ITEM NO. 17

CITY OF OCEANSIDE

MAYOR
JIM WOOD

August 26, 2010

The Honorable Kevin A. Enright
Presiding Judge
San Diego County Superior Court
220 W. Broadway
San Diego, CA 92101

Re: City of Oceanside's Response to San Diego County Grand Jury Report on Medical Marijuana in San Diego

This letter responds to the San Diego County Grand Jury's report, entitled "Medical Marijuana in San Diego." Pursuant to Penal Code section 933.05, the City Council has authorized the filing of this response to the findings and recommendations related to the City of Oceanside.

Response to Finding 5.

This finding indicates that the adoption of cost neutral zoning and land use regulations is an effective way of licensing, regulating, and inspecting medical marijuana dispensaries. The City of Oceanside recently extended its moratorium on the establishment of medical marijuana dispensaries. During the period of the moratorium, the City is evaluating all potential regulatory approaches, including a complete ban on dispensaries. The City is also monitoring developments in the case law, in particular, the ban on dispensaries challenged in the Anaheim case. Until the City's evaluation is complete, it is premature to determine whether any specific regulatory approach is effective, therefore, the City does not agree with Finding 5 at this time. The City notes that no specific examples of any effective zoning or land use regulations were included in the Grand Jury's report to support Finding 5.

Response to Finding 6.

Here, the Grand Jury finds that the recommendations of the City of San Diego Medical Marijuana Task Force for zoning and land use ordinances may serve as a model for adoption by other Cities in San Diego County. While the moratorium is pending, Oceanside will evaluate the recommendations of the Task Force before finalizing any land use regulations.

Response to Finding 10.

In Finding 10, the Grand Jury concludes that the current moratorium on opening medical marijuana dispensaries deprives some qualified patients access to marijuana in their communities. There is no evidence cited in the Grand Jury Report that any qualified patient has been deprived access in Oceanside. Furthermore, Oceanside's moratorium contains specific exemptions to allow qualified

CIVIC CENTER • 300 NORTH COAST HIGHWAY • OCEANSIDE, CA 92054-2885 • TELEPHONE (760) 435-3059 • FAX (760) 435-6058
E-MAIL: jwood@ci.oceanside.ca.us

patients to receive medical marijuana from several legitimate medical providers. Consequently, the City does not agree with this finding.

Response to Finding 11.

In Finding 11, the Grand Jury indicates that the imposition of regulatory fees and associated costs could create a financial hardship for the smaller medical marijuana cooperatives and collectives. As noted above, the City does not currently allow medical marijuana dispensaries. As a result, there are no regulatory fees for this use in Oceanside. The City has not evaluated regulatory fees of other jurisdictions and is therefore unable to determine if any other agency's regulatory fees create a financial hardship.

Response to Recommendation 10-120.

The Grand Jury recommends that the City adopt a cost neutral program for the licensing, regulation and monitoring of medical marijuana collectives and cooperatives, and to establish a limit on the number of such facilities. As discussed above, Oceanside is currently operating under a moratorium which will remain in effect until no later than May 12, 2011. While the moratorium is in effect, the City is researching various approaches to the licensing of these facilities, including a permanent ban on dispensaries. The City continues to monitor developments in relevant case law as well. Until the City has completed its research, the appellate court rules on the Anaheim case, and additional public hearings are conducted, Oceanside believes it is premature to enact any further regulations. As a result, this recommendation is unwarranted and will not be implemented at this time.

Response to Recommendation 10-121.

This recommendation indicates the City should adopt regulations which would allow for the closure of unlicensed dispensaries. The City has a validly adopted moratorium on all dispensaries. At least one unlicensed dispensary has been closed by the City. Therefore, this recommendation has already been implemented.

Response to Recommendation 10-122.

The Grand Jury recommends that upon the enactment of an ordinance closing unlicensed dispensaries, the current moratorium be terminated. For the same reasons discussed in its response to Recommendation 10-120, this recommendation is unwarranted at this time and will not be implemented.

Thank you for the opportunity to provide this response to the Grand Jury's recommendations. If you need additional information, the City Attorney and City Manager are available to answer any questions.

Sincerely,

JIM WOOD
Mayor

MEDICAL MARIJUANA IN SAN DIEGO

INTRODUCTION

The 2009/2010 San Diego County Grand Jury received more complaints on the subject of medical marijuana than on any other subject. The common thread of these complaints is the lack of clear and uniform guidelines under which qualified medical marijuana patients can obtain marijuana. The threat of reprisals against these patients and their suppliers by law enforcement agents was also a common concern. The collateral issue is the proliferation of storefront medical marijuana "dispensaries" in the City of San Diego, many of which community members allege are operating illegally. These issues have been compounded by a legislative/judicial quagmire of conflicting federal, State and local regulations and court decisions. The 2009 California Police Chief's Association "white paper" refers to the catch-22 in which local public entities are ensnared in trying to reconcile California's medical marijuana laws on one hand and federal regulations on the other.

This report seeks to balance the concerns of patients for whom the use of medical marijuana has legally and legitimately been recommended with the concerns of residents disturbed by the activities that surround marijuana stores opening in their communities. This balance can be achieved by the adoption of enforceable ordinances for the licensing and monitoring of a limited number of medical marijuana collectives and cooperatives in the eighteen cities and the unincorporated areas of the County. These collectives and cooperatives should be operated in strict accordance with the regulations in Senate Bill 420 (in effect as of January 1, 2004) and the guidelines set forth by the State Attorney General in August 2008.

Until such ordinances can be put into effect, the Grand Jury is suggesting the enactment of an immediate moratorium on the opening of additional storefront dispensaries in the City of San Diego.

The San Diego County District Attorney's Office has coordinated the execution of search warrants in the current fiscal year on a number of storefront dispensaries allegedly operating illegally. There are some operators of collectives and cooperatives who are trying to operate within the law. Consequently, the Grand Jury believes that the District Attorney's Office should publish a position paper to outline what it considers the legal and illegal operation of medical marijuana collectives and cooperatives and should also establish a Medical Marijuana Advisory Council as a forum to engage in an ongoing dialogue with the operators, patients, and members of the public.

Disclaimer: The report does not endorse or condone the illegal use of drugs. The report does not address the issue of whether marijuana has any medicinal value. California law is clear: the cultivation and possession of marijuana is not punishable under State law when necessary for medical purposes and authorized by a physician.

INVESTIGATION

The Grand Jury:

- Researched applicable federal, State and local laws and court cases
- Researched the laws, regulations and guidelines of the fourteen other states that have medical marijuana programs, with the objective of identifying common successful best practices
- Researched practices in other selected cities and counties in the State
- Obtained and analyzed regulations for the County of San Diego and each of its eighteen cities
- Monitored the activities and recommendations of the City of San Diego's Medical Marijuana Task Force
- Interviewed selected Medical Marijuana Task Force members and elected officials
- Interviewed community members who have identified possibly illegal dispensaries in their neighborhoods
- Interviewed operators of marijuana collectives and visited two collectives
- Interviewed County and City health and medical officials
- Interviewed law enforcement personnel and reviewed the 2009 *White Paper on Medical Marijuana Dispensaries* published by the California Police Chiefs Association
- Interviewed medical marijuana patients
- Interviewed four attorneys with experience in medical marijuana issues
- Observed operations of the Medical Marijuana ID Card Program operated by the County Health and Human Services Agency
- Reviewed and partially adapted the report of the 2004/2005 Grand Jury entitled *The Politics of Medical Marijuana*
- Researched the web sites of the Medical Review Board of California and the Osteopathic Review Board of California

Issues Identified: The purpose of the study is to identify the steps the County of San Diego and its eighteen cities have taken to implement the State of California's Compassionate Use Act of 1996. As a result of the Grand Jury's investigation, the following issues have been identified:

- Lack of uniform guidelines for patient eligibility and identification
- Lack of uniform guidelines for the licensing and regulation of operators of cooperatives, collectives and "dispensaries"
- Moratoria and outright bans on medical marijuana distribution outlets in many communities in San Diego County
- Conflicting federal, State and local regulations
- Community outrage and possible criminal activity associated with unregulated storefront and mobile "dispensaries"
- Large scale cash transactions not subject to audit; potential for tax fraud
- Limited number of physicians prescribing marijuana; incomplete diagnoses based on patient's reporting of symptoms
- Lack of dialogue between law enforcement agencies and patient advocacy groups

DISCUSSION

Federal Law: Marijuana is a Schedule I Controlled Substance

The Controlled Substances Act, 21 U.S.C. 801 *et seq.,* makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance. It is also a crime to possess any controlled substance except as authorized by the Act. Persons who violate federal law are subject to criminal and civil penalties.

The restrictions that the Controlled Substances Act places on the manufacture, distribution, and possession of a controlled substance depend upon the schedule in which the drug has been placed. Since the Controlled Substances Act was enacted in 1970, marijuana has been classified as a Schedule I controlled substance.

According to 21 U.S.C. 812(b) (1) (A)-(C), a drug is listed in Schedule I, the most restrictive schedule, if the following findings have been made:

> "(A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision."

Under federal law, it is unlawful to manufacture, distribute, dispense, or possess marijuana or any other Schedule I drug, except as part of a strictly controlled research project that has been registered with the Drug Enforcement Administration and approved by the Food and Drug Administration.

In the case of *Gonzales v. Raich,* the United States Supreme Court declared that, despite the attempts of several states to legalize marijuana partially, it continues to be wholly illegal since it is classified as a Schedule I drug under federal law. The Controlled Substances Act does not recognize the medical use of marijuana. As such, there are no exceptions to its illegality. 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. These attempts have all failed.

The June 6, 2005 *Gonzales v. Raich* decision upheld the federal ban on the use of marijuana even where states approve its use for medicinal purposes. The mere categorization of marijuana as "medical" by some states fails to carve out any legally recognized exception regarding the drug. The government argued that if a single exception was made to the Controlled Substances Act, it would become unenforceable in practice.

A dissenting opinion in the *Gonzalez v. Raich* case stated "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

While the Drug Enforcement Administration has been very active in raiding medical marijuana dispensaries in California in the recent past, and arresting and prosecuting their principal operators under federal law in selected cases, the United States Attorney General announced in March 2009 a major change of federal position in the enforcement of federal drug laws with respect to marijuana dispensaries. Only those medical marijuana dispensaries that are suspected fronts for drug trafficking will be targeted for prosecution. The Federal Department of Justice has new guidelines that allow for non-enforcement of the federal ban in some situations:

"It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana, but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal."

It remains to be seen what standards and definitions will be used to determine what indicators will constitute a drug trafficking operation suitable to trigger investigation and enforcement under these new federal guidelines.

The Grand Jury investigation revealed that law enforcement personnel in San Diego County attribute the recent spike in the opening of storefront medical marijuana dispensaries to the apparent relaxation of enforcement at the federal level.

California Law

Proposition 215: On November 5, 1996, the voters of California passed Proposition 215. This initiative measure added Section 11362.5 to the California Health and Safety Code and is also known as the Compassionate Use Act of 1996. The purposes of the Act are "to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the 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 medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." Caregivers have the same right to legal possession, as does the patient. A primary caregiver is defined by the Act as "the individual designated by the person exempted under this section who has ***consistently*** *assumed responsibility for the housing, health, or safety of that person.*" [Emphasis added]

An analysis of the Compassionate Use Act reveals that it did not address several issues that became problem areas during its implementation. A fundamental weakness of the Act is that while it exempts qualified patients and their primary caregivers from State criminal prosecution, it does not address **how** those qualified patients obtain their

marijuana. Not all patients or primary caretakers are able to cultivate marijuana on their own due to the nature of their illness and limitations of their housing situation, and so they need an external source of supply. The words collaborative, collective and dispensary do not appear in the Act. The Act also does not address limits on the amount of marijuana that patients or caregivers are allowed to possess. It does not address the subject of medical marijuana identification cards or other documentation by which qualified patients could establish to law enforcement personnel their exemption from prosecution.

The Compassionate Use Act is also subject to differing interpretations in the area of patient eligibility. Physicians may recommend marijuana for persons whose health would benefit from the drug in the treatment of such conditions as cancer, anorexia, AIDS, glaucoma, arthritis and other specified conditions. However, physicians may also recommend marijuana to treat "any other illness for which marijuana provides relief." This gives physicians wide latitude and discretion to recommend the drug for patients who may not meet the description of "seriously ill Californians" that the legislation was intended to help.

Senate Bill 420: Although the Compassionate Use Act provided no set limits regarding the amount of marijuana patients may possess and/or cultivate, the California legislature adopted guidelines in 2003. The Medical Marijuana Program Act, known as Senate Bill 420 (SB 420), incorporated as Health and Safety Code Sections 11362.7 -11362.83, was signed into law in October 2003 and took effect on January 1, 2004. It imposes statewide guidelines outlining how much medical marijuana patients may grow and possess. Under the guidelines, qualified patients and/or their primary caregivers may possess no more than eight ounces of dried marijuana and/or six mature (or twelve immature) marijuana plants. However, SB 420 allows patients to possess larger amounts of marijuana when a physician recommends such quantities. The legislation also allows counties and municipalities to approve and/or maintain local ordinances permitting patients to possess larger quantities of medical marijuana than allowed under the State guidelines.

The provisions of SB 420 regarding limits on the amount of marijuana a qualified patient or primary caregiver could legally possess were successfully challenged in the case of *The People v. Patrick Kelly.* According to the decision of the California State Supreme Court on January 21, 2010, the limit provisions of SB 420 have the effect of amending the Compassionate Use Act, which did not address limits on quantity for qualified medical marijuana patients. Since the Compassionate Use Act was enacted by ballot initiative, the Supreme Court (upholding the ruling of two lower courts) ruled that only another ballot initiative could legally amend it. Article II, section 10, subdivision (c) of the California Constitution provides the Legislature may "amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." The decision in the *Kelly* case did not invalidate SB 420 as a whole, only the provisions limiting quantities. Federal regulations on quantity limits continue to apply.

SB 420 also mandates that the California State Department of Health Services establish a **voluntary** medical marijuana patient registry and issue identification cards to qualified patients and caregivers. The cards are to be issued through County Health Departments or their designee.

While an official identification card is optional and is not necessary to provide an affirmative defense, the card is a convenience when a qualified patient or caregiver is confronted by law enforcement. The system provides for a twenty-four hour telephone number for verification of patient and caregiver status. Verification can now also be done immediately on-line by entering the number of the ID card into the State Department of Public Health data base. Upon verification, there would be no arrest or citation and marijuana and/or plants would not be confiscated unless legal limits are exceeded. Such immediate verification is not always possible when the patient is carrying only the physician's recommendation or no documentation at all.

SB 420 provides that medical marijuana patients and primary caregivers may "associate within the State of California in order to collectively or cooperatively cultivate marijuana for medical purposes." That is the only reference to collectives or cooperatives in SB 420. The term "dispensary" does not appear in the law.

Attorney General's Guidelines: SB 420 does require the State Attorney General to "develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996." This resulted in the promulgation of an eleven page document in August 2008, widely known as the Attorney General's Guidelines. Four pages of this document are devoted to guidelines for the operation of collectives and cooperatives. Those guidelines are summarized as follows:

- Cooperatives and collectives must be non-profit entities;
- Medical marijuana transactions are subject to sales tax, per a determination by the State Board of Equalization;
- Cooperatives and collectives must follow generally accepted cash handling practices, such as maintaining a ledger of cash transactions;
- Each member's status as a qualified patient or primary caregiver must be verified, either by possession of a valid Medical Marijuana ID Card or by authentication of a doctor's recommendation through contact with the issuing physician, and be documented in the records of the cooperative or collective; and,
- Cooperatives and collectives must be self-contained; that is, they cannot distribute marijuana to or acquire marijuana from non-members.

According to the Attorney General's Guidelines, some of the storefront medical marijuana "dispensaries" now operating in San Diego can be considered legal, but only if they are properly operated and organized as cooperatives or collectives and adhere to the guidelines above. Both medical marijuana advocates and law enforcement officials indicated during the investigation that the Attorney General's Guidelines are not specific enough and have been subject to a wide variety of interpretations by local governmental jurisdictions throughout the State. In particular, advocates have claimed that law

enforcement agencies in San Diego County have been overly aggressive in raiding collectives which are attempting to comply with the Attorney General's Guidelines.

Programs In Other States

California was the first state to adopt a law permitting the medical use of marijuana. Since 1996 fourteen other states have enacted medical marijuana laws whereby, to some degree, marijuana recommended by a physician to a specified patient may be legally possessed. These states are Alaska, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

The medical marijuana laws in those states differ from those of California in that their programs are all operated solely on the state level, with little or no interpretive discretion left to local governmental entities, such as counties and cities. Also many more of the issues associated with medical marijuana programs are addressed in the other states' authorizing legislation than are addressed in California's Compassionate Use Act. Ten of these states have statewide patient registries and ID Card programs; in all of those states, the state issued card is mandatory for patient and caregiver participation. The laws in ten of those states are silent on the subject of cooperatives and collectives. New Mexico and Rhode Island have state licensed and regulated providers of medical marijuana. The recently established program in New Jersey proposes to establish a network of distribution outlets under State management. A medical marijuana patient in Oregon must list his or her marijuana provider with the State as a "registered site."

The majority of the other states are more specific than California in listing the diagnosed diseases which qualify a patient as eligible; those states have appeal processes under which additional medical conditions may be added. The limits for possession vary widely among the states which have medical marijuana programs.

Local Government Implementation

The 2004/2005 San Diego County Grand Jury published a report dated June 8, 2005 entitled *The Politics of Medical Marijuana: A Question of Compassion*, many parts of which have been adapted for this report. Among the major findings of the 2004/2005 Grand Jury was the failure of San Diego County to implement the provisions of the Compassionate Use Act and SB 420. Their report specifically cited the failure of the County to establish a program for the issuance of medical marijuana ID cards and the failure to issue uniform protocols for law enforcement personnel. Recommendations were addressed to the County Board of Supervisors on those two issues.

ID Cards: Eight months after the 2004/2005 Grand Jury report was issued, the County of San Diego filed suit against the California Department of Health Services on February 1, 2006 in San Diego Superior Court. The County contended that the State law was pre-empted by federal prohibitions against marijuana. Therefore, the County of San Diego did not have to abide by the Compassionate Use Act and SB 420.

San Diego County Board of Supervisors claimed that their lawsuit was filed in response to a threatened suit by the San Diego chapter of the National Organization for the Repeal of Marijuana Laws (NORML) over the County's objection to implementing the state's medical marijuana ID card program. Therefore, the case is called *San Diego County v. San Diego NORML*. On December 6, 2006, the Court confirmed the validity of California medical marijuana laws and rejected the County's challenge.

The County of San Diego appealed the Superior Court decision on February 22, 2007. On July 31, 2008, the California Court of Appeal for the Fourth Appellate District, Division One, issued a decision denying the County's position on the basis that the applications for the ID card expressly state the card will not exempt the bearer from compliance with federal laws. Also, the card itself does not imply that the holder is immune from prosecution for federal offenses. The card merely identifies those persons California has elected to exempt from State criminal penalties and thus there is no conflict with the federal Controlled Substances Act.

On October 16, 2008, the California Supreme Court denied the County's Petition for Review and the United States Supreme Court denied the County's request to hear the case on May 26, 2009.

On July 6, 2009, the County initiated its Medical Marijuana ID Card Program. Through March 2010, the County had received 495 applications for the card. This is a low total, since there are at least 5,000 (and probably considerably more) medical marijuana patients in the County. County staff were prepared to receive many more applications. The ID Card Program is operated on a cost recovery basis, so the fee for the card is $166 ($83 for Medi-Cal recipients). The Grand Jury investigation revealed that the high fee was not as much a cause for the relatively low number of applicants as was the fear by applicants that their names and addresses would be entered into a data base available to law enforcement agents. The investigation showed that this is not the case. All transactions are held in strict confidence; law enforcement personnel entering a suspect's ID Card number into the State data base would only be able to ascertain whether or not that card was currently valid.

Members of the Grand Jury visited the County's Medical Marijuana ID Card Program located in the Health Services Complex at 3851 Rosecrans Street, San Diego. Unlike other aspects of medical marijuana law, the ID Card Program has definite guidelines for patients, primary caregivers and staff to follow. Among these are:

- All applications must be filed in person.
- Primary caregivers applying for a card must appear at the same time as the patient.
- The non-refundable fee must be paid at the time of application.
- A photo identification card and proof of residence must be submitted with the application.
- A valid doctor's recommendation must be presented with the application.
- Staff must verify whether the recommending physician is currently licensed.
- Staff must verify the authenticity of the recommendation with the physician.

- Staff determine the validity of a primary caregiver's status in accordance with the definition in the Compassionate Use Act, cited above.
- Approved applications are entered into the State data base and the card is issued by the State Department of Health Services within thirty days.

Staff of the Medical Marijuana ID Card Program are currently conducting training sessions for law enforcement personnel in authenticating the card. Advantages of having a card include:

- Having the card should prevent arrest or prosecution for patients dealing with law enforcement and possessing less medicine than allowed by county or state guidelines.
- Not having an ID card might result in an arrest.
- Possession of the ID card is a now mandatory condition for those patients on probation.
- The ID card is still an optional program for all other patients, but having an ID may be useful in a law enforcement encounter.

Law Enforcement Protocols: During the three year period the County of San Diego was litigating the legality of the State's medical marijuana laws, local jurisdictions in the County did very little to establish guidelines. This is especially true in the area of regulating the outlets for obtaining marijuana: cooperatives, collectives and "dispensaries". There have been a number of undercover sting operations, and executions of search warrants for allegedly illegal medical marijuana operations. Operators of some of these facilities have been arrested and charged. On September 9, 2009, Operation Green Rx, a multi-agency investigation targeting fourteen medical marijuana dispensaries, resulted in the arrests of thirty-three people, fourteen of whom were medical marijuana patients. This operation was conducted by the Office of the San Diego County District Attorney and a coalition of federal, county and municipal law enforcement agencies. Such operations have not reduced the proliferation of storefront dispensaries in the City of San Diego. Two recent highly publicized prosecutions of medical marijuana collective owners resulted in acquittals.

Community members opposed to the opening of medical marijuana storefront dispensaries in their neighborhoods are monitoring them for possible illegal activities. Operators of apparently legal collectives also acknowledge that many of the newly opened dispensaries are operating outside the law. The following types of activities have been observed at some of the alleged illegal dispensaries:

a) glossy advertisements in local publications
b) inducements of free or reduced price marijuana
c) sign twirler advertising
d) patients congregating outside the facility
e) younger customers with no apparent disabilities
f) sales of other drugs and other non-marijuana products
g) selling marijuana to non-members

h) obtaining marijuana from non-members
i) importing marijuana from outside the County
j) weapons on the premises
k) frequented by members of street gangs
l) large supplies of cash with no ledger or records of transactions
m) doctors associated with the facility giving recommendations, with little or no examination of patients
n) failure to authenticate recommendations of prospective members
o) operators of dispensaries acting as primary caregivers for multiple patients
p) profit making dispensaries

Even law enforcement personnel and community opponents of storefront dispensaries acknowledge that the dispensary clientele includes the seriously ill patients that the medical marijuana legislation was intended to help. Patients and operators of legally operating collectives are requesting guidelines from law enforcement so that patients may have safe access to medical marijuana and so that operators will not be subject to search warrants and arrests. The United States Attorney General has issued an enforcement opinion; the State Attorney General has issued guidelines. The Grand Jury is proposing that the District Attorney of the County of San Diego follow suit by issuing a position paper on what is and what is not considered a legal cooperative or collective in this County. This position paper can be developed in cooperation with the San Diego County Sheriff's Department and in consultation with leaders of municipal law enforcement agencies throughout the County.

Medical Marijuana Advisory Council: Another area of concern among medical marijuana advocates is the absence of a forum for the exchange of information between government leaders and the collective operators and members. This is especially important at a time when court decisions and the proposed enactment of new regulatory ordinances by both the County and the City of San Diego are constantly changing the medical marijuana landscape. The County's web site lists about twenty advisory councils or committees. Examples are the Older Adults System of Care Advisory Council, the Parks Advisory Committee, and the Veterans Advisory Council. The Grand Jury is suggesting that a Medical Marijuana Advisory Council be established in the District Attorney's Office. This Advisory Council would provide a forum through which the operators of legitimate medical marijuana cooperatives and collectives, as well as patients and members of the public, could engage in dialogue with representatives of the County law enforcement agencies on a regular basis.

Regulatory Strategies:
The County of San Diego and each of its eighteen cities have chosen one of the following three strategies to control the establishment of medical marijuana dispensaries in their respective jurisdictions:

1. Enactment of interim moratoria
2. Outright bans
3. No permissible use under existing land use codes

Just because one of these strategies is in effect in a given community does not necessarily mean that there are no cooperatives or collectives currently operating in that jurisdiction.

Moratoria: While in the process of investigating and researching the issue of licensing marijuana dispensaries, city councils may enact date-specific moratoria that expressly prohibit the presence of medical marijuana dispensaries and prohibit the sale of marijuana 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 allowing for the regulation, licensing and permitting of medical marijuana collectives and cooperatives.

A county board of supervisors can also enact a moratorium with respect to marijuana dispensaries within the unincorporated areas of a county. Approximately eighty California cities, including the cities of Chula Vista, Imperial Beach, National City, Oceanside and Santee have enacted moratoria on marijuana dispensaries.

The following provisions of California Government Code Section 65858 apply when a moratorium is being established:

- The legislative body to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. That urgency measure shall require a four-fifths vote of the legislative body for adoption.
- The legislative body may extend the interim ordinance for ten months and fifteen days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.
- The legislative body shall not adopt or extend any interim ordinance unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare.
- Ten days prior to the expiration of that interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.

The City of San Diego's Medical Marijuana Task Force is currently studying specific zoning and land use proposals for medical marijuana cooperatives and collectives. Until the recommendations of the Task Force are adopted into law, the City Council may enact a moratorium on the opening of any additional "dispensaries" under the provisions of Government Code Section 65858. The Grand Jury proposes the enactment of such a moratorium. The failure to enact a moratorium in the City of Los Angeles has resulted in the opening of an estimated 1,000 dispensaries that officials are now trying to regulate.

On September 26, 2009 the County of San Diego Board of Supervisors enacted a moratorium on the establishment of medical marijuana collectives in the unincorporated areas. The purpose of the moratorium was to allow County staff the time to study how collectives should be permitted and appropriately regulated. The County Department of Planning and Land Use published regulatory guidelines and a draft ordinance on March 3, 2010. The draft ordinance marks a major step forward for the County after many years of challenging the legality of the State's medical marijuana laws. However, the ordinance was not developed in consultation with patient advocates and is perceived to be more restrictive than what has been recommended for the City of San Diego by the Medical Marijuana Task Force. Public comment on the draft ordinance closed on April 2, 2010. The ordinance is on the agenda for the County Planning Commission meeting on May 14, 2010 and is scheduled to be considered by the Board of Supervisors on June 23, 2010.

Bans: While the Compassionate Use Act of 1996 allows seriously ill persons to obtain and use marijuana for medical purposes upon a physician's recommendation, it is silent on medical marijuana dispensaries and does not expressly authorize or prohibit the sale of medical marijuana to patients or primary caregivers. Neither Proposition 215 nor Senate Bill 420 specifically authorize nor prohibit the dispensing of marijuana from a storefront business. Also, no State statute expressly permits or disallows the licensing or operation of marijuana dispensaries. Consequently, over a hundred California cities and nine counties have prohibited marijuana dispensaries within their respective geographical boundaries.

In San Diego County, the Cities of El Cajon, Escondido, San Marcos and Vista have enacted bans on medical marijuana dispensaries. These total bans deny some qualified patients access to medical marijuana in their communities of residence; they also place the onus of regulation and enforcement on neighboring cities that either permit and regulate such establishments or are presently considering the enactment of land use and zoning ordinances.

The legality of outright bans will most likely be determined by the decision in the case of *Qualified Patients Association v. City of Anaheim,* now pending in California's Fourth Appellate District Court. A decision was initially expected in December 2009, but the Court requested further briefing to seek clarification on whether the State legislature meant to prevent local governments from using nuisance statutes to outlaw medical marijuana distribution.

The plaintiff, Qualified Patients Association, filed a lawsuit shortly after Anaheim adopted a ban on dispensaries in July 2007. It argued that the clear intent of the Medical Marijuana Program Act (SB 420), in providing an exemption under the nuisance law, was to preempt local ordinances and enforcement efforts based on nuisance law. It also argued that local governments cannot simply ban an activity that has been deemed lawful by the state. Qualified Patients Association had been in operation for about five months prior to the ban. An appeal was filed in March 2008 after the Orange County Superior Court ruled that Anaheim could prohibit medical marijuana dispensaries from operating within its city limits.

The Anaheim case has drawn considerable attention as more and more local governments confront the issue of access to medical marijuana. Many law enforcement associations in the State filed briefs in support of Anaheim, as have about thirty-six cities. The case is the first lawsuit of its kind to reach the appellate courts in California, and may shape the issue of access to medical marijuana for patients across the State. A decision by the Fourth Appellate District Court in the case is expected in the summer of 2010.

Restricted zoning: City and County officials have the authority to restrict owners and operators to locate and operate "medical marijuana dispensaries" in prescribed geographical areas, and require them to meet prescribed licensing requirements. The City of San Diego is considering such an approach through its Medical Marijuana Task Force. In contrast to the County, the City of San Diego has conducted a much more open and inclusive process with significant input from patients, business owners, legal experts and community residents. The initial set of Task Force recommendations dealt with permitting and zoning regulations; hours of operation; non-profit status; and required lighting, signage, and security. On March 24, 2010, the City Council's Land Use and Housing Committee directed the City Attorney to prepare a draft ordinance, based largely on the Task Force's recommendations, for consideration at a future meeting of the full City Council.

Other cities have land use codes that do not specifically recognize "medical marijuana dispensaries" as an allowable use and therefore have a *de facto* ban on granting permits. During the Grand Jury investigation, both proponents and opponents of medical marijuana agreed that many of the storefront "dispensaries" were operating outside the limited definition of cooperatives and collectives as implicitly stated in SB 420 and more explicitly defined in the Attorney General's Guidelines. There was agreement also that many patients obtaining medical marijuana from the apparently illegal storefront operations are truly qualified patients according to the original intent of the Compassionate Use Act. These are patients who are unable to cultivate their own marijuana due to extreme incapacity or by the restrictions of their own living arrangements. The County and every city therein should adopt land use regulations allowing the establishment of a limited number of cooperatives and collectives within their jurisdictions, so that these qualified patients are able to obtain medical marijuana in their own communities.

Facility Site Visits: Grand Jury members visited two facilities that appeared to be operating in accordance with the Attorney General's guidelines. Both of these operations blended in with their respective communities; patients were not congregating around their facilities. Both verified recommendations of prospective patients/members and maintained records of cash transactions. Both had business licenses and paid sales tax on their transactions. Both had not-for-profit status. Neither advertises in local publications. The major difference between them is size of membership: one would be considered a large collective and the other would be considered a small one.

When regulations and guidelines are adopted to govern cooperatives/collectives, there should be a distinction drawn between a small cooperative/collective and a large one. Guidelines, when enacted, may direct cooperatives and collectives to:

1) install security measures, i.e., security guards or video surveillance
2) have annual or periodic audits
3) pay a business tax
4) report on payments to growers and suppliers
5) undergo land use processes (process 2 through process 5)
6) obtain business licenses/permits
7) install signage and special lighting
8) pay administrative fee costs

The smaller cooperatives and collectives will be challenged to follow the guidelines because of budgetary constraints. Cooperatives or collectives that are providing a legitimate service to qualified patients, and are willing to follow the guidelines for their small group of medical marijuana patients, should not be forced to close because they cannot afford to remain in compliance with the new regulations.

Physicians

The Grand Jury's investigation reveals that law enforcement personnel and some government officials believe that there are physicians in San Diego County whose sole practice consists of writing medical marijuana recommendations. The Grand Jury has no jurisdiction over State agencies, such as the Medical Board of California or the Osteopathic Medical Board of California. We point out, however, that citizens who suspect professional malfeasance can register a complaint with either agency, as appropriate.

The Grand Jury investigation revealed that the vast majority of medical marijuana recommendations in the San Diego area are being written by about twenty-five physicians, some of whom are affiliated with dispensaries. Advertisements for some of those dispensaries indicate that a physician is available to write a recommendation for an advertised fee. Very few mainstream doctors have been writing the recommendations, although their numbers are increasing.

There are sufficient legal protections for doctors who write recommendations for medical marijuana. California Health & Safety Code section 11362.5(c) states "Notwithstanding any other provision of law, no physician in this State shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."

The Medical Board of California, recognizing that medical marijuana is an emerging treatment modality, has assured physicians that they will not be subject to investigation or disciplinary action by the Board if they arrive at the decision to recommend marijuana in accordance with accepted standards of medical responsibility. The mere receipt of a complaint that the physician is recommending medical marijuana will not generate an investigation unless there is additional information indicating that the physician is not adhering to accepted medical standards.

These accepted standards, according to the Medical Board, are the same as any reasonable and prudent physician would follow when recommending or approving any other medication, and include the following:

1. History and good faith examination of the patient
2. Development of a treatment plan with objectives
3. Provision of informed consent including discussion of side effects
4. Periodic review of the treatment's efficacy
5. Consultation, as necessary
6. Proper record keeping that supports the decision to recommend the use of medical marijuana

If physicians use the same care in recommending medical marijuana to patients as they would in recommending any other medication, they would not be subject to license suspension or revocation.

On the federal level, the United States Court of Appeals ruled in a 2002 decision in the *Conant v. Walters* case that the government could not revoke a physician's Drug Enforcement Administration registration merely because the doctor makes a recommendation for the use of medical marijuana based on a legitimate medical judgment, and could not initiate an investigation solely on that ground. These prohibitions would apply whether or not the doctor anticipates that the patient will use the recommendation to obtain marijuana in violation of federal law. The Court recognized that physicians have a constitutionally-protected right to discuss medical marijuana as a treatment option with their patients and to make recommendations for medical marijuana.

These protections notwithstanding, the majority of doctors are reluctant to write medical marijuana recommendations for their patients. Some doctors, with a patient's consent, will share medical records with another physician who will write a recommendation. More frequently, however, a patient will seek out one of a small group of physicians who specialize in marijuana recommendations for a fee, usually between $100 and $200. The Grand Jury does not wish to paint all these physicians with the same brush, but there are some documented investigations in the files of both the Medical Board of California and the Osteopathic Medical Board of California of doctors who violated the above described standards of care when recommending medical marijuana. The Grand Jury's research of the public records of State medical boards revealed that disciplinary action has been taken against some physicians for improper conduct relating to medical marijuana patients. Disciplinary actions have included fines and license suspensions. Types of improper conduct include issuing medical marijuana recommendations without conducting adequate medical examinations, failure to consult with primary care or treating physicians or to obtain a review of the patients' medical records, and failure to maintain adequate documentation.

FACTS AND FINDINGS

Fact: The number of medical marijuana dispensaries in the City of San Diego has increased from less than fifty in June 2009 to over one hundred in March 2010.

Fact: The County of San Diego District Attorney's Office, along with the County of San Diego Sheriff's Office, the San Diego Police Chief's Office and other State and local law enforcement offices, announced on September 10, 2009 that search warrants were served at fourteen marijuana dispensaries in San Diego County.

Fact: State of California medical marijuana legislation has been subject to variations in interpretations by cities and counties throughout the State.

Fact: Medical marijuana advocates in San Diego County have been requesting guidelines from law enforcement agencies for several years.

Fact: Most cities in San Diego County have bans or moratoria (*de jure* or *de facto*) on medical marijuana dispensaries.

Fact: Some community activists and law enforcement personnel believe that the storefront medical marijuana dispensaries in the City of San Diego are operating illegally.

Fact: The City of San Diego has impaneled a Medical Marijuana Task Force to make recommendations to the City Council for the regulation of cooperatives and collectives.

Fact: Membership in individual cooperatives and collectives ranges from a few patients to over a thousand.

***Finding #01*:** The District Attorney's Office has not published guidelines for the operation of legal medical marijuana cooperatives and collectives in San Diego County which would address the concerns of operators of those programs who are trying to comply with State law.

***Finding #02*:** There is currently no forum through which the operators of legitimate medical marijuana collectives and cooperatives could engage in dialogue with representatives of the District Attorney's Office on a regular basis.

***Finding #03*:** There are no clear and uniform guidelines for law enforcement personnel in San Diego County which would protect the rights of legitimate qualified medical marijuana patients.

***Finding #04*:** The San Diego City Council is empowered by Government Code Section 65858 to enact a moratorium on the opening of additional medical marijuana dispensaries.

Finding #05: Adopting cost neutral zoning and land use ordinances is an effective method for the licensing, regulation and periodic inspection of cooperatives and collectives distributing medical marijuana in the unincorporated areas and eighteen cities of San Diego County.

Finding #06: The recommendations of the City of San Diego's Medical Marijuana Task Force for zoning and land use ordinances for cooperatives and collectives may serve as a model for adoption by other cities in the County.

Finding #07: Annual financial reporting and periodic auditing of cooperatives and collectives, predominantly cash operations, are not currently required in San Diego County.

Finding #08: The current ban on the opening of medical marijuana collectives in the Cities of El Cajon, Escondido, San Marcos and Vista deprives some qualified medical marijuana patients of access to marijuana in their communities.

Finding #09: The lack of zoning and land use ordinances for the licensing, regulation and periodic inspection of cooperatives and collectives distributing medical marijuana in the cities of Carlsbad, Coronado, Del Mar, Encinitas, La Mesa, Lemon Grove, Poway and Solana Beach deprives some qualified medical marijuana patients of access to marijuana in their communities.

Finding #10: The current moratorium on the opening of cooperatives and collectives distributing medical marijuana in the unincorporated areas of San Diego County and the cities of Chula Vista, Imperial Beach, National City, Oceanside and Santee deprives some qualified medical marijuana patients of access to marijuana in their communities.

Finding #11: The imposition of regulatory fees and associated costs could create a financial hardship for the smaller medical marijuana cooperatives and collectives.

RECOMMENDATIONS

The 2009/2010 San Diego County Grand Jury recommends that the County of San Diego District Attorney:

10-107: **In consultation with the San Diego County Sheriff's Department and officials of the Police Departments of the Cities of Carlsbad, Chula Vista, Coronado, El Cajon, Escondido, La Mesa, National City, Oceanside and San Diego, publish a position paper which contains guidelines for the operation of legal medical marijuana cooperatives and collectives in San Diego County.**

10-108: **In cooperation with the San Diego County Sheriff's Department, establish a Medical Marijuana Advisory Council as a forum through which the operators of legitimate medical marijuana collectives and cooperatives, as well as patients and members of the public, could engage in dialogue with representatives of County law enforcement agencies on a regular basis.**

The 2009/2010 San Diego County Grand Jury recommends that the County of San Diego Sheriff:

10-109: **In cooperation with the County of San Diego District Attorney and in consultation with officials of the nine municipal police departments in the County, publish a position paper which contains guidelines for the operation of legal medical marijuana cooperatives and collectives in San Diego County.**

10-110: **Adopt clear guidelines for law enforcement personnel so that the rights of legitimate medical marijuana patients will be respected.**

10-111: **In cooperation with the County of San Diego District Attorney, establish a Medical Marijuana Advisory Council as a forum through which the operators of legitimate medical marijuana collectives and cooperatives, as well as patients and members of the public, could engage in dialogue with representatives of County law enforcement agencies on a regular basis.**

The 2009/2010 San Diego County Grand Jury recommends that the County of San Diego Board of Supervisors:

10-112: **Adopt a cost neutral County program for the licensing, regulation and periodic inspection of authorized collectives and cooperatives distributing medical marijuana in the unincorporated areas of San Diego County, and establish a limit on the number of such facilities.**

10-113: **Adopt regulations which would allow for the closure of all unlicensed "dispensaries" in the unincorporated areas.**

The 2009/2010 San Diego County Grand Jury recommends that the Mayor of the City of San Diego and the City Council of the City of San Diego:

10-114: **Enact an ordinance creating an immediate moratorium on the opening of additional medical marijuana dispensaries in the City of San Diego, pending the adoption by the Council of guidelines regulating such establishments, as recommended by the Medical Marijuana Task Force with appropriate public input.**

10-115: **Enact an ordinance to establish a cost neutral program for the licensing, regulation and monitoring of medical marijuana collectives and cooperatives, and establish a limit on the number of such facilities.**

10-116: **Adopt regulations which would allow for the closure of all unlicensed "dispensaries."**

The 2009/2010 San Diego County Grand Jury recommends that the City Councils of El Cajon, Escondido, San Marcos and Vista:

10-117: **Enact an ordinance to establish a cost neutral program for the licensing, regulation and monitoring medical marijuana collectives and cooperatives, and establish a limit on the number of such facilities.**

10-118: **Adopt regulations which would allow for the closure of all unlicensed "dispensaries."**

10-119: **Upon the enactment of such an ordinance, rescind the current ban on the opening of medical marijuana collectives and cooperatives.**

The 2009/2010 San Diego County Grand Jury recommends that the City Councils of Chula Vista, Imperial Beach, National City, Oceanside and Santee:

10-120: **Enact an ordinance to establish a cost neutral program for the licensing, regulation and monitoring of medical marijuana collectives and cooperatives, and establish a limit on the number of such facilities.**

10-121: **Adopt regulations which would allow for the closure of all unlicensed "dispensaries."**

10-122: **Upon the enactment of such an ordinance, rescind the current moratorium on the opening of medical marijuana collectives and cooperatives.**

The 2009/2010 San Diego County Grand Jury recommends that the City Councils of Carlsbad, Coronado, Del Mar, Encinitas, La Mesa, Lemon Grove, Poway and Solana Beach:

10-123: **Enact an ordinance to establish a cost neutral program for the licensing, regulation and monitoring of medical marijuana collectives and cooperatives, and establish a limit on the number of such facilities.**

10-124: **Adopt regulations which would allow for the closure of all unlicensed "dispensaries."**

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under

the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such comment shall be *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

(a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
    (1) The respondent agrees with the finding
    (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
    (1) The recommendation has been implemented, with a summary regarding the implemented action.
    (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
    (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
    (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

Responding Agency	Recommendations	Date
District Attorney, County of San Diego	10-107, 10-108	8/6/10
Sheriff, County of San Diego	10-109, 10-110, 10-111	8/6/10
Board of Supervisors, County of San Diego	10-112, 10-113	9/6/10
Mayor, City of San Diego	10-114, 10-115, 10-116	9/6/10
City Council, City of San Diego	10-114, 10-115, 10-116	9/6/10
City Council, City of El Cajon	10-117, 10-118, 10-119	9/6/10
City Council, City of Escondido	10-117, 10-118, 10-119	9/6/10
City Council, City of San Marcos	10-117, 10-118, 10-119	9/6/10
City Council, City of Vista	10-117, 10-118, 10-119	9/6/10
City Council, City of Chula Vista	10-120, 10-121, 10-122	9/6/10
City Council, City of Imperial Beach	10-120, 10-121, 10-122	9/6/10
City Council, City of National City	10-120, 10-121, 10-122	9/6/10
City Council, City of Oceanside	10-120, 10-121, 10-122	9/6/10
City Council, City of Santee	10-120, 10-121, 10-122	9/6/10
City Council, City of Carlsbad	10-123, 10-124	9/6/10
City Council, City of Coronado	10-123, 10-124	9/6/10
City Council, City of Del Mar	10-123, 10-124	9/6/10
City Council, City of Encinitas	10-123, 10-124	9/6/10
City Council, City of La Mesa	10-123, 10-124	9/6/10

City Council, City of Lemon Grove	**10-123, 10-124**	**9/6/10**
City Council, City of Poway	**10-123, 10-124**	**9/6/10**
City Council, City of Solana Beach	**10-123, 10-124**	**9/6/10**