

October 22, 2009

Report Regarding "Fourth Revised Draft Ordinance Establishing Regulations Regarding Medical Marijuana Collectives"

RECOMMENDATION: Americans for Safe Access (ASA) recommends that the Los Angeles City Council reject the draft ordinance regulating medical cannabis cultivation, and instruct staff to create a new version based on the input of the Planning Department's medical cannabis working group. Barring that, we recommend the City Council adopt the changes discussed in this report.

The Draft Ordinance is Misguided

On October 20, the Los Angeles City Attorney's office published the "Fourth Revised Draft Ordinance Establishing Regulations Regarding Medical Marijuana Collectives" (City Council File No. 08-0923). Like previous versions, this draft ordinance is framed around fundamental misrepresentations of state and case law. In evaluating what changes to make in this ordinance, City Councilmembers should bear in mind that:

1. **Medical cannabis collectives may maintain storefront facilities to provide medicine to members.** In guidelines published in August of 2008, California Attorney General Jerry Brown states that "It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law" provided that the association substantially complies with the guidelines. This position has been upheld in *People v. Urziceanu* (132 Cal.App.4th 747); and again in *People v. Hochanadel* (98 Cal.Rptr.3d 347), which holds that "storefront dispensaries that qualify as 'cooperatives' or 'collectives' under the CUA and MMPA, and otherwise comply with those laws, may operate legally..."
2. **Not every member of a medical cannabis collective must participate in cultivation of the medicine.** In fact, the nature of a collective or cooperative association is naturally one in which differing forms of participation are necessary and appropriate. In *County of Butte v. Superior Court of Butte County* (96 Cal.Rptr.3d 421), the court held that "the [State] legislature intended collective cultivation of medical marijuana would not require physical participation in the gardening process by all members of the collective, but rather would permit that some patients would be able to contribute financially, while others performed the

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labor and contributed the skills and 'know-how.'" The Court of Appeal upheld the trial court ruling. In *People v. Newcomb et al.* (2009 WL 1589574), the court also found that "other than merely purchasing marijuana, not every member must contribute to some aspect of the collective or cooperative..."

3. **Incremental reimbursements for the cost and service of providing medicine are legal, whether they are characterized as sales, over-the-counter sales, donations, or reimbursements.** California Health and Safety Code Section 11362.775 states that qualified patients and their primary caregivers "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." Thus, the possession (Section 11357), possession for sale (Section 11359), and cultivation of cannabis (Section 11358) within the context of a collective or cooperative medical cannabis association is lawful. This interpretation is consistent with the decisions in *County of Butte v. Superior Court of Butte County*, *People v. Newcomb et al.*, and *People v. Urziceanu* (referenced above).
4. ***People v. Mentch* (45 Cal.4th 274, 283) does not make medical cannabis collectives or sales of medicine within their membership illegal.** This is a clear misreading of the decision, which simply upholds a narrow definition of the term "Primary Caregiver" in Proposition 215. The ruling only concerns *an individual's* claim to be a Primary Caregiver under state law; it does not address the legality of patients' collectives and cooperatives. Applying *Mentch* to medical cannabis collectives, including those that maintain storefront facilities in Los Angeles, is misguided and legally invalid.
5. **Medical cannabis collectives are not necessarily operating in a for-profit fashion simply because they receive payment, in cash or otherwise, for medicine.** The exchange of reimbursement does not automatically equate to profits or profiteering. For example, Goodwill Industries International, Inc., is statutory Nonprofit Corporation that earned \$3.2 billion in 2008, while operating 2,300 retail storefronts. However, their legal status as a nonprofit corporation remains valid, as does the integrity of the not-for-profit mission of the corporation.

Recommended Changes

The fourth revised draft ordinance has only minor changes from the version approved, over the objection of patients and advocates, by the Planning and Land Use Management (PLUM) Committee on September 29, 2009. Additional restrictions on proximity to medical

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facilities and residential housing make finding a suitable location for a legal collective even more difficult, perhaps resulting in a nearly complete ban on collectives.

This report suggests changes to the ordinance that will facilitate consensus between patients, advocates, elected officials, and law enforcement. This is the best way to ensure the rapid adoption and implementation of sensible guidelines for medical cannabis collectives and cooperatives. This is important, because research proves that regulations reduce crime and complaints. We can expect more unnecessary delay if the City Council fails to make these common-sense improvements.

In general, the most important changes needed in the fourth revised draft ordinance will achieve three crucial objectives:

1. **Protect the anonymity of medical cannabis patients, including those who provide medicine to collectives or cooperatives that are legally organized and operated under state law.** We must remove requirements to list the names of members on the collective's registration form (Sec. 45.19.6.2.D) or the names of patient-cultivators in the collective's records (Sec. 45.19.6.4). Furthermore, the membership and financial records of the facility must only be available to law enforcement by due process of law (Sec. 45.19.6.4 and 45.19.6.5).
2. **Provide a realistic legal framework for storefront facilities maintained by legally organized and operated collectives and cooperatives.** The provisions in this draft seek to regulate communal gardens, and do not seem to anticipate the storefront facilities recognized by state law, the California Attorney General, and the courts. Furthermore, some of the proposed regulations are so onerous as to make lawful operation impossible. These include restrictions on the location of collectives and the outright prohibition on sales of or reimbursements for cannabis to members. Priority changes include:
 - Establish a reasonable buffer zone around a small number of sensitive uses (Sec.45.19.6.3.A.3) and remove the new restrictions on collectives near residential housing (Sec. 43.19.6.3.A.2).
 - Allow collectives to provide medicine, including edible preparations, in exchange for incremental reimbursements for the cost and service of providing medicine (Sec. 45.19.6.3.B.6).
 - Provide for reasonable possession limits (Sec/ 45.19.6.3.B.8).
 - Remove the unnecessary and illegal requirement that all members participate in collective cultivation (Sec. 45.19.6.3.B.8).
3. **Recognize the legal standing of collectives and cooperatives that complied in good faith with the provisions of Interim Control Ordinance Number 179027 establishing a moratorium on new storefront facilities after September 14, 2007.** The draft ordinance must

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allow for the continuous and uninterrupted operation of these facilities and adequate time for relocation to achieve compliance, if necessary (Sec. 45.19.6.6 and 45.19.6.8, Section 3).

Details of these and other suggested changes follow:

Section 45.19.6.1. DEFINITIONS

For the purposes of this ordinance, the definition of a medical cannabis collective should include only those patients' associations that maintain a storefront facility to provide medicine to members, and recognize the fact that not all cultivation of medicine occurs at the same location where it is provided. A better definition would be:

"Medical marijuana collective ("collective")." An incorporated or unincorporated association, composed solely of ~~four or more~~ qualified patients, persons with identification cards, and designated primary caregivers of qualified patients and persons with identification cards (collectively referred to as "members") who associate ~~at a particular location ("location" or "property")~~ to collectively or cooperatively cultivate marijuana for medical purposes, in strict accordance with California Health and Safety Code Sections 11362.5, et seq.

Section 45.19.6.2. REGISTRATION

D. Registration Form

This section requires the names of all members of the collective to be listed on the registration form filed with the Office of Finance. This provision is unnecessary, and may subject legal patients to risk of federal prosecution or harassment from local law enforcement. Furthermore, the requirements to submit the names of members and update this information quarterly are likely to be a burden for city staff. Requiring the collective to maintain membership records, subject to inspection following due process of law, is sufficient.

At a minimum, the phrase *"the names of all persons who are members of the collective"* should be deleted from the list of required information in the second sentence of this section.

E. Additional Registration Documents

This section requires that the names and copies of the state issued identification of managers be provided to the Certified Neighborhood Council representing the area in

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which the collective is located. This is inappropriate, as personal information should not be divulged to a body without regulatory authority over medical cannabis collectives.

The phrase "*and Certified Neighborhood Council*" should be removed from the last sentence of this section.

Section 45.19.6.3. REGULATIONS

A. Pre-inspection Requirements

(2) The requirement that medical cannabis collectives can not be located across the street or alley from or have a common corner with property improved with an exclusively residential building is excessive and unnecessary. This new provision was not considered or approved by the PLUM Committee, and has not been considered by the Planning Commission. If adopted, it will exclude the majority of retail properties and, together with other location restrictions proposed in this draft, make finding a suitable location almost impossible. This subsection should be deleted in its entirety.

(3) Requiring a one thousand foot buffer zone between regulated medical cannabis collectives and a laundry list of sensitive uses is unnecessary and excessive. By way of comparison, Los Angeles Municipal Code Section 12.70(c) requires that adult oriented businesses are located only 500 feet from a religious institution, school, or public park. This section should be removed and considered as part of the anticipated land-use ordinance after review maps currently under development by the Planning Department. If it is not removed, it should be amended to read:

*"No collective shall be located within a ~~1,000~~**500**-foot radius of a school, public park, ~~public library,~~ religious institution, ~~licensed child care facility,~~ youth center, ~~hospital,~~ medical facility, ~~substance abuse rehabilitation center,~~ or **within a 1,000-foot radius of any other medical marijuana collective(s)**..." , etc.*

B. Conditions of Operation

(6) This section prohibits sale of cannabis and edible preparations of cannabis. The prohibition on the sale of cannabis, whether in edible form or otherwise, is unacceptable and represents a fundamental misunderstanding of the provisions of California law and court decisions. As discussed earlier in this report, incremental reimbursements for the cost and service of providing medicine are legal, whether they are characterized as sales, over-the-counter sales, donations, or reimbursements.

Furthermore, edible preparations of cannabis are the primary source of non-smoked cannabis for many patients who cannot or will not use smoked cannabis. Edible

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preparations of cannabis are a time-tested and safe way to ingest cannabis. No public good is served by banning these products, although labeling standards may be prudent.

It is essential that this section be removed in its entirety, and replaced at the City Council's discretion with language regarding labeling for edible preparations:

"No edible products containing marijuana can be provided to members, unless they are packaged in a sanitary manner and clearly labeled as medicine. No labels mimicking commercial products shall be permitted."

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

The aggregate possession guidelines described by the Attorney General may not be appropriate for every medical cannabis collective, especially those with large memberships. The regulations should authorize collectives to possess an amount of cannabis and number of plants reasonably necessary to meet the immediate needs of patients. Appropriate security measures can mitigate risks of burglary or robbery more effectively than arbitrary numeric limits.

In addition, this section anticipates that members who cultivate medicine for the collective will register the address of their garden under the terms of the ordinance. This means inappropriately registering a large number of small, legal gardens; and requiring individual patient-cultivators to comply with the onerous restrictions of the draft ordinance. This provision misunderstands the nature of a legal member-supplied collective, in which every member can choose to grow individually or collectively.

(10) The draft ordinance requires that collectives only provide medicine to those members who participate in cultivation. This represents a misunderstanding of the nature of a legally organized and operated medical cannabis collective. In *County of Butte v. Superior Court* (96 Cal.Rptr.3d 421) and *People v. Newcomb* (2009 WL 1589574) the courts recognized that not every member of a collective or cooperative must physically participate in the cultivation of the medicine. The phrase *"who participate in the collective cultivation of marijuana at or upon the property of that collective"* should be removed from the first sentence.

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Section 45.19.6.4. MAINTENANCE OF RECORDS

Legal collectives and cooperatives only receive medicine from their registered members and provide it to other members. This arrangement ensures a closed circuit of medicine, isolated from the illicit market. Requiring the patients' associations to disclose the names and addresses of members who supply medicine is unnecessary and places the patient-cultivator at undue legal risk from inappropriate law enforcement activity, rogue police officers, and federal interference. Item number three in the list of eight types of records to be maintained, pertaining to "*members who participate in collective cultivation,*" should be removed.

Legally organized and operated collectives and cooperatives should maintain detailed membership and financial records. To preserve the Constitutional rights of the members and managers, however, these records should only be available for inspection by law enforcement following due process of law, including a subpoena or search warrant. The last two sentences of this section should be modified to read:

*"These records shall be maintained by the collective for a period of five years and made available by the collective to the Police Department upon request. ~~Consent is given by the collective under the article to the provision of said records to the Police Department without requirement for a search warrant, subpoena, or court order.~~ **due process of law.**"*

Section 45.29.6.5. INSPECTION AUTHORITY

The Planning Department should be allowed to inspect records that demonstrate compliance with the ordinance, but the Los Angeles Police Department should only have access to collective and cooperative records following due process of law, including a subpoena or search warrant. To avoid violating Constitutional rights and remain consistent with proposed changes to Section 45.19.6.4, this should be amended to read:

"The Department of Building and Safety may enter and inspect the property of every collective between the hours of 10:00 AM and 8:00 PM... In addition, the Police Department may enter and inspect the property of every collective ~~and the records maintained pursuant to Section 45.19.6.5 of this article~~ between the hours of... refuse to allow, impede, obstruct or interfere with an inspection, ~~review or copying of records~~ and closed circuit monitoring authorized and required under the article..."

Section 45.19.6.6. EXISTING MEDICAL MARIJUANA OPERATIONS

Medical cannabis collectives and cooperatives that complied with Interim Control Ordinance Number 179027 should be allowed one year from the effective date of the

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ordinance to relocate their collectives in order to achieve compliance. Furthermore, it is not reasonable to request that a collective forfeit land use rights, including legal nonconforming use status. This provision may be illegal and is likely to result in additional litigation. The final sentence of this section, beginning with "*No medical marijuana collective, dispensary...*" should be removed.

Section 45.19.6.8. VIOLATIONS AND ENFORCEMENT

Section 3 should be amended to ensure that collectives and cooperatives that complied with Interim Control Ordinance Number 179027 may operate during the 180-day period specified for their pre-inspection and registration. Furthermore, the City Council should allow collectives and cooperatives that complied with Interim Control Ordinance Number 179027 up to one year to relocate, if necessary to achieve compliance.

Contact ASA California Director Don Duncan at don@SafeAccessNow.org or (323) 326-6347 with questions or comments.

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