic, and are counter to Council's on-going efforts to "clean up the waterfront."

On the Embarcadero, the City has recently painted the curbs. The plethora of *No Parking* and *Oversize Vehicle* signs have been removed. PG&E has painted the lamp posts. A new flag pole will be installed at the top of Centennial Staircase. Several business owners are working on refurbishing their signs and storefronts. The standpipes by the North T-pier are being painted (courtesy of the Coast Guard). Directional and informational signs are being re-painted. New banners will be installed by Memorial Day. A list of small details – repairs/refurbishments – is being addressed. All is geared toward giving the waterfront a new, fresh "look," the belief being our visitors will feel something special, new, and exciting is happening here and take that message home. The ultimate goal is increasing tourism, thereby increasing revenues into the City.

Attached hereto are pictures of A-frame signs throughout the City. The A-frame signs that have proliferated the City have become blight, an impediment to pedestrian traffic, and are counter to Council's on-going efforts just expressed. The presenters of this item believe the removal of all A-frame signs will further those efforts.

Prepared By: ________________________ **Dept Review:** ____________________

City Manager Review: ________________

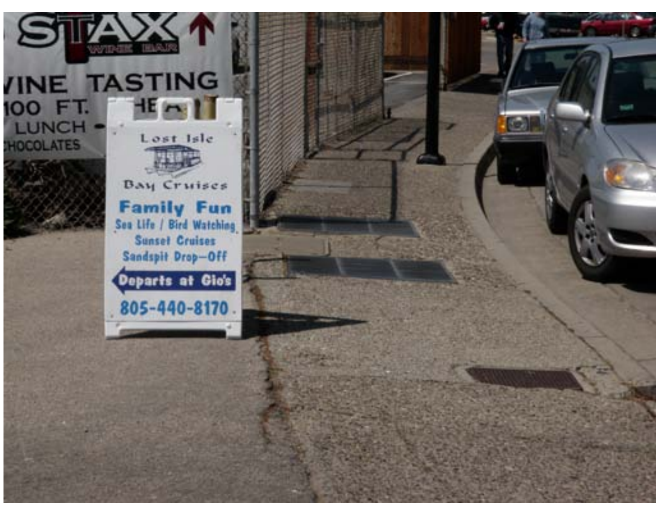
City Attorney Review: ________________

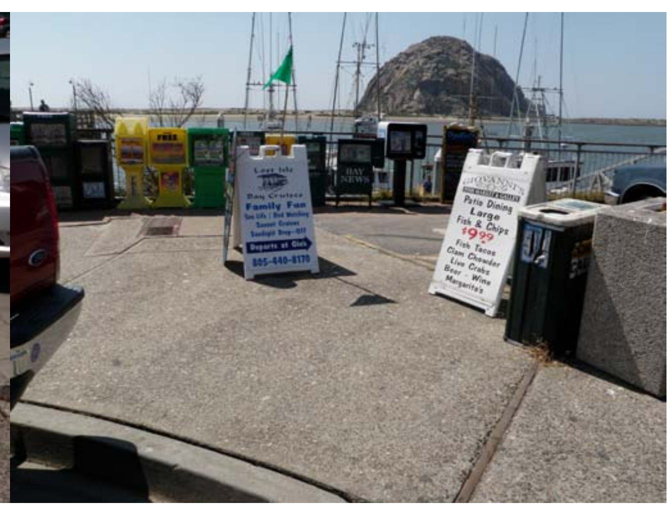
We recognize this will be controversial with business owners, but believe prohibition of the signs *is* a business friendly move. The cleaner the waterfront, downtown and North Main Street business areas are, the more welcoming they will be; it is all about bringing more visitors to our city. More visitors translate into increased business. Increased business translates into more City revenue. Furthermore, the A-frame signs have multiplied to the extent they have become an obstacle to pedestrian traffic.

. . .

The presenters of this item are proponents of allowing Pub Signs on the waterfront. These are small signs that overhang the sidewalk as shown in the attached photos. Pub signs keep the sidewalk clear while allowing businesses to promote their business. Specific regulations for pub signs will be forthcoming.

Embarcadero





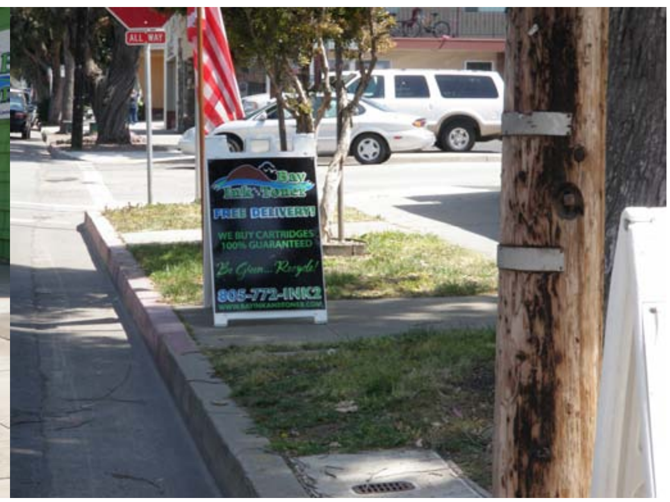
Embarcadero

Embarcadero

Embarcadero

<u>Embarcadero</u>

Morro Bay Blvd.



Morro Bay Blvd.

Napa Street

Main Street


Bayshore Realty
805-772-0300
FREE MAPS!!


Hot Dogs
on Harbor
Simply Delicious


OPEN
772-0200
SABETTI'S PIZZA
1 Slice w/1 Topp
& A Can of Soda
All Day!
Every Day!
FREE DELIVERY
772-0200


1.800.99.GOOFY
WINDOW VINYL
BANNERS
STOREFRONTS
MAGNETICS
VEHICLE SIGNAGE


1.800.99.GOOFY
WINDOW VINYL
BANNERS
STOREFRONTS
MAGNETICS
VEHICLE SIGNAGE


ASTROLOGY

Main Street


FREE
Morro Bay Realty
PARKING ONLY
UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNER'S EXPENSE


NO PARKING
Morro Bay Realty
OPEN HOUSE

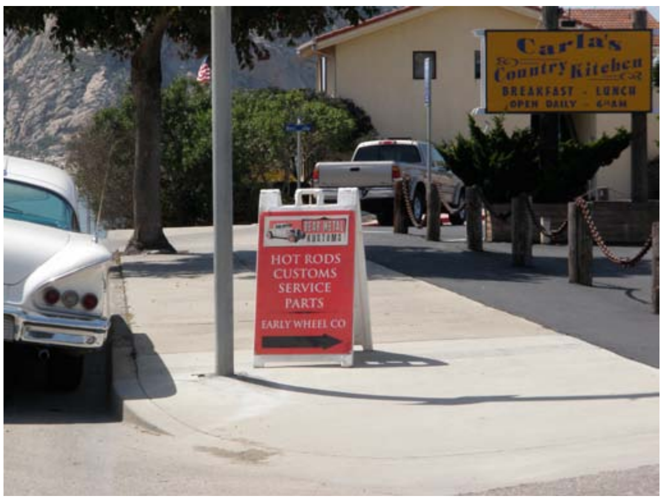

Kayak And More
Kayaks
Folding / Inflatable
Paddles
Wooden / Carbon
Life Jackets
Dollies / Books
Explore More!
257 Morro Bay Blvd.
772-9900


TOP DO
COFFE
BAR
BREAKFAST
LUNCH
INTERNET


Wine Tasting
La Belle
WINERY


SALON & SPA
WALK-INS
WELCOME
772-7123

Beach Street



Beach Street

Harbor Street

Quintana Road

Quintana Road

North Main Street

AGENDA NO:	D-2
MEETING DATE:	April 26, 2011

Staff Report

TO: **Honorable Mayor and City Council** **DATE:** **4/19/2011**

FROM: **Susan Lichtenbaum, Harbor Business Manager**

SUBJECT: **Annual Review of Harbor Lease Site Businesses**

RECOMMENDATION:
Staff recommends that the City Council consider the annual review of Harbor Lease Site Businesses.

FISCAL IMPACT:
None

SUMMARY:
The City manages the Tidelands Granted properties on the west side of the Embarcadero under lease agreements. The leases are made in accordance with State Tidelands policies. Following the severe recession that started in 2008, the City has taken action on two separate occasions aimed at supporting businesses and preventing vacancies on the Embarcadero Lease Sites.

DISCUSSION:
In September 2009 the City Council passed Resolution No. 47-09 (Attachment A) which authorized staff to: 1) negotiate payment plans for past due rent; 2) waive penalties and interest on past due rent; 3) allow for quarterly payment of semi-annual rent; 4) support office-type uses on the second floor; and 5) waive the contractually outlined Consumer Price Index adjustments. This Resolution applied to certain modern City Leases for the Fiscal Year FY2009-10, so that master tenants would pass the savings through to subtenants in an effort to reduce vacancies on City Tidelands properties. These actions were unique to FY2009-10 and were not continued.

In April 2010 the City Council passed Resolution No. 21-10 (Attachment B) authorizing a rent credit for Lease Sites that filled vacant spaces, or spaces that became vacant prior to June 30, 2011. The rent credit would be $3,000 per business up to a maximum of $6,000 per Lease Site to be passed through to the subtenants. The rent credit was made available to those tenants operating under modern Master Lease agreements and who paid percentage of gross rent on their Lease Sites. The resolution also directed staff NOT to recapture the 2008 calendar year CPI increase of 3.5% on the FY2010-11 rent.

Prepared By: ________ **Dept Review:**_____

City Manager Review: ________

City Attorney Review: ________

Lease Site revenue has been declining since FY2008-09. Forgoing the 3.5% CPI adjustment per the Lease contracts in FY2009-10 resulted in a loss of approximately $25,000 in minimum rent. Percentage of gross sales rent declined 24% from FY2007-08 to FY2008-09. Minimum rent was relatively flat in FY2009-10, up slightly at .025% ($3,000). Percentage of gross sales rent was down over 8% from FY2008-09 to FY2009-10. While it appears that tourism is slowly increasing in Morro Bay as seen in hotel and restaurant sales, the retail sector is still struggling, and we anticipate another 2 years of relatively flat percentage of gross sales rent.

The City truly is in partnership with the Lease Site tenants due to the way the percentage of gross sales rent is structured under the City's Master Lease format. The City's percentage of gross sales rent is structured so that the tenants only pay percentage of gross sales rent when the percentage of gross sales goes above the minimum rent. For example if a tenant pays the City an annual rental of $30,000 and the gross sales rent for the fiscal year is $600,000, the percentage of gross sales rent would be $30,000 ($600,000 x 0.05). The rent is structured so that the minimum rent already paid for the fiscal year is subtracted from the percentage of gross sales rent, in this case resulting in no additional rental due. Under the same example if gross sales for the fiscal year are $700,000, the percentage of gross sales rent would be $35,000, and the tenant would owe the difference between the percentage of gross sales rent and the minimum rent already paid, or $5,000. As a result, when business is good and when Lease Site vacancies are low the master tenants, the subtenants and the Harbor Fund do well. When business suffers, the Harbor Fund is directly impacted as well.

The City Council authorized staff to continue allowing quarterly payments of the minimum rent for FY2010-11, and several tenants have taken advantage of that option. Another option to consider for the next 2 fiscal years would be to allow monthly payment of the minimum lease rent, as is the case in several other Cities and Districts that administer Tidelands leases. While there would be no loss of income to the Harbor Fund, it could assist the Lease Site tenants with cash flow especially during the winter months. Subtenants pay their rent on a monthly basis, and not 6 months in advance.

The Harbor Fund is contributing toward installation of banners on the Embarcadero and will be repairing/repainting some of the Embarcadero signage. The Harbor Fund, as an enterprise fund, can only spend what it receives in revenues. These last few years, with revenues declining, we have been unable to add funds to our accumulation fund, leaving fewer funds available for anything outside normal operating expenses or planned capital projects.

CONCLUSION:

Staff recommends that the City Council consider the annual review of Harbor Lease Site businesses and to consider implementation of a monthly rental payment for Harbor Lease Sites for the next two fiscal years.

RESOLUTION NO. 47-09

RESOLUTION DETAILING STRATEGIES TO PREVENT AND REDUCE VACANCIES ON THE EMBARCADERO AND STIMULATE BUSINESS

THE CITY COUNCIL
City of Morro Bay, California

WHEREAS, the City of Morro Bay is the lessor of certain properties on the Morro Bay Waterfront described as City Tidelands leases and properties; and,

WHEREAS, the local, California and national economies are experiencing the worst economic recession in at least 30 years, which has impacted many local businesses and resulted in vacancies on the City Tidelands lease properties; and,

WHEREAS, vacancies on Tidelands lease properties harm the City wide business environment and reduce direct rents received by the City in the form of percentage of gross sales rent collections; and

WHEREAS, the City Council of the City of Morro Bay desires to outline policies that can be established to support City Tidelands tenants and reduce vacancies for overall City business enhancement and the public good; and,

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Morro Bay, California, that City staff is authorized to negotiate payment plans for past due rents and charges under the City Tidelands Lease Sites and to waive penalties and interests that would otherwise be required by the existing Tidelands lease agreements; and,

BE IT FURTHER RESOLVED that City staff is authorized to offer to all City Tidelands Lease Site tenants that they can pay any minimum annual rent payments which are normally due six months in advance the option of making those payments quarterly in advance; and,

BE IT FURTHER RESOLVED that the City Council will support office type uses on the second floor of City Tidelands Lease Site properties for the purpose of reducing vacancies, provided those uses conform with any and all planning and zoning regulations or requirements; and,

BE IT FURTHER RESOLVED that for the Fiscal Year 09-10 the City Council of Morro Bay directs that minimum annual rents for all modern City Leases (not including leases known as Pipkin or County Leases) shall be set at the exact same rate as the minimum annual rents were in Fiscal Year 08-09, except those sites where 5-year appraisal adjustments have reset minimum annual rents to a level lower than the Fiscal Year 08-09, specifically LS71-74/71W-74W and LS89/89W. The effect of this action is to waive contractually outlined Consumer Price Index adjustments for certain modern City Leases in Fiscal Year 09-10 so that master tenants pass these savings through to subtenants in an effort to reduce vacancies on City Tidelands properties.

BE IT FURTHER RESOLVED that these actions are unique to Fiscal Year 09-10 and shall not continue or obligate the City to repeat or continue this Resolution in the future without further City Council action.

PASSED AND ADOPTED by the City Council of the City of Morro Bay at a regular meeting thereof held on the 28th day of September, 2009 on the following vote:

AYES: Borchard, Grantham, Smukler, Winholtz, Peters

NOES: vote

ABSENT: vote

____
JANICE PETERS, Mayor

ATTEST:

____
BRIDGETT BAUER, City Clerk

RESOLUTION NO. 21-10

AUTHORIZATION OF ONE-TIME RENT CREDITS FOR CERTAIN CITY TIDELANDS LEASE SITE TENANTS TO REDUCE VACANCIES ON THE EMBARCADERO AND STIMULATE BUSINESS

CITY COUNCIL
CITY OF MORRO BAY, CALIFORNIA

WHEREAS, the City of Morro Bay manages some 40 ground lease agreements on state granted tidelands, many of which are multi tenant, mixed use developments; and

WHEREAS, retail vacancies on City tidelands leased properties are historically high, and many City tenants are experiencing difficulty finding new sub tenant businesses and must offer drastically reduced rents for those few interested new retail sub-tenants; and

WHEREAS, the City has taken steps to reduce minimum rents, make payment plans, expand allowable uses on certain City tidelands Lease Sites and now desires to offer limited one time rent credits for Tenants to establish new subtenant businesses on said Lease Sites under certain conditions; and

WHEREAS, the City waived a contractual CPI increase of 3.5 percent in the FY09-10 minimum rent based on the 2008 calendar year CPI. The CPI for the 2009 calendar year was -.08 percent. The City could contractually now include the 3.5 percent 2008 calendar year CPI increase for the purposes of calculating FY10-11 minimum rents.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Morro Bay, California, that Staff is authorized to provide certain tidelands Lease Site Tenants a rent credit up to $6000 under the following conditions:

1) The rent credit will be $3000 per new retail subtenant, up to a total of $6000 per modern Master Lease Agreement, in a space that is currently vacant or becomes vacant prior to June 30, 2011.
2) The rent credit can be taken on the FY09-10 percentage rent payment or the FY-10-11 percentage rent payment. Those tenants who are not paying percentage rent are not eligible. If a tenant pays less than $3000 percentage rent, or in the case of two rent credits $6000 percentage rent, then the maximum rent shall be the total percentage rent paid.
3) The rent credit is only for "new" businesses on the sites; relocated businesses from elsewhere in the City of Morro Bay, or from other City tidelands Lease Sites, shall not be eligible for the rent credit. Businesses directly operated by the Master Tenant shall be eligible only if they are new businesses in vacant spaces.

4) Rent credits for subleased businesses must be passed through to the subtenants as evidenced in Sublease agreements.
5) This rent credit shall expire on June 30, 2011, unless extended by Resolution of the City Council.

BE IT FURTHER RESOLVED, that, consistent with the City Council Resolution #47-09, for the purposes of calculating FY10-11 minimum rent on City modern lease agreements, Staff is directed not to recapture the 2008 calendar year CPI increase of 3.5 percent.

PASSED AND ADOPTED by the City Council of the City of Morro Bay at a regular meeting thereof held on the 12th day of April, 2010 on the following vote:

AYES: Borchard, Grantham, Smukler, Winholtz, Peters

NOES: None

ABSENT: None

____
JANICE PETERS, Mayor

ATTEST:

____
BRIDGETT KESSLING, City Clerk

AGENDA NO: D-3

MEETING DATE: April 26, 2011

Staff Report

TO: Honorable Mayor and City Council **DATE:** April 20, 2011

FROM: Rob Livick, PE/PLS - Public Services Director

SUBJECT: Discussion of a Bike Racks with Dedication Plaques Program

RECOMMENDATION

Staff requests that the City Council discuss a bike rack with commemorative plaque dedication and provide any direction to staff.

FISCAL IMPACT

If a program that is modeled after one such as the City of San Luis Obispo's "Racks with Plaques," there would be no cost to the City of Morro Bay. The donor contributes the amount required for the rack, commemorative plaque and long term maintenance of the rack.

DISCUSSION

This proposed program can provide needed short-term bicycle parking. As proposed, the donors would pay for the rack, plaque, installation and maintenance for a powder-coating of the rack in the future. The donation of racks would be subject to the City's donation policies. Donations are tax deductible.

Key program benefits include:

- Bicyclists are provided with more, conveniently located, easy to use bicycle parking racks.
- The City is able to provide new, highly functional and attractive bicycle parking racks at no cost.
- The donor helps the City and receives permanent recognition.

Racks to be installed in the downtown should be powder-coated forest green to match the street lighting and racks installed outside downtown, and in City parks should be powder-coated black. Bike rack locations within the public right-of-way or on City property will need to be approved by City staff prior to installation to insure that the rack does not interfere with pedestrian traffic or parking.

ATTACHMENT

Example "Racks with Plaques" brochure from City of San Luis Obispo

Prepared By: R. Livick **Dept Review: R. Livick**

City Manager Review: ________

City Attorney Review: ________