



CITY OF MODESTO
COUNCIL AGENDA REPORT

COUNCIL MEETING:

October 24, 2006

Date: October 18, 2006

TO: Mayor and Councilmembers

FROM: Susana Alcala Wood, City Attorney
David Cervantes, Senior Deputy City Attorney

SUBJECT: An Ordinance Amending Sections 10-2.234.2 and 10-2.307 of Chapter 2 of Title 10, Adding Sections 10-2.2203 and 10-2.2204 to Chapter 2 of Title 10, and Repealing Article 24.1 of Chapter 2 of Title 10 of the Modesto Municipal Code Pertaining to Medical Marijuana Dispensaries and Uses Prohibited by State and Federal Law.

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RECOMMENDED COMMISSION ACTION:

Introduction of an Ordinance Amending Sections 10-2.234.2 and 10-2.307 of Chapter 2 of Title 10, Adding Sections 10-2.2203 and 10-2.2204 to Chapter 2 of Title 10, and Repealing Article 24.1 of Chapter 2 of Title 10 of the Modesto Municipal Code Pertaining to Medical Marijuana Dispensaries and Uses Prohibited by State and Federal Law.

BACKGROUND AND REASON FOR RECOMMENDED ACTION:

On December 14, 2005, the City Council adopted Ordinance No. 3401-C.S. which added Section 10-2.234.2, amended Section 10-2.307 and added Article 24.1 pertaining to medical marijuana dispensaries. Ordinance No. 3401-C.S. also repealed Ordinance No. 3384-C.S pertaining to a temporary moratorium on the establishment of medical marijuana dispensaries within the City. Briefly, the amendment to Section 10-2.307 expanded the limitations of land use; Section 10-2.24.101 set forth provisions regarding amortization of nonconforming medical marijuana dispensaries; Section 10-2.24.102 set forth provisions regarding extension of time for termination of nonconforming uses relating to medical marijuana dispensaries; and section 10-2.234.2 defined a medical marijuana dispensary as, in part: "Medical marijuana dispensary" or "dispensary" means any facility or location, where medical marijuana is sold or offered for sale on a for profit basis by or to one or more of the following: a primary caregiver, a qualified patient, or a person with an identification card, in strict accordance with California Health and Safety Code Section 11362.5 et seq...."

Section 10-2.307 relating to limitation of land use, states in part: "...Provided, however, it shall be unlawful for any person or entity to locate or operate in any zone in the City of Modesto all uses which are illegal under State or Federal law including without limitation medical marijuana dispensaries..."

Additionally, Section 10-2.24.102 of the Modesto Municipal Code, provided that an existing defined medical marijuana dispensary could apply for an extension of time within which to terminate their nonconforming use as a medical marijuana dispensary.

Pursuant to the terms of the ordinance, an existing medical marijuana dispensary applied for an extension of time, and challenged the medical marijuana ordinances on several grounds, including:

1. The ordinance was inapplicable to them because they were operating as a California not for profit corporation and were therefore exempt from the ordinance that as written, applies only to medical marijuana dispensaries that operate on a for profit basis;
2. The language of Section 10-2.307, which makes it unlawful for any person or entity to locate or operate in any zone in the City of Modesto all uses which are illegal under State or Federal law including without limitation medical marijuana dispensaries is so overbroad as to prevent the use or cultivation of marijuana for medical purposes as provided by Proposition 215 and codified at Health & Safety Code Section 11362.5 and is therefore in conflict with California law.

After extensive legal research, opinions from outside counsel, and thorough review of the legislative record, it appears that while the definition of medical marijuana dispensaries set forth in Section 10-2.234.2 prohibits a medical marijuana dispensary which operates on a for profit basis, the definition may not prohibit a medical marijuana dispensary which operates on a not for profit basis. After a thorough review of the legislative record, this did not appear to be the intent of the City Council.

Additionally, as written the language of Section 10-2.307 may subject to criminal prosecution certain qualified individuals who would not otherwise be subject to criminal prosecution under the provisions of the Compassionate Use Act set forth in Health & Safety Code Section 11362.5 and the Medical Marijuana Program Act set forth in Health & Safety Code Sections 11362.765 and 11362.775. These sections essentially provide a limited defense from prosecution for state penal laws related to marijuana use, cultivation or possession.

It is therefore the recommendation of the City Attorney's Office that the ordinance be amended to clarify its application and conform with the intent of the original City Council.

REGULATORY ACTIVITIES OF OTHER CITIES IN CALIFORNIA:

The City Council of the City of Modesto made a finding that in 1996, the voters of the State of California approved Proposition 215, codified as California Health and Safety Code Section 11362.5, et seq. Effective January 1, 2004, the State Legislature enacted SB 420 to clarify the scope of Proposition 215 and to allow cities to adopt and enforce rules and regulations consistent with SB 420. In the early months of 2005, the City of Modesto received several inquiries from individuals seeking to establish medical marijuana dispensaries in the City of Modesto. After adoption of an emergency interim ordinance to study the matter further, the Modesto City Council adopted Ordinance No. 3401-C.S. on December 14, 2005, prohibiting medical marijuana dispensaries and setting forth an amortization period. On September 26, 2006, the Council found that it was necessary to amend the ordinance to clarify its intent to prohibit medical marijuana dispensaries that don't comply with State and Federal law.

As set forth in the July 13, 2004, memorandum from Mark Siemens, Chief of Police of the City of Rocklin originally considered by the Council in 2005, as well as the October 2, 2006, memorandum from the Modesto Police Department which details the criminal and nuisance activity which has occurred as a direct result of the operation of an unregulated medical marijuana dispensary in the City of Modesto (copies of which are attached), it is apparent that from the experiences in other cities such as Oakland, Hayward, Fairfax, and Roseville, as well as Modesto's experience, that medical marijuana dispensaries in general create negative secondary effects in the community that include increased illegal drug activity and other crimes, and also bring nuisance activities to neighborhoods including solicitation of marijuana sales to residents and contribute to the deterioration of neighborhoods in which they are located. Most recently, the medical marijuana dispensary at 1009 McHenry Avenue was closed by Federal law enforcement officers; however, as part of their raid it was determined that there was a great deal of criminal activity associated with the operation of this dispensary.

On June 6, 2005, the United State Supreme Court issued its decision in *Gonzales v. Raich*. The Supreme Court held that the Ninth Circuit Court of Appeals had erred in reversing a District Court decision that had denied plaintiff marijuana user's request for a preliminary injunction. The preliminary injunction would have prohibited the enforcement of the Federal Controlled Substances Act to the extent that Act prevented plaintiffs from possessing, obtaining or manufacturing marijuana for their personal medical use as authorized under California's Compassionate Use Act of 1996 (Proposition 215). In other words, the Federal government's prohibition on the possession and/or use of marijuana is still the law in the United States. Marijuana is still subject to seizure under Federal law, and the holder subject to prosecution by Federal agencies. The importance of this case is that following California law will not protect a person from prosecution under Federal laws. Under this circumstance, the Modesto City Council previously determined that it is bad public policy to allow a use within the City of Modesto that is illegal under Federal law. Accordingly, the Council also previously determined that it is appropriate to ban all uses in Modesto which are illegal under State and Federal law including without limitation medical marijuana dispensaries.

STAFF RECOMMENDATION:

In view of all of the above, it is the recommendation of the City Attorney's office that the most appropriate response is to adopt an Ordinance Amending Sections 10-2.234.2 and 10-2.307 of Chapter 2 of Title 10, Adding Sections 10-2.2203 and 10-2.2204 to Chapter 2 of Title 10, and Repealing Article 24.1 of Chapter 2 of Title 10 of the Modesto Municipal Code pertaining to medical marijuana dispensaries and uses prohibited by State and Federal law.

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By: _____
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SAW/DC/jr

Attachments: City of Rocklin Memorandum
Modesto Police Department Memorandum
Ordinance