



DATE: June 25, 2014

TO: Honorable Mayor and City Council Members
Chair and Members of the Community Development Commission

FROM: Development Services Department/Planning Division

SUBJECT: **MEDICAL MARIJUANA DISPENSARIES**

SYNOPSIS

Consideration of Zone Amendment (ZA13-00005) to amend the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4, adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations" and adding "Section AA, Medical Marijuana Dispensaries", to Article 36 of the Zoning Ordinance – Applicant: George Sadler – Nature's Leaf Collective.

Staff recommends that the City Council adopt the resolution denying Zone Amendment (ZA13-00005). The denial would maintain Medical Marijuana Dispensaries as a prohibited land use throughout the City of Oceanside.

BACKGROUND

On September 5, 2013, the City of Oceanside received an application for a Zone Amendment (ZA13-00005). The proposed zone amendment is a request to amend the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4 and adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations". **(Attachment 1)** The subject request is proposed to be implemented City-wide with the exception of properties located within the Coastal Zone, including the Downtown District Area (Former Redevelopment Area).

On May 5, 2014, the Planning Commission reviewed the proposed zoning text amendments and recommended by a 3-2-2 (2 absent) vote that the City Council approve ZA13-00005 and adopt the subject text amendments as proposed by the applicant George Sadler of Nature's Leaf Collective.

Pursuant to State CEQA guidelines, environmental review is not required when projects are rejected or disapproved. Should Council wish to consider approval of the proposed amendments, the applicant would need to then return to the Planning Division for completion of the appropriate level of environmental review and present the environmental document to the Planning Commission and City Council for review and action.

Public Safety Analysis:

The Oceanside Police Department considers the presence of medical marijuana dispensaries within the City of Oceanside a detriment to public safety. In addition to the public safety factor, federal law does not recognize any form of legalized marijuana and considers the substance contraband. During 2013, the Drug Enforcement Agency conducted enforcement operations against several medical marijuana dispensaries located within Oceanside. The attached analysis provides an overview of the documented impacts associated with the illegal establishment of medical marijuana dispensaries in the City of Oceanside. **(Attachment 2)**

Environmental Determination:

Pursuant to Section 15270 (a) of the CEQA guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. In addition, Section 15270 (b) allows for the initial screening of projects on the merits for quick disapprovals prior to initiation of the CEQA process where the agency can determine that the project cannot be approved. Should staff's recommendation to deny be overturned, the project would need to be returned to staff in order to conduct the required CEQA review prior to any discretionary action on the project application.

CITY ATTORNEY'S ANALYSIS

The City Attorney has prepared a detailed memorandum attached to this staff report summarizing the Compassionate Use Act (CUA) and the Medical Marijuana Program (MMP). As summarized in that memorandum, the City retains its legal authority to prohibit or regulate storefront dispensaries. Should the proposed amendment be denied, the City Attorney will continue to abate illegal dispensaries through public nuisance litigation. However, the proposed amendments are within the discretion of the City Council to adopt. If the Council is inclined to approve the amendment, the application should be returned to staff to prepare environmental review under CEQA. The CEQA document will need to be evaluated by the Planning Commission before adoption by the City Council. **(Attachment 3)**

Pursuant to Zoning Ordinance Article 4506, the City Council is authorized to hold a public hearing on the proposed Zone Amendment. Consideration of the zoning code amendments should be based on the recommendation of the Planning Commission, the record of the Planning Commission public hearing, public input, and any other evidence introduced at the public hearing on this matter.

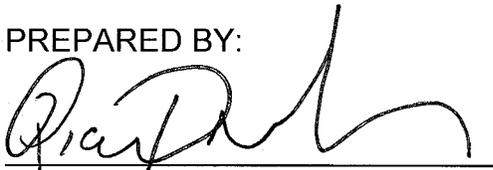
After conducting the public hearing, the Council shall affirm, modify, or reject the Planning Commission's recommendation with regard to the Zone Amendment. A modification not previously considered by the Commission shall be referred to the Commission for review and report prior to adoption of the proposed Zone Amendment.

RECOMMENDATION

Consideration of Zone Amendment (ZA13-00005) to amend the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4, adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations" and adding "Section AA, Medical Marijuana Dispensaries", to Article 36 of the Zoning Ordinance – Applicant: George Sadler – Nature’s Leaf Collective.

Staff recommends that the City Council adopt the resolution denying Zone Amendment (ZA13-00005). The denial would maintain Medical Marijuana Dispensaries as a prohibited land use throughout the City of Oceanside.

PREPARED BY:



Richard Greenbauer
Senior Planner

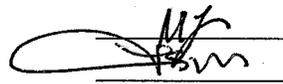
SUBMITTED BY:



Steven R. Jepsen
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager
Marisa Lundstedt, City Planner
Frank McCoy, Police Chief



Attachments:

1. Proposed Text Amendment Language (Exhibit "A")
2. Public Safety Analysis
3. City Attorney Analysis
4. City Council/CDC Resolution Denying ZA13-00005
5. Planning Commission Staff Report dated May 5, 2014
6. Planning Commission Resolution No. 2014-P10

City of Oceanside
Proposed Zoning Text Amendment
(Medical Marijuana Dispensaries)

General Description: To amend the Zoning Ordinance of the City of Oceanside to add use classifications for Medical Marijuana Dispensaries.

Rationale: Allowing Medical Marijuana Dispensaries to operate within the City of Oceanside is congruent with the General Plan of Oceanside and the City's goal of being conducive to good health and well-being. Permitting well-regulated Medical Marijuana Dispensaries will enable Oceanside's numerous qualified patients to obtain safe access to a crucial, low-impact source of medication recommended by their doctors.

Proposed additions/changes to the Zoning Ordinance of the City of Oceanside:

1. Addition of subpart "FF" to Section 450 of Article 4 of the Zoning Ordinance of the City of Oceanside:

FF. **Medical Marijuana Dispensary:** Any site, facility, location, use, collective, association, cooperative or business that distributes, dispenses, stores, sells, exchanges, processes, delivers, gives away, possesses and/or cultivates marijuana for medical purposes to, with, for and/or from qualified patients, health care providers, primary caregivers or physicians pursuant to Health and Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any state regulations adopted in furtherance thereof. These establishments shall be regulated by performance standards set forth in section 3043 of Article 30, as well as the location guidelines of Article 36.

2. Addition of "Medical Marijuana Dispensaries" to the list of uses permitted by Conditional Use Permit to zoning classifications CG and CS-HO in Article 11 of the Zoning Ordinance of the City of Oceanside.

3. Addition of "AA. Medical Marijuana Dispensaries" to the list of regulated uses in Section 3602 of Article 36 of the Zoning Ordinance of the City of Oceanside, and the addition of the following definition to Section 3603:

AA. **Medical Marijuana Dispensary:** Any site, facility, location, use, collective, association, cooperative or business that distributes, dispenses, stores, sells, exchanges, processes, delivers, gives away, possesses and/or cultivates marijuana for medical purposes to, with, for and/or from qualified patients, health care providers, primary caregivers or physicians pursuant to Health and Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any state regulations adopted in furtherance thereof.

4. Addition of Section 3043 to Article 30 of the Zoning Ordinance of the City of Oceanside, as follows:

Section 3043 – Medical Marijuana Dispensaries

The following regulations and performance standards shall apply to the operation of Medical Marijuana Dispensaries, as defined in section 450 of Article 4.

A. Purpose. These regulations are designed to assure that the operations of Medical Marijuana Dispensaries are in compliance with California law and to mitigate the adverse effects from unregulated operation of Medical Marijuana Dispensaries, all to promote the public's health, safety and welfare.

B. Definitions.

1. "Medical Marijuana Dispensary" shall mean a collective, cooperative, association or similar entity that cultivates, distributes, dispenses, stores, exchanges, processes, delivers, makes available or gives away marijuana for medical purposes to qualified patients, or primary caregivers of qualified patients pursuant to Health and Safety Code Section 11362.5 (adopted as Proposition 215, the "Compassionate Use Act of 1996") or any State regulations adopted in furtherance thereof, including Health and Safety Code Section 11362.7 et seq., (adopted as the "Medical Marijuana Program Act").

2. "Marijuana" shall have the same meaning as used in Health and Safety Code Section 11018.

C. Security Guard. During all hours of operation, there shall be at least one licensed, uniformed security guard on the premises of each Medical Marijuana Dispensary. Such guard(s) shall be licensed by the State of California Department of Consumer Affairs in a manner compliant with all applicable state and local laws.

D. Hours of Operation. Hours of operation shall be limited to between the hours of 9:00 a.m. and 8:00 p.m., each day of the week.

E. Location Criteria. Each Medical Marijuana Dispensary shall be located in compliance with the following requirements:

1. The use must be within a CG or CS-HO zoning classification area as described in Article 11 of the Zoning Ordinance of the City of Oceanside.

2. No Medical Marijuana Dispensary may operate within a 600-foot radius from any "playground" (as defined in Health and Safety Code Section 104495(a)(1)) or "school" (as defined in Health and Safety Code Section 11362.768(h)), with such distance determination measured in accordance with Health and Safety Code Section 11362.768(c). If any playground or school begins operating within a 600-foot radius of any Medical Marijuana Dispensary after such dispensary has received permission to operate at the location in question, the use shall remain lawful.

3. Medical Marijuana Dispensaries may not operate within a 1,000-foot radius from each other, with such distance determination measured in accordance with Health and Safety Code Section 11362.768(c).

F. Dispensing of Marijuana. Medical Marijuana Dispensaries shall only dispense medical marijuana to qualified patients and/or their primary caregivers as defined by Health and Safety Code Section 11362.5, et seq.

G. No Alcohol or Tobacco Sales. No alcohol or tobacco may be sold by Medical Marijuana Dispensaries.

H. Mandatory Warning Sign. A sign shall be posted in a conspicuous location inside each Medical Marijuana Dispensary stating as follows: "The diversion of marijuana for non-medical purposes is a

violation of State law, as is loitering at this location for an illegal purpose. The use of marijuana may impair a person's ability to drive a motor vehicle or operate heavy machinery."

- I. No Marijuana Visible from Outside. No marijuana may be visible by the naked eye from the exterior of any Medical Marijuana Dispensary.
- J. No On-Site Consumption. No marijuana may be ingested, consumed or used on the premises of any Medical Marijuana Dispensary.
- K. No Excessive Dispensing. Per visit, each person obtaining medical marijuana from a Medical Marijuana Dispensary shall not be provided with an amount in excess of the end-user's personal medical needs, which shall be determined in the reasonable discretion of the Medical Marijuana Dispensary.
- L. Restriction on Underage Dispensing. No Medical Marijuana Dispensary may dispense marijuana to anyone under the age of 18 unless he or she is a qualified patient and is accompanied by a parent or legal guardian in accordance with California law.
- M. No Excessive Cash On-Site Overnight. Medical Marijuana Dispensaries shall not keep more than \$500.00 in cash overnight on the premises.
- N. Appearance. The exterior appearance of the structure housing any Medical Marijuana Dispensary shall be compatible with surrounding structures in the immediate vicinity, to ensure against blight, deterioration, or substantial diminishment or impairment of property values in the area.
- O. City Enforcement Access. All local code enforcement officers, police officers, and other agents or employees of the City of Oceanside requesting admission for the sole purpose of determining compliance with the provisions of this Section shall be given unrestricted access upon reasonable notice.
- P. Numerical Limit. There shall be no more than 10 Medical Marijuana Dispensaries in the City of Oceanside.
- Q. Indemnification of City. To the fullest extent permitted by law, the City of Oceanside shall assume no liability whatsoever, and expressly does not waive sovereign immunity, with respect to any medical marijuana dispensed through any Medical Marijuana Dispensary, or for the activities of any Medical Marijuana Dispensary. Upon receiving a conditional use permit, the primary operator (or officer or board, depending on the legal structure) of each Medical Marijuana Dispensary shall sign an agreement indemnifying and holding the City of Oceanside harmless to the fullest extent permitted by law, on behalf of the Medical Marijuana Dispensary.
- R. No Convicted Felons. No person who has been convicted of a felony under federal or state law within the past 7 years may operate or otherwise work at a Medical Marijuana Dispensary.
- S. Records and Inspection. All Medical Marijuana Dispensaries shall maintain sufficiently detailed written records regarding their processes for ensuring that medical marijuana is dispensed only to qualified patients and primary caregivers under Health and Safety Code Section 11362.5 et seq. Such records are subject to inspection by local police, upon reasonable notice, to ensure compliance with this Section.
- T. Confidential Patient Information. All approval and inspection processes conducted pursuant to this Section shall preserve to the maximum extent possible all legal protections and privileges of the parties involved, consistent with reasonably verifying the qualifications and status of qualified patients

and their primary caregivers. Disclosure of any patient information to assert facts in support of qualified status shall not be deemed a waiver of confidentiality of that information under any provision of law.

U. No "Profit" Permitted. No Medical Marijuana Dispensary may make a "profit" as contemplated under California law. Non-profit operations are permitted, including reasonable compensation for officers and employees, payment of all overhead expenses, and cash reserves as approved by the board of directors, officers, and/or members of each Medical Marijuana Dispensary, as applicable.

City of Oceanside "PUBLIC SAFETY ANALYSIS"

The following synopsis has been provided by the Oceanside Police Department to clearly illustrate the public safety issues that have occurred throughout the City of Oceanside as a direct result of Medical Marijuana Dispensaries illegally establishing in the City and without any type of approvals.

During 2013, Oceanside Police investigated at least twenty six (26) robberies related to the sale/purchase of marijuana. Sixteen (16) were committed using firearms, six (6) were committed with the use of Tasers, knives and pepper spray and finally, three (3) were determined to be strong armed. Ten (10) of these were classified as Home Invasion, including one that occurred on a boat in the Oceanside Harbor. Thirteen (13) were classified as street robberies, and three (3) were classified as a Kidnapping, Carjacking, and Commercial Robbery.

The commercial robbery incident took place at 2525 South Vista Way (Natures Leaf Dispensary). At least one armed suspect entered the business, held the victim at gunpoint and stole cash and marijuana. The business and victim(s) were less than cooperative during the investigation and gave varying information regarding how much cash and product were actually stolen. Since the incident, the business has hired a security guard; however, we have still received several calls for service including, most recently on December 7th, another call of an armed robbery which they denied took place.

Lack of cooperation with Law Enforcement is a common theme with dispensaries. During a business inspection at 909-913 South Coast Highway (Green Vine Collective) Detectives were denied access by an employee. This, despite a court mandated cease and desist order. Another dispensary at 1925 South Coast Highway (Levi's Actor Studio) was found, in 2012, to be furnishing marijuana to a subject who did not possess a Medical Marijuana card. The subject, who was arrested, admitted to purchasing marijuana from this dispensary on at least ten (10) occasions without a card.

Another concern regarding medical marijuana dispensaries is their sale of instruments to facilitate the use of Honey Oil. Honey Oil is a very concentrated form of Cannabis, the active ingredient in marijuana, which is obtained by a highly dangerous and explosive extraction method utilizing white gas. While we have not seen dispensaries selling Honey Oil, which is illegal under both state and federal law, it does cause concern that it encourages the use of Honey Oil.

*Office of the City Attorney***Memorandum**

TO: Honorable Mayor and City Council Members

FROM: John P. Mullen, City Attorney *JPM*

DATE: June 25, 2014

SUBJECT: City Attorney Analysis of Proposed Medical Marijuana Zoning Text Amendment

I. INTRODUCTION

The applicant for the proposed zoning text amendment is currently operating a medical marijuana dispensary in Oceanside and has been named in a civil nuisance abatement action (“the action”) filed by the City Attorney’s Office. The City filed the action because the City’s Zoning Ordinance does not specifically allow medical marijuana dispensaries; therefore, the City contends the existing operation is an illegal use and has requested the Superior Court issue an injunction to prevent its continued operation. The City has successfully closed approximately ten illegal dispensaries in similar actions filed in the Superior Court.

After the City filed the action against Nature’s Leaf, the applicant submitted the present application for a zoning text amendment to allow medical marijuana dispensaries to operate in specified zoning districts subject to the approval of a discretionary conditional use permit. Nevertheless, the applicant continues to operate in violation of the Zoning Ordinance. The Superior Court has granted the City’s motion for a preliminary injunction against Nature’s Leaf but stayed enforcement until the City Council considers the proposed amendment.

The legal issues surrounding medical marijuana are somewhat complicated. This memo lays out the current state of the law on the topic and summarizes the City’s land use authority to regulate these establishments. As discussed below, the Council has the legal authority to approve the proposed amendment. However, staff is recommending against the proposed amendment, and therefore, environmental review under the California Environmental Quality Act (“CEQA”) has not been prepared. If the Council is inclined to approve the amendment, the

item should be returned to staff for preparation of CEQA analysis and the CEQA document would need to be reviewed by the Planning Commission.

Alternatively, the City Council could reject the proposed amendment without further CEQA review. In this event, the City Attorney will continue to abate storefront dispensaries that are not a permitted use under the Zoning Ordinance.

II. THE COMPASSIONATE USE ACT

In 1996, California voters adopted Proposition 215 known as the Compassionate Use Act (“CUA”), codified as Health and Safety Code section 11362.5. The stated purposes of the CUA are:

1. 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 in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. §11362.5, subd. (b)(1)(A).
2. To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction. §11362.5, subd. (b)(1)(B).
3. To encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana. §11362.5, subd. (b)(1)(C).

The CUA exempts patients and their “primary caregivers” from criminal liability under state law for the possession and cultivation of marijuana for personal medical use. A qualified patient is an individual who has received a physician’s recommendation for the use of marijuana for a medical purpose, and the primary caregiver is someone who has consistently assumed responsibility for the housing, health, or safety of a patient. (§11362.5, subd. (e); *see also People v. Urziceanu* (2005) 132 Cal.App.4th 747, 771). This limited criminal defense in the CUA does not extend to those who supply marijuana to qualified patients and their caregivers. Furthermore, selling, giving away, transporting, and growing large quantities of marijuana was not legalized by the adoption of the CUA. (*Id.* at 772). The CUA does provide protection to physicians who “recommend” marijuana to

qualified patients. Physicians, however, cannot issue a prescription because marijuana is illegal under federal law. (§11362.5, subd. (c)).

III. THE MEDICAL MARIJUANA PROGRAM—SB 420

In 2003, the California Legislature adopted the Medical Marijuana Program (“MMP”) to clarify the scope of lawful medical marijuana practices. The MMP was intended to:

1. Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;
2. Promote uniform and consistent application of the CUA among the counties within the state;
3. Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
4. Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act. (Stats. 2003, ch. 875, §1 (Sen. Bill No. 420)).

The MMP added additional terms, including “qualified patient,” defined as a “person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article.” (§11362.7, subd. (f)). The Legislature also expanded the definition of “primary caregiver,” which retains the same language as that in the CUA, but provides examples of individuals who may act as a primary caregiver, including owners and operators of clinics and care facilities. This definition also added the requirement that a primary caregiver must, with limited exceptions, be at least 18 years of age. (§11362.7, subd. (e)).

The MMP also provided additional narrow immunities to specified individuals for specific conduct related to the provision of medical marijuana to qualified patients: “As part of its effort to clarify and smooth implementation of the [Compassionate Use] Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients.” (*People v. Mentch* (2008) 45 Cal.4th 274, 290 (citing § 11362.765)). This “range of conduct” is carefully circumscribed and includes transportation of marijuana by qualified patients for their own personal medical use under §11362.765,

subdivision (b) (1). The MMP also immunizes from criminal liability a “designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.” (§11362.765, subd. (b)(2)). On the “sole basis” of this immunized range of conduct under Section 11362.765, the specified individuals are not subject to criminal liability under the enumerated Health and Safety Code sections relating to marijuana.

Section 11362.775 of the MMP provides additional immunities to specific individuals who associate to collectively or cooperatively cultivate medical marijuana: “Qualified 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, 11358, 11359, 11360, 11366, 11366.5, or 11570.” Like section 11362.765, section 11362.775 authorizes specific conduct (associating to collectively or cooperatively cultivate marijuana) by specific individuals (qualified patients with or without identification cards and their designated primary caregivers) and provides that, “solely on the basis of that fact,” such individuals are not subject to criminal sanction for violation of state marijuana laws.

A key aspect of the medical marijuana laws, however, is that there is no criminal immunity for commercial or for-profit distribution. Section 11362.765(a) provides “nothing in this section shall authorize ... any individual or group to cultivate or distribute marijuana for profit.”

IV. CITIES CAN ENFORCE LAND USE REGULATIONS TO PROHIBIT OR REGULATE DISPENSARIES

“Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151). Article XI, section 7 provides that, “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” The California Supreme Court “has recognized that a city’s or county’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.” (*Id.* at 1151 (quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782)). “The power of cities and counties to zone land use in

accordance with local conditions is well entrenched.” (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89). “In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances.” (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460). Subject to the limitation that it not act contrary to state law, the police power of a city is as broad as the police power exercised by the state Legislature itself. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140).

Based upon published case law, medical marijuana activities can be regulated using local land use authority. For example, the court of appeal in *City of Corona v. Naulls*, affirmed the issuance of a preliminary injunction to close a medical marijuana distribution facility which was operating without a valid zoning designation. (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418). The court held that “where a particular use of land is not expressly enumerated in a city’s municipal code as constituting a permissible use, it follows that such use is impermissible.” Accordingly, “[the dispensary operator], by failing to comply with the City’s various procedural requirements, created a nuisance *per se*, subject to abatement in accordance with the City’s municipal code.” (*Id.* at 433).

A similar result occurred in *City of Claremont v. Kruse*, where the court held that neither the CUA nor MMP preempted a city’s local regulations restricting the establishment of marijuana distribution facilities. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1172-1176). Finally, the California Supreme Court ruled in 2013 that cities may lawfully enact zoning prohibitions on medical marijuana dispensaries. *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal. 4th 729.

Thus, the MMP provides an exception, under certain specified circumstances, to what was once deemed to be the *illegal* use and distribution of marijuana, but does not affirmatively grant marijuana users the “legal right” to open dispensaries and sell marijuana in clear violation of local laws. (*See e.g., People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774 (“[T]he [CUA] created a limited defense to crimes, not a constitutional right to obtain marijuana.”). As the appellate courts have already recognized, “the statute does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose.” (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868-69; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704 (cultivation may be locally regulated).

Moreover, section 11362.83 of the MMP specifically provides:

Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the

following: (a) Adopting local ordinances that regulate the location, operation, or establishment of medical marijuana cooperative or collective. (H&S Code § 11362.83(a)).

Similarly, section 11362.768, effective January 1, 2011, provides: “Nothing in this section shall prohibit a city . . . from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. (H&S Code § 11362.768(f) (emph. added)).

V. OCEANSIDE’S REGULATION OF STOREFRONT DISPENSARIES

A storefront marijuana dispensary is not considered a “permitted use” under Oceanside’s Zoning Ordinance. The City’s ordinance is consistent with the MMP, as the City is not trying to criminalize what the Legislature has determined will no longer be criminal; nor is the City attempting to impose sanctions on qualified patients or designated primary caregivers “solely on the basis of [the] fact’ that [such individuals] have associated collectively or cooperatively to cultivate marijuana for medical purposes.” (*County of Los Angeles v. Hill*, supra, 192 Cal.App.4th at 869 (citing § 11362.775)). Instead, the City regulates the establishment of medical marijuana distribution businesses within its boundaries, something the MMP specifically states it can do. (*See Conejo Wellness Center, Inc. v. City of Agoura Hills*, (2013) 214 Cal. App. 4th 1534, 1550 (complete ban upheld, finding that the MMP does not interfere with local zoning authority to ban medical marijuana collectives and cooperatives)).

Oceanside’s Zoning Ordinance, like those in Claremont and Corona, lists all of the permitted uses within each zoning district, but does not include dispensing marijuana through a storefront among the classified uses. (*Naulls*, 166 Cal.App.4th at 431; *Kruse*, 177 Cal.App.4th at 1159-60; OZO, Article 11, § 1120). Under a permissive zoning code such as Oceanside’s, any use not enumerated in the code is presumptively prohibited. (OZO § 420; *see also Naulls*, 166 Cal.App.4th at 425). Persons seeking to use their property for a non-enumerated use in Oceanside are required to follow specified procedures for obtaining the approval of such use. (OZO, Article 45). If they fail to secure such an amendment, yet continue to operate within the City, such operation may be enjoined as a nuisance *per se*. (177 Cal.App.4th at 1164-65).

The City of Oceanside’s zoning ordinance and business license codes are applied equally to all uses and all businesses. All businesses which desire to operate in the City are required to comply. The Attorney General has recognized that “failure to follow local . . . laws applicable to similar businesses” is one indicia that a collective or cooperative is operating unlawfully. (2008 Attorney General

Guidelines for the Security and Non-Diversion of Marijuana Grown for Medicinal Use (“Guidelines”), p.11, section C.2 (emph. added); *see also County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868-69 (“The limited statutory immunity from prosecution . . . does not prevent the County from applying its nuisance laws to MMD’s that do not comply with its valid ordinances”).

Section 17.3(m) of Oceanside’s Municipal Code, expressly states that any condition caused or permitted to exist in violation of its provisions constitutes a public nuisance. (OCC §17.3; *see also Naulls*, 166 Cal.App.4th at 433 (holding that substantial evidence supported trial court’s conclusion that defendant’s failure to comply with city’s procedural requirements before operating a medical marijuana dispensary “created a nuisance *per se*” and upheld the issuance of a preliminary injunction); *Kruse*, 177 Cal.App.4th at 1159 (dispensary was a nuisance *per se* subject to injunction)).

Pursuant to its zoning and abatement powers, the City has filed numerous cases seeking permanent injunctions to close illegally-operating marijuana dispensaries. In every such case, except those still pending, the City has secured a permanent injunction prohibiting operation of the dispensary within the City’s boundaries. Recently, the City secured money judgments against two such operations in excess of \$800,000.00. (*People v. Green Vine, et. al*, CN 37-2013-00047878; *People v. Miller, et. al*, CN 37-2013-00034450).

VI. CONCLUSION

Based upon the authorities cited above, the City has the legal authority to continue to bring nuisance abatement actions against storefront dispensaries as it has done in the past.

Nature’s Leaf’s proposed zoning amendment, if ultimately adopted, would pave the way for up to ten dispensaries in the CG and CS-HO zoning districts through a conditional use permit process. Further, a proposed dispensary would need to meet all of the locational restrictions in Article 36 of the Zoning Code unless the restrictions were waived by the City Council. Although this proposal is within the City’s legal authority to adopt, the amendment requires CEQA review. If Council favors the proposed amendment, the application should be returned to staff to complete CEQA review and present the environmental document to the Planning Commission for its consideration.

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OCEANSIDE DENYING ZONE AMENDMENT (ZA13-00005) TO AMEND THE 1992 OCEANSIDE ZONING ORDINANCE, ADDING MEDICAL MARIJUANA DISPENSARIES AS A NEW LAND USE WITHIN ARTICLE 4 AND ADDING SECTION 3043 "MEDICAL MARIJUANA DISPENSARIES" ESTABLISHING REGULATIONS AND PERFORMANCE STANDARDS TO ARTICLE 30 "SITE REGULATIONS"

(Applicant: Natures Leaf Collective, George Sadler)

WHEREAS, applicants Nature's Leaf Collective and George M. Sadler currently operate a marijuana dispensary located at 2525 Vista Way in Oceanside, California. The City of Oceanside Zoning Ordinance ("OZO") does not currently permit marijuana dispensaries in any zoning district in the City, and therefore, the City Attorney has filed a civil nuisance abatement action ("the Action") in the name of the People of the State of California against the applicants and the owner of the property. (*People of the State of the California ex rel. John P. Mullen. City Attorney of the City of Oceanside v Nature's Leaf Collective, George M. Sadler, et al.*, San Diego Superior Court Case Number 37-2013-000062401. The Action was filed after the City unsuccessfully exhausted all attempts with the defendants to comply with the OZO ; and

WHEREAS, applicants filed the instant proposed zone amendment after refusing the City's efforts to comply with the OZO and after the City initiated the Action. The application proposes an amendment of the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4 and adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations." The proposed amendment purports to apply city-wide with the exception of all real property within the Coastal Zone; and

WHEREAS, the proposed zone amendment is a project under the California Environmental Quality Act ("CEQA"), Public Resource Code section 21080 and CEQA Guideline section 15378, however, staff is recommending denial of the application and has prepared a notice of exemption pursuant to CEQA Guidelines section 15061(b)(4) which provides an exemption for projects that will be rejected or disapproved by a public agency; and

WHEREAS, in 1996, California voters adopted Proposition 215 known as the Compassionate Use Act ("CUA") codified at Health and Safety Code section 11362.5 and in 2004

1 the California Legislature adopted SB 420, also known as the Medical Marijuana Program
2 (“MMP”); and

3 WHEREAS, as addressed in the staff report for this item, particularly the City Attorney’s
4 Analysis of Proposed Medical Marijuana Zoning Text Amendment dated June 25, 2014, neither
5 the CUA nor the MMP preempt cities from enacting land use regulations concerning the operation
6 of medical marijuana dispensaries within their boundaries. *City of Claremont v. Kruse* (2009)
7 177 Cal.App.4th 1153, 1172-1176; *City of Riverside v. Inland Empire Patients Health &*
8 *Wellness Center, Inc.* (2013) 56 Cal. 4th 729. The CUA and MMP provide exceptions under
9 specified circumstances, to criminal charges related to the use and distribution of marijuana.
10 Cities remain free to prohibit the operation of storefront dispensaries under zoning laws. *City*
11 *of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal. 4th 729.
12 Under current law, each city in California can determine whether or not a medical marijuana
13 dispensary may operate within its borders; and

14 WHEREAS, on May 5, 2014, the Planning Commission of the City of Oceanside, after
15 holding a duly advertised public hearing, adopted Resolution No. 2014-P10, by a vote of 3-2 to
16 recommend approval of said Zone Amendment (ZA13-00005). Two members of the
17 Commission were absent from the meeting; and

18 WHEREAS, on June 25, 2014, the City Council of the City of Oceanside held a duly
19 noticed public hearing and heard and considered evidence and testimony by all interested parties
20 concerning the above identified Zone Amendment; and

21 WHEREAS, studies and investigations made by this Council and on its behalf reveal the
22 following facts:

23 FINDINGS:

- 24 1. The creation of a new Land Use referred to as “Medical Marijuana Dispensaries” within
25 the City of Oceanside Zoning Ordinance and the establishment of regulations and
26 performance standards that would allow dispensing, storage, cultivation, and/or selling of a
27 controlled substance would create a land use that violates the federal Controlled Substances
28 Act, 21 USC Section 801 et seq.

- 1 2. Data provided by the Oceanside Police Department has confirmed that the addition of a
2 new Land Use referred to as "Medical Marijuana Dispensaries" would directly result in
3 adverse public service impacts. The Police Department has documented examples of
4 criminal activity associated with dispensaries illegally in Oceanside. The applicants are
5 currently operating a marijuana dispensary in clear violation of Oceanside Zoning
6 Ordinance. The Oceanside Police Department has received calls for service for two
7 separate armed robberies at the location. In one of the two incidents, an armed suspect
8 entered the business and held the victim at gunpoint and stole cash and marijuana. On
9 December 7, 2013, a second report of an armed robbery was received for the illegal
10 dispensary operated by Nature's Leaf at the site in Oceanside. In both incidents, the Police
11 Department found that the employees were uncooperative during the investigation.
- 12 3. The creation of a new Land Use referred to as "Medical Marijuana Dispensaries" and the
13 potential approval of up to ten dispensaries is inconsistent with the General Plan Land
14 Use Element goal to ensure the consistent, significant, long term preservation and
15 improvement of the environment, values, aesthetics, character, and image of Oceanside
16 as a safe, attractive, desirable, and well-balanced community. Creation of the subject
17 land use would not be a significant benefit to the City and would actually lessen the
18 character and image of the City of Oceanside as a safe, attractive, and desirable
19 community by allowing a land use that is known to increase illegal activities in close
20 proximity to this type of land use.
- 21 4. The applicant has not conducted an environmental review of the project, and as a
22 result, the City Council has not been presented with evidence of the project's
23 environmental impacts, proposed mitigation measures, and/or feasible alternatives to
24 the project to reduce or eliminate potential environmental impacts. The impacts of
25 allowing up to ten dispensaries in specified commercial zoning districts is unknown
26 until the required environmental studies are completed. Approval of the amendment at
27 this time would potentially lead to significant and unmitigated environmental impacts
28 in violation of CEQA.

1 NOW, THEREFORE, BE IT RESOLVED that the City Council does hereby deny the
2 Zone Amendment (ZA13-00005).

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4 PASSED AND ADOPTED by the City Council of the City of Oceanside, California,
5 this _____ day of _____, 2014, by the following vote:

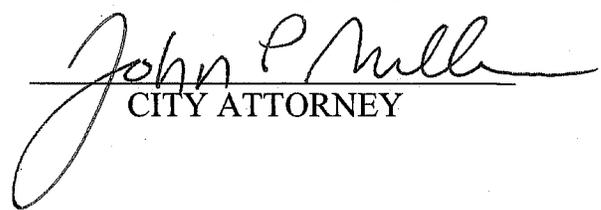
- 6 AYES:
- 7 NAYS:
- 8 ABSENT:
- 9 ABSTAIN:

10 MAYOR OF THE CITY OF OCEANSIDE

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12 ATTEST:

13 APPROVED AS TO FORM:

14 _____
15 CITY CLERK

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CITY ATTORNEY

ATTACHMENT 5 AGENDA NO. 5

PLANNING COMMISSION



STAFF REPORT

DATE: May 5, 2014

TO: Chairperson and Members of the Planning Commission

FROM: Development Services Department/Planning Division

SUBJECT: **CONSIDERATION OF A ZONE AMENDMENT (ZA13-00005) TO AMEND THE 1992 OCEANSIDE ZONING ORDINANCE, ADDING MEDICAL MARIJUANA DISPENSARIES AS A NEW LAND USE WITHIN ARTICLE 4 AND ADDING SECTION 3043 "MEDICAL MARIJUANA DISPENSARIES" ESTABLISHING REGULATIONS AND PERFORMANCE STANDARDS TO ARTICLE 30 "SITE REGULATIONS". – APPLICANT: GEORGE SADLER – NATURE'S LEAF COLLECTIVE.**

RECOMMENDATION

Staff recommends that the Planning Commission adopt PC Resolution No. 2014-P10 recommending denial of Zone Amendment (ZA13-00005) and forward the recommendation to the City Council for final action.

As detailed below, staff makes this recommendation because although the State of California has adopted the Compassionate Use Act (CUA) and the Medical Marijuana Program (MMP) to ensure access of patients and caregivers to medical marijuana without being subject to prosecution, the subject use remains recognized by the Federal Government as an illegal activity. Further, the Oceanside Police Department considers the presence of Medical Marijuana Dispensaries in the City to be detrimental to public safety. Adding a Land Use that is in conflict with Federal Law, and contrary to the recommendation of local law enforcement would not be good public stewardship and in keeping with the best interest of the citizens of Oceanside.

The applicant does not agree with staff's recommendation of denial, and has requested that staff move the project forward to the Planning Commission. Pursuant to section 15270 "Projects which are Disapproved" of the CEQA guidelines, CEQA review is not required. If the Planning Commission decides to recommend approval of ZA13-00005, and the City Council ultimately approves in concept the Zone Amendment, the project would need to then return to the Planning Division for completion of the environmental review process.

PROJECT DESCRIPTION AND BACKGROUND

Application Background: On September 5, 2013, the City of Oceanside after having secured multiple permanent injunctions prohibiting operation of dispensaries within the City's boundaries, received an application for a Zone Amendment (ZA13-00005). The proposed zone amendment is a request to amend the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4 and adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations". **(Attachment 1)** The subject request is proposed to be implemented City-wide with the exception of properties located within the Coastal Zone, including the Downtown District Area (Former Redevelopment Area).

LEGAL ANALYSIS

Staff has focused their review and analysis based upon applicable case law and how the Compassionate Use Act and Medical Marijuana Program has been legally interpreted throughout the State. The following synopsis provides an overview of the State Acts and how Local Land Use Regulations and Control of the subject use are not pre-empted by the Acts:

COMPASSIONATE USE ACT

In 1996, California voters adopted Proposition 215 known as the Compassionate Use Act ("CUA"), codified as Health and Safety Code section 11362.5. The stated purposes of the CUA are:

1. 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 in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. §11362.5, subd. (b)(1)(A).
2. To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction. §11362.5, subd. (b)(1)(B).
3. To encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana. §11362.5, subd. (b)(1)(C).

The CUA exempts patients and their "primary caregivers" from criminal liability under state law for the possession and cultivation of marijuana for personal medical use. A qualified patient is an individual who has received a physician's recommendation for the use of marijuana for a medical purpose, and the primary caregiver is someone who has consistently assumed responsibility for the housing, health, or safety of a patient. (§11362.5, subd. (e); see also *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 771). This limited criminal defense does not extend to those who supply marijuana to qualified patients and their caregivers; furthermore, selling, giving away, transporting, and growing large quantities of marijuana remain criminal notwithstanding the adoption of the CUA. (*Id.* at 772). The CUA does provide protection to physicians who "recommend" marijuana to qualified patients. Physicians, however, cannot issue a prescription because marijuana is illegal under federal law. (§11362.5, subd. (c)).

THE MEDICAL MARIJUANA PROGRAM

In 2003, the Legislature adopted the Medical Marijuana Program ("MMP") to clarify the scope of lawful medical marijuana practices. The MMP was intended to:

1. Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;
2. Promote uniform and consistent application of the CUA among the counties within the state;
3. Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
4. Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act. (Stats. 2003, ch. 875, §1 (Sen. Bill No. 420)).

Additional terms are added to the MMP, including "qualified patient," defined as a "person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article." (§11362.7, subd. (f)). There is also an expanded definition of "primary caregiver," which retains the same language as that in the CUA, but provides examples of individuals who may act as a primary caregiver, including owners and operators of clinics and care facilities. This definition also added the requirement that a primary caregiver must, with limited exceptions, be at least 18 years of age. (§11362.7, subd. (e)).

The MMP also provided additional narrow immunities to specified individuals for specific conduct related to the provision of medical marijuana to qualified patients: "As part of its effort to clarify and smooth implementation of the [Compassionate Use] Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of

medical marijuana to qualified patients.” (*People v. Mentch* (2008) 45 Cal.4th 274, 290 (citing § 11362.765). This “range of conduct” is carefully circumscribed and includes transportation of marijuana by qualified patients for their own personal medical use under §11362.765, subdivision (b) (1). The MMP also immunizes from criminal liability a “designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver.” (§11362.765, subd. (b)(2)). On the “sole basis” of this immunized range of conduct under Section 11362.765, the specified individuals are not subject to criminal liability under the enumerated Health and Safety Code sections relating to marijuana.

Section 11362.775 of the MMP provides additional immunities to specific individuals who associate to collectively or cooperatively cultivate medical marijuana: “Qualified 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, 11358, 11359, 11360, 11366, 11366.5, or 11570.” Like section 11362.765, section 11362.775 authorizes specific conduct (associating to collectively or cooperatively cultivate marijuana) by specific individuals (qualified patients with or without identification cards and their designated primary caregivers) and provides that, “solely on the basis of that fact,” such individuals are not subject to criminal sanction for violation of state marijuana laws.

A key aspect of the medical marijuana laws, however, is that there is no criminal immunity for commercial or for-profit distribution. Section 11362.765(a) provides “nothing in this section shall authorize ... any individual or group to cultivate or distribute marijuana for profit.”

LAND USE REGULATION AND LOCAL CONTROL

“Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151). Article XI, section 7 provides that, “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” The California Supreme Court “has recognized that a city’s or county’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.” (*Id.* at 1151 (quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782)). “The power of cities and counties to zone land use in accordance with local conditions is well entrenched.” (*IT Corp. v. Solano County Bd. Of Supervisors* (1991) 1 Cal.4th 81, 89). “In enacting zoning ordinances, the

municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances.” (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460). Subject to the limitation that it not act contrary to state law, the police power of a city is as broad as the police power exercised by the state Legislature itself. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140).

Based upon published case law as it exists today, medical marijuana activities can be regulated using local land use authority. For example, the court of appeal in *City of Corona v. Naulls*, affirmed the issuance of a preliminary injunction to close Ronald Naulls’ marijuana distribution facility, which was operating without a valid zoning designation. (*City of Corona v. Naulls* (2008) 166 Cal.App.4th 418). The court held that “where a particular use of land is not expressly enumerated in a city’s municipal code as constituting a *permissible* use, it follows that such use is *impermissible*.” Accordingly, “Naulls, by failing to comply with the City’s various procedural requirements, created a nuisance *per se*, subject to abatement in accordance with the City’s municipal code.” (*Id.* at 433).

The court of appeal upheld the trial court’s issuance of the preliminary injunction, opining that “Naulls did not comply with the City’s requirements, failing to take any steps to obtain approval before opening his doors for business. As a consequence, operation of marijuana dispensary violated the City’s municipal code and, as such, constituted a nuisance *per se*.” (*Id.* at 428). Importantly, the court of appeal rejected Naulls’ argument that the trial court erred in finding that any use not enumerated in the City’s zoning code was presumptively prohibited. The City’s Specific Plan listed all permissible and impermissible uses within each zoning district; neither selling nor distributing medical marijuana was among them. A prospective licensee could apply for a Planning Commission determination of the proper zoning, if any, for such miscellaneous uses. Naulls thus needed to obtain a “similar use” determination or an amendment to the Specific Plan. He did neither. (*Id.*).

In *City of Claremont v. Kruse*, the court specifically analyzed whether there was express or implied preemption by the CUA or the MMP that would prevent local regulations, such as zoning laws, from restricting the establishment of marijuana distribution facilities. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1172-1176). The court of appeal held:

Zoning and licensing are not mentioned in the findings and declarations that precede the CUA’s operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. *The CUA accordingly did not expressly preempt the City’s enactment of the moratorium or the enforcement of local zoning and business licensing requirements.* (177 Cal.App.4th at 1175 (emph. added)).

The *Kruse* court's holding was not based solely on the existence of a temporary moratorium. Rather, the court plainly based its decision on the city's zoning and licensing authority found in Claremont's municipal code. "Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws ... does not conflict with the CUA or the MMP." (*Id.* at 1176; *see also City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal. 4th 729 (city's zoning prohibition was not preempted by state law)).

Thus, the MMP provides an exception, under certain specified circumstances, to what was once deemed to be the *illegal* use and distribution of marijuana, but does not affirmatively grant marijuana users the "legal right" to open dispensaries and sell marijuana in clear violation of local laws. (See *e.g., People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774 ("[T]he [CUA] created a limited defense to crimes, not a constitutional right to obtain marijuana."). As the appellate courts have already recognized, "the statute does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." (*County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868-69; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704 (cultivation may be locally regulated)).

Moreover, section 11362.83 of the MMP specifically provides:

Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of medical marijuana cooperative or collective. (H&S Code § 11362.83(a)).

Similarly, section 11362.768, effective January 1, 2011, provides: "Nothing in this section shall prohibit a city . . . from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. (H&S Code § 11362.768(f) (emph. added)).

Thus, as the court in *County of Los Angeles v. Hill* stated, "If there was ever any doubt about the Legislature's intention to allow local governments to regulate marijuana dispensaries, and we do not believe there was, the newly enacted section 11362.768 has made clear that local government may regulate dispensaries." (*County of Los Angeles v. Hill*, 192 Cal.App.4th at 868; *see also Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1153 [holding zoning ordinance was not preempted where state regulations "expressly preserve and plainly contemplate the exercise of local authority"]; *Candid Enterprise v. Grossmont Union HS District* (1985) 39 Cal.3d 878, 888 ["Preemption by implication of legislative intent may not be found where the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations"]; *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal. 4th 729).

The City of Oceanside

Pursuant to the City of Oceanside's zoning ordinance, a storefront marijuana dispensary is not considered a "permitted use." The City's ordinance is consistent with the MMP, as the City is not trying to criminalize what the Legislature has determined will no longer be criminal; nor is the City attempting to impose sanctions on qualified patients or designated primary caregivers "'solely on the basis of [the] fact' that [such individuals] have associated collectively or cooperatively to cultivate marijuana for medical purposes." (*County of Los Angeles v. Hill*, supra, 192 Cal.App.4th at 869 (citing § 11362.775)). Instead, the City is regulating the establishment of medical marijuana *distribution* businesses within its boundaries, something the MMP specifically states it can do. (*See Conejo Wellness Center, Inc. v. City of Agoura Hills*, (2013) 214 Cal. App. 4th 1534, 1550 (complete ban upheld, finding that the MMP does not interfere with local zoning authority to ban medical marijuana collectives and cooperatives)).

Oceanside's municipal code, like Claremont and Corona's municipal codes, lists all of the permitted uses within each zoning district, but does not include dispensing marijuana through a storefront among the classified uses. (*Naulls*, 166 Cal.App.4th at 431; *Kruse*, 177 Cal.App.4th at 1159-60; OZO, Article 11, § 1120). Under a permissive zoning code such as Oceanside's, any use not enumerated in the code is presumptively prohibited. (OZO § 420; *see also Naulls*, 166 Cal.App.4th at 425). Persons seeking to use their property for a non-enumerated use in Oceanside are required to follow specified procedures for obtaining the approval of such use. (OZO, Article 45). If they fail to secure such an amendment, yet continue to operate within the City, such operation may be enjoined as a nuisance *per se*. (177 Cal.App.4th at 1164-65).

The City of Oceanside's zoning ordinance and business license codes are applied equally to all uses and all businesses. All businesses which desire to operate in the City are required to comply. The Attorney General has recognized that "failure to follow local ... laws applicable to similar businesses" is one indicia that a collective or cooperative is operating unlawfully. (2008 Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medicinal Use ("Guidelines"), p.11, section C.2 (emph. added); *see also County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868-69 ("The limited statutory immunity from prosecution . . . does not prevent the County from applying its nuisance laws to MMD's that do not comply with its valid ordinances"))).

Section 17.3(m) of Oceanside's municipal code, expressly states that any condition caused or permitted to exist in violation of its provisions constitutes a public nuisance. (OCC §17.3; *see also Naulls*, 166 Cal.App.4th at 433 (holding that substantial evidence supported trial court's conclusion that defendant's failure to comply with city's procedural requirements before operating a medical marijuana dispensary "created a nuisance *per se*" and upheld the issuance of a preliminary injunction); *Kruse*, 177 Cal.App.4th at 1159 (dispensary was a nuisance *per se* subject to injunction)).

Pursuant to its zoning and abatement powers, the City has filed numerous cases seeking permanent injunctions to close illegally-operating marijuana dispensaries. In every such case, except those still pending, the City has secured a permanent injunction prohibiting operation of the dispensary within the City's boundaries. Recently, the City secured money judgments against two such operations in excess of \$800,000.00. (*People v. Green Vine, et. al*, CN 37-2013-00047878; *People v. Miller, et. al*, CN 37-2013-00034450).

PUBLIC SAFETY ANALYSIS

The Oceanside Police Department considers the presence of medical marijuana dispensaries within the City of Oceanside a detriment to public safety. In addition to the public safety factor, the Federal Justice System does not recognize any form of legalized marijuana and considers the substance contraband. During 2013, the Drug Enforcement Agency conducted enforcement operations against several medical marijuana dispensaries located within Oceanside.

During 2013, Oceanside Police investigated at least twenty six (26) robberies related to the sale/purchase of marijuana. Sixteen (16) were committed using firearms, six (6) were committed with the use of Tasers, knives and pepper spray and finally, three (3) were determined to be strong armed. Ten (10) of these were classified as Home Invasion, including one that occurred on a boat in the Oceanside Harbor. Thirteen (13) were classified as street robberies, and three (3) were classified as a Kidnapping, Carjacking, and Commercial Robbery.

The commercial robbery incident took place at 2525 South Vista Way (Natures Leaf dispensary). At least one armed suspect entered the business, held the victim at gunpoint and stole cash and marijuana. The business and victim(s) were less than cooperative during the investigation and gave varying information regarding how much cash and product were actually stolen. Since the incident, the business has hired a security guard; however, we have still received several calls for service including, most recently on December 7th, another call of an armed robbery which they denied took place.

Lack of cooperation with Law Enforcement is a common theme with dispensaries. During a business inspection at 909-913 South Coast Highway (Green Vine Collective) Detectives were denied access by an employee. This, despite a court mandated cease and desist order. Another dispensary at 1925 South Coast Highway (Levi's Actor Studio) was found, in 2012, to be furnishing marijuana to a subject who did not possess a Medical Marijuana card. The subject, who was arrested, admitted to purchasing marijuana from this dispensary on at least ten (10) occasions without a card.

Another concern regarding medical marijuana dispensaries is their sale of instruments to facilitate the use of Honey Oil. Honey Oil is a very concentrated form of Cannabis, the active ingredient in marijuana, which is obtained by a highly dangerous and explosive

extraction method utilizing white gas. While we have not seen dispensaries selling Honey Oil, which is illegal under both state and federal law, it does cause concern that it encourages the use of Honey Oil.

KEY PLANNING ISSUES

GENERAL PLAN CONFORMANCE

The 1992 Zoning Ordinance should not be amended because the creation of a new Land Use Designation referred to as "Medical Marijuana Dispensaries" citywide is inconsistent with the goals and objectives of the City's General Plan. Staff analyzed the subject request to amend the Zoning Ordinance for consistency with the General Plan as follows:

A. Land Use Element I. Community Enhancement

Goal: The consistent, significant, long term preservation and improvement of the environment, values, aesthetics, character, and image of Oceanside as a safe, attractive, desirable, and well-balanced community.

1.11 Balanced Land Use

Policy B: The City shall analyze proposed land uses for assurance that the land use will contribute to the proper balance of land uses within the community or provide a significant benefit to the community.

Staff has reviewed the proposed Zoning Ordinance change, and has determined that the proposed land use would lessen the character and image of the City of Oceanside as a safe, attractive, and desirable community. Increase in illegal activities in close proximity to this type of Land Use have been heavily documented by the Oceanside Police Department and would not provide for a significant benefit to the community, but would rather create additional service impacts to Public Safety.

ENVIRONMENTAL DETERMINATION

Pursuant to Section 15270 (a) of the CEQA guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. In addition, Section 15270 (b) allows for the initial screening of projects on the merits for quick disapprovals prior to initiation of the CEQA process where the agency can determine that the project cannot be approved. Should staff's recommendation to deny be overturned, the project would need to be returned to staff in order to conduct the required CEQA review prior to any discretionary action on the project application.

RECOMMENDATION

Staff recommends that the Planning Commission adopt PC Resolution No. 2014-P10 recommending denial of Zone Amendment (ZA13-00005) and forward the recommendation to the City Council for final action.

PREPARED BY:



Richard Greenbauer,
Senior Planner

SUBMITTED BY:



Marisa Lundstedt,
City Planner

ML/RG/fil

Attachments:

1. Proposed Text Amendment Language
2. PC Resolution No. 2014-P10

ATTACHMENT 6

PLANNING COMMISSION
RESOLUTION NO. 2014-P10

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY
OF OCEANSIDE, CALIFORNIA RECOMMENDING APPROVAL OF A
ZONE AMENDMENT

APPLICATION NO: ZA13-00005

APPLICANT: Natures Leaf Collective, George Stadler

LOCATION: City-Wide with the Exception of the Coastal Zone

THE PLANNING COMMISSION OF THE CITY OF OCEANSIDE, CALIFORNIA DOES
HEREBY RESOLVE AS FOLLOWS:

WHEREAS, there was filed with this Commission a verified petition on the forms prescribed by the Commission requesting a Zone Amendment under the provisions of Articles 45 of the Zoning Ordinance of the City of Oceanside to permit the following:

amendment of the 1992 Oceanside Zoning Ordinance, adding Medical Marijuana Dispensaries as a new land use within Article 4 and adding Section 3043 "Medical Marijuana Dispensaries" establishing regulations and performance standards to Article 30 "Site Regulations" as shown in the attached Exhibit "A";

City-wide with the exception of all real property within the Coastal Zone and the Downtown District.

WHEREAS, the Planning Commission, after giving the required notice, did on the 5th day of May, 2014 conduct a duly advertised public hearing as prescribed by law to consider said application;

WHEREAS, Pursuant to Section 15270 (a) of the CEQA guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. In addition, Section 15270 (b) allows for the initial screening of projects on the merits for quick disapprovals prior to initiation of the CEQA process where the agency can determine that the project cannot be approved;

WHEREAS, studies and investigations made by this Commission and on its behalf reveal the following facts:

FINDINGS:

1. The creation of a new Land Use referred to as "Medical Marijuana Dispensaries" is consistent with the General Plan Land Use Element goal to ensure the consistent,

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significant, long term preservation and improvement of the environment, values, aesthetics, character, and image of Oceanside as a safe, attractive, desirable, and well-balanced community. Creation of the subject land use would be a significant benefit to the Citizens of Oceanside and City as a whole.

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission does hereby recommend approval of Zone Amendment (ZA13-00005) to the City Council for final action.

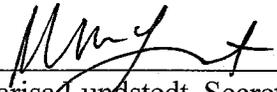
PASSED AND ADOPTED Resolution No. 2014-P10 on May 5, 2014 by the following vote, to wit:

- AYES: Balma, Martinek and Troisi
- NAYS: Neal, Ross
- ABSENT: Rosales, Morrissey
- ABSTAIN: None



 Robert Neal, Chairperson
 Oceanside Planning Commission

ATTEST:



 Marisa Lundstedt, Secretary

I, MARISA LUNDSTEDT, Secretary of the Oceanside Planning Commission, hereby certify that this is a true and correct copy of Resolution No. 2014-P10.

Dated: May 5, 2014