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Sensible Policies for Medical Marijuana Dispensaries in Los Angeles

By Skaidra Smith-Heisters







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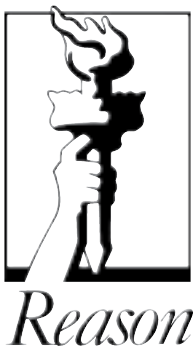

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Part 1

Introduction

Medical marijuana dispensaries serve a critical purpose in the city of Los Angeles, providing a reliable means for qualified medical patients to obtain medical marijuana in accordance with California law. Dispensary regulation also creates a mechanism for local government oversight of medical marijuana cultivation and distribution. Though many aspects of medical marijuana dispensary regulation are the responsibility of the state government, zoning decisions and conditional use permitting processes governing the operation of the city's medical marijuana dispensaries are the purview of the City Council.

The Los Angeles Police Department recently issued recommendations to the City Council for a list of restrictions to be imposed on all existing and future medical marijuana dispensaries in the city. These recommendations serve as a useful reference point for some of the issues facing the City Council in its determination of appropriate guidelines for the operation of medical marijuana dispensaries; however, they do not reflect an entirely accurate understanding of California's medical marijuana laws.

The following is offered as a framework to clarify the city's role in regulating medical marijuana dispensaries and proposes goals for the adoption of a city ordinance that ensures:

- Medical marijuana dispensaries are compatible with surrounding land use;
- Operation of dispensaries does not create conditions for crime or other endangerment; and
- Rights and needs of medical marijuana patients are positively met.

Part 2

Background

Beginning in 1976, marijuana became a legal drug for qualified patients in the federal Single Patient Investigational New Drug Program for Compassionate Use, administered by the Food and Drug Administration. This program allows individuals whose physicians think they will benefit from unapproved drugs to receive them. It was closed to new medical marijuana applicants in 1992 when the number of applicants, mainly people with HIV wasting syndrome, apparently overwhelmed the government's ability to supply marijuana through the program.[1]

In 1996, California voters approved Proposition 215, the Compassionate Use Act (CUA), a landmark initiative that gave medical patients in California the right to obtain and use marijuana. Prior to the CUA, people with health conditions such as chronic pain, nausea, loss of appetite and spasticity risked arrest and prosecution for using marijuana as a treatment, even if its use had been advised by their physician. The intent of the CUA was clear, but it did not address specific issues of enforcement—such as how law enforcement officers would identify qualified patients and their caregivers, and how patients and caregivers would obtain marijuana without growing it themselves or buying it on the illicit market.

Senate Bill (SB) 420, establishing the Medical Marijuana Program (MMP), was passed by the California legislature in 2003 to clarify some of these issues. Three major provisions of this bill included the establishment of a voluntary state medical marijuana identification card (MMIC) issued by each county, maximum penalties for abuse of the MMIC system, and explicit allowance for qualified patients and their designated caregivers to collectively or cooperatively cultivate marijuana and receive reasonable compensation for this service. The legislation also provided that people acting in accordance with the MMP shall not be subject, on that sole basis, to criminal liability for transporting, selling, administering, or giving away marijuana.[2] In response to SB 420, patient collectives, that can operate privately but also commonly operate as "retail-style" dispensaries, were formed in communities across the state.[3]

Los Angeles City Council members Dennis P. Zine and Ed Reyes submitted a motion (Council File No. 05-0872) in May 2005 requesting that city staff recommend actions for the regulation of medical marijuana dispensaries. In December 2006, Chief William Bratton of the Los Angeles Police Department (LAPD) issued a "Fact Sheet" identifying problems associated with the dispensaries in the city, along with specific recommendations to the Board of Police

Commissioners and the City Council for a moratorium on new dispensaries and numerous restrictions to be imposed on existing and future dispensaries.[4]

Other California cities and counties have approved or are working on ordinances to regulate medical marijuana dispensaries within their jurisdictions. Americans for Safe Access, a national medical marijuana patients' advocacy group, surveyed eight California municipalities in 2006 that had ordinances in place and reported that complaints about dispensaries and associated public safety concerns generally decreased after regulation.[5] However, if an ordinance is expected to benefit the people and institutions of the city of Los Angeles, greater understanding of the legal and political context of medical marijuana dispensary regulation is badly needed.

Part 3

LAPD "Fact Sheet" Fact-Check

A number of statements made in the LAPD recommendations are inaccurate and, without clarification, could lead to the adoption of an ordinance that would violate the letter and spirit of California's medical marijuana laws. These misunderstandings by the LAPD might also lead to an exaggerated impression of the problems associated with the operation of dispensaries in Los Angeles.

A. Voluntary versus mandatory provisions of California's medical marijuana law

The LAPD "Fact Sheet" states:

> *SB 420 is wholly voluntary, which is the reason why municipalities are able to prevent medical marijuana dispensaries from operating in their cities. (p. 1)*

To the contrary, SB 420 is not "wholly voluntary." It is a state law codified in Health and Safety Code § 11362.7, *et seq.*, building from the foundation of the Compassionate Use Act. In the past decade, the CUA has been before courts at every level, including the California Supreme Court and the United States Supreme Court, and it has never been found unconstitutional or preempted by federal law.[6] Further, since the CUA was a voter initiative, the California Constitution only allows for it to be modified by the voters. SB 420 added explicit protections to the provisions of the CUA, including the right of qualified patients and their designated caregivers to form collectives for the purpose of obtaining marijuana for medical use, and this too has been upheld in court.[7]

B. Local dispensary bans and state preemption

The LAPD "Fact Sheet" states:

> *Three of the five counties with bans, Merced, San Diego, and San Bernardino, are currently taking the State of California to court concerning the legality of SB 420 and its violation of Federal law. (p. 2)*

Merced, San Diego, and San Bernardino counties did indeed sue the state of California over implementation of the MMIC.[8] On December 6, 2006, the Superior Court ruled against their claim

in *County of San Diego v. San Diego NORML, et al*, (Case No. GIC860665). Merced County has since indicated that it will implement the MMIC program, while the other two counties will appeal the decision to the Supreme Court.

However, the three counties the LAPD "Fact Sheet" names—Merced, San Diego, and San Bernardino—never actually banned dispensaries from their jurisdictions. Merced County has put a temporary moratorium on the establishment of any new dispensaries. In all three counties, local law enforcement has supported federal Drug Enforcement Administration (DEA) raids resulting in temporary closure of these counties' medical marijuana dispensaries and/or prevention of new dispensaries opening.

The LAPD "Fact Sheet" also quotes the opinion of a Los Angeles Deputy City Attorney that "Federal law takes precedence over State law."[9] While it is true that federal law takes precedence over state law where a "positive conflict" occurs, that is not the present situation. It was the court's opinion in *County of San Diego v. San Diego NORML, et al*, that there is no "positive conflict" between federal law and either the CUA or the MMP, because the state's medical marijuana provisions only remove penalties for the medicinal use of marijuana under California's drug laws—they don't require or authorize breaking federal law. The December ruling was absolutely clear: "Neither the CUA nor the MMP is preempted by the Supremacy Clause, by the CSA [Controlled Substances Act], or by the Single Convention."[10]

Additionally, the state constitution (Article III, § 3.5) states, "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power…To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations." In a related case, the California Supreme Court wrote, "A local executive official has no authority to impose his or her personal view on others by refusing to comply with a ministerial duty imposed by a statute."[11] California law states that one of the purposes of the CUA is "To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana"[12]; the state MMP creates additional statutory provisions for carrying that out.

C. The Medical Marijuana Identification Card (MMIC) program and other patient identification cards

The LAPD "Fact Sheet" states:

> *[In counties and cities that have ordinances regulating dispensaries] in the intervening timeframe between the adoption of an ordinance and its actual implementation, profiteers have initiated their own MMICs and other official looking documents in direct violation of SB 420… (p. 3)*

Elsewhere, the memo states that abuse of the state's medical marijuana provisions had occurred using a card "issued by the dispensary, not issued by the County or its designee card as required by law."[13] Some confusion here is likely a result of the fact that medical marijuana dispensaries typically issue membership cards to people belonging to their collectives. These cards serve only to identify the member at the dispensary that issued the card.

The state MMIC, on the other hand, is primarily intended to assist law enforcement officers in quickly identifying qualified patients and caregivers. The MMIC is easily distinguished by the state seal and other security features, and can be verified by law enforcement officers via a 24-hour telephone number and/or online database. People in Los Angeles County cannot currently obtain a state MMIC because the county has not yet made the program available to local residents.

Again, it is important to understand that cultivating, obtaining, and using marijuana has been legal under state law for patients and their designated caregivers for more than a decade, and SB 420 does not require them to have a MMIC, so nothing in the actions described by the LAPD above are illegal in and of themselves.

All that is required for a qualified patient to indicate legal possession of marijuana is a doctor's recommendation. Local police protocols differ, but the California Highway Patrol has established a medical marijuana enforcement protocol which directs officers to attempt to verify the doctor's recommendation or MMIC, if available, before confiscating marijuana found within the quantity guidelines set by the state or local jurisdiction. Clearly, the MMIC is much easier to verify in this situation, but a valid doctor's recommendation has equal legal weight under state law.

D. The relationship of medical marijuana dispensaries to community crime levels

Because the city of Los Angeles has waited and allowed dispensaries to become established without any ordinance in place, dispensaries have not been required to obtain special permits or otherwise register their presence with the city. As a result, estimates of the number of dispensaries are based on personal observations of members of the police department, often as a result of print or electronic advertisement by the dispensaries themselves. The LAPD reports that 98 known medical marijuana dispensaries currently operate in the city of Los Angeles. By most accounts, the number of dispensaries has grown exponentially since late 2004 (SB 420 went into effect January 1, 2004) to well over two hundred dispensaries today.[14]

The LAPD also reports that the quantity of marijuana seized increased 140 percent from 2005 to 2006, from 7,381 to 17,750 pounds. The report concludes:

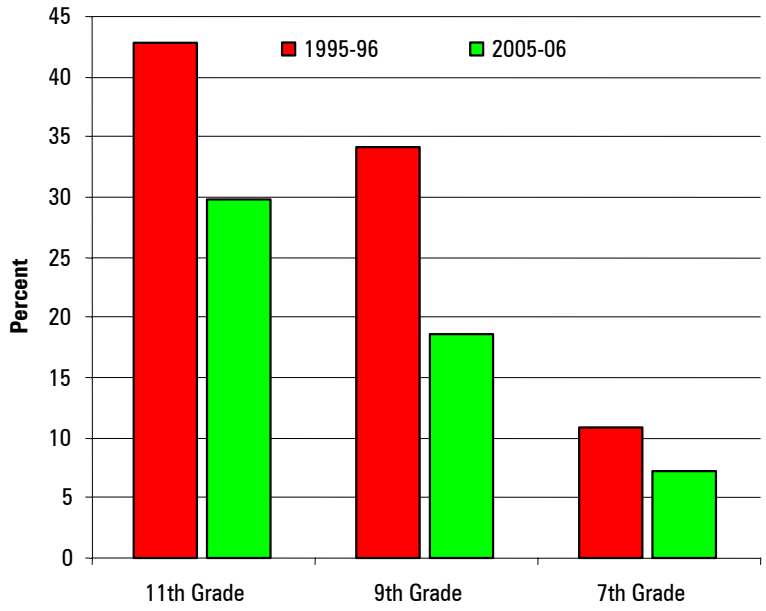
> *Anecdotal evidence, such as the increased number of clinics, suggests that these increased seizures are due to the increase in usage in California since the passage of the CUA…The increase in seizures and arrests can be attributed to the greater frequency of encountering the drug on the street without the proper credentials per the CUA. (p. 6)*

The LAPD does not provide any conclusive evidence that the passage of the CUA has resulted in increased marijuana usage, and there are no statewide or regional statistics on adult drug use that could reliably confirm or refute this speculation. Any number of factors could explain the reported increase in the amount of marijuana seized in Los Angeles, including recent changes in political leadership, changes in crime-reduction policy, changes in drug trafficking patterns outside of Los Angeles, or seizure of marijuana intended for medical consumers.

It is not because of more arrests. Marijuana arrests in 2006, provided by the LAPD report, totaled 5506—a *reduction* from 5946 total felony and misdemeanor marijuana arrests reported in 2004, when the MMP went into effect.[15] Overall, the number of total marijuana arrests per 1000 people in Los Angeles has decreased approximately 40 percent since the approval of the CUA, from 2.3 in 1997 to 1.4 in 2005, and approximately 1.3 last year.[16] If dispensaries were leading to greater illicit distribution of marijuana, one might expect to see more arrests with smaller amounts of marijuana, but probably not fewer arrests and larger amounts.

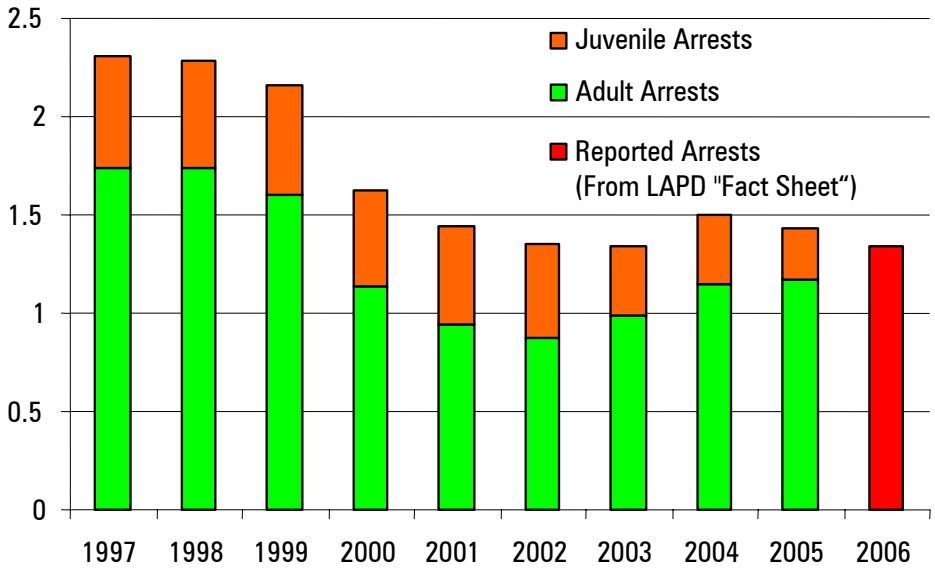
Comparison to other drug seizure data is necessary to determine the relevance of the figures supplied by the LAPD. Indeed, since the CUA has been in effect for ten years, increase in marijuana seizures reported by the LAPD for the period of November 2005 to 2006 would appear to have little correlation with the CUA. State data for marijuana use among teens in California, the only long-term dataset on marijuana use in the state, indicate that statewide marijuana use among this group has *decreased*, not increased, since the passage of the CUA.[17]

Figure 1: Percentage of California Teens Having Used Marijuana in the Past Six Months, Before and After Passage of Proposition 215 (By Grade Level)



From the California Office of the Attorney General, "California Student Survey," biennial survey of 10,638 students in grades 7, 9 and 11 in 113 randomly selected schools (October 2006).

Figure 2: Total Marijuana Arrests per 1000 People in the City of Los Angeles, 1997–2006



All data from the California Department of Justice Criminal Justice Statistics Center (includes felony and misdemeanor marijuana arrests) and LAPD *Statistical Digest,* except 2006 data, from LAPD "Fact Sheet" and estimated population.

The LAPD "Fact Sheet" provides a table showing increases and decreases in crime rates in some areas where they have received complaints about dispensaries, and states:

> *While the factors that influence Part I crimes are varied, the anecdotal evidence and data suggests the significant likelihood that these medical marijuana dispensaries affect crime in adjacent communities.*

There is no evidence given for, and common logic cannot provide for, any reason why Part 1 crimes such as auto burglaries or even rape would have any correlation to the operation of medical marijuana dispensaries. Even so, the statistics cited by the LAPD fail to show any consistent pattern between Part 1 crimes reported and the number of dispensaries located in each area. Overall, the LAPD reports that the total crime rate *decreased* in every area.

According to the "Fact Sheet," 110 total complaints about dispensaries had been received as of November 16, 2006. Given that dispensaries have existed in the city of Los Angeles since 2004, and more than two hundred dispensaries are currently operating, the number of complaints in proportion to the number of dispensaries might actually be relatively small. (For comparison, the Los Angeles County Department of Public Health received one complaint for every five restaurants last year).[18] Further, anecdotal information that police have shared with dispensary advocates suggests that the majority of complaints are generated by a small number of "problem" dispensaries, and that the complaints tend to be about either public marijuana smoking (typically

regulated by any city dispensary ordinance) and general complaints (that is, unrelated to any specific grievance).[19]

In order to determine if the operation of medical marijuana dispensaries creates any unique potential for crimes or nuisances, the type and incidence of crime reported at dispensary locations and the type and incidence of complaints at these same addresses should be recorded and compared to crimes and complaints occurring at other types of businesses in the city.

Medical Marijuana patient, Kay Mitchell, 82, of Sonoma, joined over a thousand people protesting outside the California State Capitol against the Justice Department's recent raids and arrests at state approved and licensed medical marijuana dispensaries in California which serve mostly terminally ill patients suffering from cancer, AIDS, and other ailments. © Kim Kulish/Corbis

Part 4

Local Context

The explicit purpose of the MMP is to promote uniform and consistent application of the Compassionate Use Act among all counties within the state. However, large variation in county and local programs and ordinances still exists. Los Angeles County has implemented a medical marijuana dispensary ordinance for the unincorporated areas of the county, as have two incorporated cities in the county, Whittier and West Hollywood.

The following table shows some of the variation in the three Los Angeles-area medical marijuana dispensary ordinances that are currently in place. The LAPD's recommended hours of operation for dispensaries, from 10 am to 6 pm, would be the most restrictive in the area and might pose a problem for patients requiring services after typical work hours during the week. The LAPD's recommendation (No. 2) for a maximum number of dispensaries not to exceed one per three miles is not found in any of the other jurisdictions.

Also, as indicated, none of the other Los Angeles-area ordinances have a provision such as the LAPD's recommendation (No. 30) for a dispensary limit of one ounce of dried marijuana per qualified patient or primary caregiver per visit. The MMP sets a default threshold for possession at eight ounces, and allows for this to be increased by a doctor's recommendation or by a local ordinance.

Additional variations in Los Angeles-area dispensary ordinances are illustrated below.

Table 1: Sample Provisions of Los Angeles-Area Dispensary Ordinances

	County of Los Angeles	City of Whittier	City of West Hollywood*
Hours of operation	7 am to 8 pm	6 am to 10 pm	10 am to 8 pm, (excepting Sundays, Noon to 7 pm)
On-site consumption	Allowed	Not allowed	Not allowed
Type of regulation	Conditional use permit	Conditional use permit	Municipal health ordinance
Age restrictions	All qualified patients, including minors, allowed	No minors allowed	Minors accompanied by guardian
Purchase limits	None	None	None
Maximum number of dispensaries	One per 1000-ft radius	No maximum	Seven (approx. one per 5000 people)
Date adopted	May 9, 2006	January 10, 2006	July 18, 2005

* As of February 2007, the city of West Hollywood is currently revising its ordinance.

Changes and discrepancies in local ordinances can also be a burden for any dispensaries that are already in operation. For example, in Whittier, a dispensary operating in the Washington-Whittier Medical Center spent $8,500 on building improvements and $50,000 in start-up costs, including security systems and cameras, before the city council approved an ordinance that conflicted with the zoning of the pre-existing dispensary.[20] According to a story last August in the *Whittier Daily News*, the city voted to allow the dispensary to stay at its original location for two years (so that it has a chance to recoup initial start-up costs) in order to limit the city's liability. The ordinance in West Hollywood only specifies operational standards, not location restrictions, so pre-existing dispensaries' loss on initial investments as a result of the ordinance would have been minimal after the adoption of the ordinance.

Medical marijuana supporter Anna Foster hangs her head after learning that Marijuana guru Ed Rosenthal was convicted by a federal jury of all three counts of marijuana cultivation and conspiracy. © Reuters/CORBIS

Any proposed medical marijuana dispensary ordinance for the city of Los Angeles should take into consideration regional standards and allow enough time for compliance so that pre-existing dispensaries are not unfairly penalized. The city should also allow variances from any adopted ordinance for existing or proposed dispensaries, consistent with the variance provisions for other businesses (i.e. Planning and Zoning Code § 12.27).

In the absence of a city ordinance, medical marijuana dispensaries in Los Angeles have practiced self-regulation. Many have worked together to develop conscientious "best practices" that should be recognized as a working model and utilized to bring more dispensaries in the city up to the same high standards of operation.[21]

Part 5

Effective Regulation of Medical Marijuana Dispensaries

The CUA, MMP, and other laws at the state level supply part of the regulation needed to make sure that dispensaries provide a high level of service to both their members and the communities in which they operate; county and city laws also play an important role, particularly in making the MMIC available to patients at the county level, and through land use and business licensure guidelines that are the prerogative of the city. Goals and guidelines for regulation of dispensaries at the city level are outlined below.

A. Ensure compatibility with surrounding land use

It is generally accepted that dispensaries are best suited to a commercial setting, and that some provision should be made about the proximity of dispensaries to non-commercial establishments such as schools and residential areas. These provisions may be either fixed (e.g. a 500-foot buffer) or discretionary, on a case-by-case basis. For example, the city of Los Angeles Planning and Zoning Code (§ 12.70.C) specifies a 500-foot buffer between adult businesses and any religious institution, school, or public park, while the Planning and Zoning Code concerning sale of alcohol (§ 12.24.W.1) provides qualitative guidelines, including consideration of the California Department of Alcoholic Beverage Control's guidelines for "undue concentration," the number and proximity of alcohol-dispensing establishments within a 1000-foot radius, and the crime rate in the area (especially those crimes involving public drunkenness, the illegal sale or use of narcotics, drugs or alcohol, disturbing the peace and disorderly conduct).[22]

The LAPD recommendations state that the exclusion of "liquor stores, adult oriented entertainment, and smoke shops within 1000 feet of any school" should be extended to medical marijuana dispensaries (No. 1).[23] The "Fact Sheet" also states that all of the current dispensaries are less than 1000 yards (that is, 3000 feet) of a "house of worship, public or private school, or other location where children are likely to congregate, such as a public park" and some are located less than a mile (i.e. 5280 feet) from "public locations of concern."[24] Since the actual locations of these dispensaries are not in the public record, we cannot evaluate the validity of these generalizations,

but should caution that the inconsistent measures provided may obscure the real proximity of any of the existing dispensaries to schools or other locations.

The LAPD recommendations (No. 1) advocate a fixed 1000-foot distance between dispensaries and any "church or house of worship," public park, school or "any location utilized for the exclusive care of children." The LAPD also proposes (No. 2) that there be only one dispensary allowed in any three-mile radius, and that it must be easily accessible via public transportation.

Taken together, a 1000-foot distance rule setting dispensaries apart from any house of worship, public park, schools, or any other location utilized for the exclusive care of children, and a rule allowing only one dispensary in any three-mile radius, could effectively ban dispensaries from many areas of the city.[25] Dispensaries serve a legal purpose with potential benefits to the city and its residents as a whole. Restricting the locations where they are allowed to the point that they cannot effectively operate is counterproductive. The City Council should proactively ensure that dispensaries can provide quality service to their members by allowing dispensaries to locate throughout the city and not explicitly limiting the number of dispensaries allowed if such a cap would effectively monopolize, or grant a few operators exclusive control of, dispensaries.

Medical marijuana dispensaries often perform social services, similar to those provided by medical clinics, hospice organizations, churches, and other community-based charities. The City Council should be cautioned against creating restrictions on medical marijuana dispensaries that serve to relegate these operations to areas of the city occupied by adult venues, as this will likely promote dispensaries that have more of the problems associated with bars or strip clubs and fewer of the social benefits that community-based or charitable organizations typically provide.

B. Minimize conditions for crime or other endangerment

The LAPD has a legitimate interest in providing for the security of patients, dispensaries, and the neighborhoods they operate in, as they do for other businesses. With regard to most security provisions, medical marijuana dispensaries are no different than any other business that may have significant amounts of cash or readily resalable merchandise on hand at any given time. One relatively unique policing concern is the potential for diversion of medical marijuana into the black market.

Measures at every level of enforcement are already in place to minimize the potential for diversion of medical marijuana from qualified patients and caregivers to those that are not qualified to use or possess it. The Medical Board of California is responsible for licensing and disciplining doctors and maintains an online database of licensed physicians and guidelines for the recommendation of medical marijuana by physicians. County health departments and medical marijuana dispensaries are expected to use this database in conjunction with a patient's medical marijuana recommendation to screen patients for eligibility before issuing an MMIC or membership card, respectively. Although dosage is typically not specified per patient, under the state MMP,

possession of eight ounces (or more, if allowed by local regulation or a doctor's recommendation) is considered a personal supply.

Sales and profits of medical marijuana dispensaries are also overseen by state agencies. The California Board of Equalization has, since 2005, issued seller's permits to medical marijuana dispensaries and collected taxes as appropriate.[26] Nonprofit status is conferred by the California Franchise Tax Board. The city of Los Angeles Office of Finance typically assigns appropriate tax status pursuant to the state board's determination.

The focus of the city's ordinance should be on measures that ensure dispensary members are qualified patients and caregivers via thorough validation of doctors' recommendations. Except where a risk unique to medical marijuana dispensary operations can be shown, requirements such as litter and graffiti removal should be consistent with other businesses in the city of Los Angeles.

The security provisions recommended by the LAPD for dispensaries are extensive, including: alarms equipped with video and voice surveillance, 24-hour video surveillance inclusive of all areas within 100 feet of the exterior perimeter of the dispensary, 24-hour exterior lighting, bullet-resistant interior partitions, 15-minute vaults and drawers for storing stock, criminal background checks on all employees, licensed security guards, rekeying locks and reprogramming alarms at mandatory intervals, removing litter from areas inclusive of 100 feet beyond the perimeter of the property at least twice daily and comprehensive recordkeeping. One of the provisions (No. 25) would even require that print advertisements include a lengthy disclaimer in text *two inches* tall. This recommendation, like many of the others, would add substantially to the overhead costs of running a dispensary in the city, and may not be warranted in every circumstance. Some of the provisions would appear to do very little to improve the relationship of dispensaries with their neighboring communities, and may even be counterproductive—for example, 24-hour exterior lighting and invasive surveillance and litter removal might be annoying to neighbors in many locations.

At the very least, an appeals process would be appropriate for working through such lengthy security requirements, but the LAPD recommendations specify that no appeals process should be allowed (No. 38). The appeals process outlined for other conditional use permits in the Los Angeles Municipal Code (§12.24.I) should be open to medical marijuana dispensaries as well.

The LAPD "Fact Sheet" contains a number of recommendations that fall outside of the jurisdiction and expertise of the police department and are either inconsistent with state law or impractical. For instance, the recommendations (No. 5 – 7) would attempt to place city medical marijuana dispensaries under the control of California state retail alcohol regulations. The LAPD recommendation (No. 18) requiring the labeling of potency on each dose of medical marijuana may be impractical, because marijuana potency, unlike that of synthetic drugs, is variable. Los Angeles Municipal Code § 46.13 regarding disclosure of hazards and California Proposition 65 (No. 19 – 20) may be found irrelevant to the dispensing of medical marijuana. The LAPD recommendations (No. 25) also state that only adults 18 years of age or older should be allowed to obtain medical

marijuana. However, the MMP specifically allows for patients under the age of 18 to obtain an MMIC, either as a qualified patient or, in certain circumstances, as a designated primary caregiver. It would be advisable for the City Council to seek consultation with appropriate health agencies over the implementation of such measures.

Dispensary owners are cognizant of the risks associated with their operations. The City Council should ensure that dispensaries are not overburdened by costly and unnecessary security and safety requirements beyond those placed on pharmacies or other comparable businesses, and allow for variation in security measures by circumstance.

C. Recognize patient health and privacy needs as key to dispensary success

It can be expected that many qualified patients and caregivers will not join medical marijuana dispensing collectives or participate in the MMIC program unless reasonable accommodations are made for their privacy and health needs. This would be undesirable from a practical standpoint, since without voluntary participation in the programs outlined in the state's Medical Marijuana Program, the task of identifying qualified patients and caregivers is a significantly larger burden for the Los Angeles police and courts. Without a viable dispensary system, patients must necessarily cultivate their own marijuana (as protected under the Compassionate Use Act, without restriction) or resort to the black market. Patients and caregivers who choose not to carry the MMIC have the same rights under state law as those who do, but verifying non-standardized paperwork and doctors' recommendations can be time-consuming and lead to wrongful prosecution.

The state constitution prevented the SB 420 legislation from mandating that patients and their caregivers obtain an MMIC. Further, in an opinion issued by the State Attorney General, it was determined that "a city would be preempted from…making identification cards a *mandatory* prerequisite for prohibiting detention and seizure, because such provisions would directly contradict state law."[27]

There are good reasons why some qualified patients might choose or otherwise not be able to get an MMIC, including delays in implementation at the county level (as in Los Angeles), concerns about maintaining their privacy, a lack of perceived need, and the cost of the application fee (the state has indicated that their portion of the fee may increase to $142 annually, which is added to the county-apportioned fee and any personal medical costs associated with obtaining a doctor's recommendation). Patients and caregivers with an MMIC may benefit from the convenience of carrying the state identification card, but it has no bearing on their rights under California law.

The MMP specifies maximum fines and jail time for any person who breaches the confidentiality requirements of the law, including information provided to the California Department of Health Services or to a county health department or the county's designee, pertaining to an identification card program (§ 11362.81). Additionally, the Health Insurance Portability and Accountability Act

of 1996 (HIPAA) sets national standards for the protection of patient privacy, particularly transmission of health information that identifies or could be used to identify individual patients. The MMIC program protects patient privacy at the state level because individuals are identified only by an MMIC number and accompanying photo. The best policy for ensuring privacy at the county level is for the county health department or its designee to return qualifying paperwork to the individual patient once their doctor's recommendation has been verified and the MMIC issued.

Any requirement in the city of Los Angeles for MMIC numbers to be documented along with the corresponding patient, doctor, and caregiver names, addresses, phone numbers, and other personal information for inspection by the LAPD without a warrant risks violating this carefully proscribed patient privacy (see No. 24).

Patients are most likely to visit dispensaries that can provide appropriate dosage in a variety of delivery methods (including edibles and vaporization). The California Medical Association tells doctors that it "does not encourage physicians to provide specific recommendations of daily dosage levels" when advising patients about medical marijuana.[28] Potency is variable in marijuana, and dosage also depends on delivery method. Medical marijuana patients in the Food and Drug Administration's Single Patient Investigational New Drug program have received a standard dose of two ounces per week.[29] Limiting per-visit doses to one ounce, as the LAPD has recommended, would require patients with some of the most critical conditions, or their caregivers, to make twice-weekly or more frequent trips to a dispensary, creating an unnecessary hardship for the individual and increasing traffic in the neighborhood of the dispensary.

Many dispensaries also provide services to their members beyond the supply of medicine, such as counseling, support groups, or a place to administer medical marijuana on-site at the dispensary. Patient advocates believe on-site consumption is an especially important service for patients who live in subsidized housing where federal drug laws are enforced or housing arrangements that prohibit smoking. On-site consumption also allows patients to use delivery methods such as vaporizers which do not require smoking, but which might be cost-prohibitive for an individual at home. (Note: the Los Angeles Municipal Code, § 41.50.B.3, explicitly allows for enclosed designated smoking areas at health care facilities.) An ordinance that limits the services which dispensaries can provide, either explicitly or effectively, such as through overly restrictive hours of operation, will likely result in lower patient participation.

The City Council should recognize that patient privacy and adequate health services are crucial to successful implementation of California's medical marijuana laws in the dispensary setting.

Part 6

Conclusion

The Compassionate Use Act and the Medical Marijuana Program (SB 420) protect the rights of qualified patients in California to cultivate and/or obtain and use marijuana for medical purposes and allow patients and their designated caregivers to collectively cultivate marijuana and receive reasonable compensation for this service. Though medical marijuana cultivation under these provisions of California law has often been private, medical marijuana dispensaries serving large memberships have become a popular model.

Dispensaries perform an irreplaceable service for many medical marijuana patients in Los Angeles. Those concerned about the consequences of qualified patients cultivating marijuana in their own homes or purchasing marijuana on the black market should view smartly regulated dispensaries as providing desirable social benefits to the city of Los Angeles. The goal of dispensary regulation in the city should therefore be to promote the use of dispensaries as provided for in the CUA and the MMP by making these operations attractive and complimentary assets in the communities they serve.

The LAPD recommendations for restricting dispensaries in the city provide an incomplete picture of medical marijuana dispensaries and their roles, but they also indicate the need to begin earnest discussion of how to create a workable ordinance for the city of Los Angeles.

There are many measures that the City Council can take to ensure effective regulation of medical marijuana dispensaries in Los Angeles. In order to promote regional consistency, any adopted ordinance in the city of Los Angeles should not exceed the restrictions provided by the county medical marijuana dispensary ordinance. Location restrictions should be permissive enough to allow for dispensaries to operate throughout the city at a reasonable density, rather than relegate dispensaries to areas where their ability to provide valuable services to their members is diminished. To the extent possible, security and safety requirements should be on a site-specific basis. Additionally, provisions for patient privacy should be considered a high priority for the success of the ordinance. In no way should the sum of location restrictions, safety, and legal requirements add up to an effective ban on dispensaries. Finally, the expertise that existing dispensaries in the city of Los Angeles have created in working toward effective self-regulation should be used as an asset in improving dispensary operations city-wide.

Medical marijuana dispensaries work to protect both patients and the communities they serve; with thoughtful consideration, Los Angeles can adopt a dispensary ordinance that does the same.

One of the volunteers at Cannabis Club holding prescription-grade marijuana. © Jeff Albertson/CORBIS

Additional Resources

Americans for Safe Access, *Sample Ordinance for the Regulation of Dispensing Collectives*
http://www.safeaccessnow.org/downloads/Sample_Ordinance.pdf

California Department of Health Services, Medical Marijuana Program
http://www.dhs.ca.gov/mmp/

City of Whittier municipal code (see Chapter 18.45)
http://municipalcodes.lexisnexis.com/codes/whittier/

City of West Hollywood municipal code (see Chapter 7.32)
http://www.weho.org/index.cfm/fuseaction/nav/navid/24/

County of Los Angeles code (see Section 22.56.196)
http://ordlink.com/codes/lacounty/index.htm

City of Los Angeles, Office of the City Clerk, records on Motion 05-0872, and subsequent reports including the LAPD "Fact Sheet: Medical Marijuana Facilities within the City of Los Angeles."
http://cityclerk.lacity.org/CFI/DisplayOnlineDocument.cfm?SRT=D1&cfnum=05-0872

California Highway Patrol Medical Marijuana Enforcement Policy
http://www.safeaccessnow.org/downloads/CHP_policy_update_memo.pdf

About the Author

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Endnotes

[1] U.S. Department of Health and Human Services, Public Health Service, "Talking Points on Medical Marijuana Policy," (Washington, DC.: 1994). For more information, refer to the only published study on patients in this program, by Dr. Ethan Russo *et al.*, "Chronic Cannabis Use in the Compassionate Investigational New Drug Program: An Examination of Benefits and Adverse Effects of Legal Clinical Cannabis," *Journal of Cannabis Therapeutics*, Vol. 2, Issue 1, 2/13/2002, pp. 3–57.

[2] California Health and Safety Code § 11362.765

[3] Americans for Safe Access recommends the following definition of terms: A. "Medical cannabis dispensing collective," hereinafter "dispensary," shall be construed to include any association, cooperative, affiliation, or collective of persons where multiple "qualified patients" and/or "primary care givers," are organized to provide education, referral, or network services, and facilitation or assistance in the lawful, "retail" production, acquisition, and distribution of medical cannabis. B. "Medical cannabis patient collective," hereinafter "patient collective," shall be defined the same as "dispensary," but does not operate in a "retail" capacity. As such, "patient collectives" are exempt from the provisions dispensary ordinances.

[4] William J. Bratton, Los Angeles Police Department, "Fact Sheet: Medical Marijuana Facilities within the City of Los Angeles." (Los Angeles: LAPD, December 2006), See BPC No. 07-0010 (January 18, 2007).

[5] Americans for Safe Access, *Medical Cannabis Dispensing Collectives and Local Regulation* (Oakland: ASA, October 2006).

[6] See, e.g., *People v. Mower* (2002) 28 Cal. 4th 457; *Gonzales v. Raich* (2005) 545 U.S. [125 S. Ct. 2195].

[7] See *People v. Urziceanu* (2005) 132 Cal.App.4th 747.

[8] The City Attorney's report No. R06-0370 (October 16, 2006), part of the council file on Motion No. 05-0872, also erroneously reports that Riverside County was a party to this lawsuit, which they weren't.

[9] "Fact Sheet," p. 5.

[10] Judge William R. Nevitt, Jr., *County of San Diego v. San Diego NORML, et al*, (Case No. GIC860665) p. 6.

[11] *Lockyer v. City and County of San Francisco, supra*, 33 Cal. 4th (2004) p. 1107.

[12] California Health and Safety Code § 11362.5.C.

[13] "Fact Sheet," p. 7

[14] Deborah Crowe, "Riding High," *Los Angeles Business Journal*, January 29, 2007.

[15] It should be noted that arrest statistics given by the LAPD *Statistical Digest* for 2005 (4784 adult or 5882 total arrests) differ from those given by the "Fact Sheet" on p. 6 for the same year (4720 arrests).

[16] Data for 1997 – 2004 from California Department of Justice, Criminal Justice Statistics Center. Data for 2005 and population data from Los Angeles Police Department, *Statistical Digest*. Information Technology Division, Management Report Unit. Available online at: www.lapdonline.org/crime_maps_and_compstat/content_basic_view/9098.

[17] State of California, Office of the Attorney General, "Eleventh Biennial California Student Survey," (Sacramento: October 4, 2006).

[18] Michael Doom, County of Los Angeles, Department of Public Health, personal communication. February 2, 2007. 4788 total complaints were filed in 2006, compared to 25,687 restaurants in operation.

[19] Christopher Fusco, Americans For Safe Access, Los Angeles County Field Coordinator, personal communication, January 26, 2007.

[20] Mike Sprague, "Pot Center Given 2 Years," *Whittier Daily News*. August 3, 2006.

[21] Christopher Fusco, Americans For Safe Access, Los Angeles County Field Coordinator, personal communication, February 13, 2007.

[22] City of Los Angeles Planning and Zoning Code, online at: http://www.amlegal.com/los_angeles_ca/ (Last amended by legislation effective January 18, 2007).

[23] "Fact Sheet," p. 6 and p. 10.

[24] "Fact Sheet," p. 6.

[25] Restriction of dispensaries to public transit corridors, if that was the intent of the LAPD recommendations, is also a seemingly backward provision—dispensaries should not be prohibited from locating in an area solely on the basis of a lack of public transportation to that site.

[26] As nonprofit organizations, dispensaries may be exempt from income and property taxes, but the Board of Equalization is responsible for determining any exemption from sales or use taxes.

[27] State of California, Office of the Attorney General, Opinion No. 04-709. June 23, 2005. p. 7.

[28] California Medical Association's Legal Counsel, "Document #1325, The Compassionate Use Act of 1996: The Medical Marijuana Initiative." CMA On-Call: The California Medical Association's Information-on-Demand Service. January 2007, p. 15 (cmanet.org).

[29] Chris Conrad, *Cannabis Yields and Dosage: A Guide to the Production and Use of Medical Marijuana*, (El Cerrito, CA: Safe Access Now/Creative Xpressions, 2005).

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