Lompoc City Council Agenda Item

City Council Meeting Date: December 15, 2015

TO: Honorable Mayor and Council Members

FROM: Joseph W. Pannone, City Attorney

SUBJECT: Introduction of Ordinance No. 1621(16) Relating to Medical Marijuana Uses and Prohibitions in the City of Lompoc; Adoption of Resolution No. 6018(15) Reaffirming Medical Marijuana Cultivation, As Uses Not Specifically Enumerated in the Lompoc Municipal Code, Are Prohibited

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Recommendation:

Staff and the City Attorney's office recommend the City Council:

1) Introduce Ordinance No. 1621(15), and waive further reading, amending Chapter 9.36 of the Lompoc Municipal Code (LMC) to rename that Chapter and prohibit medical marijuana dispensaries, mobile dispensaries and marijuana cultivation in all zones (the "Amended Ordinance") (Attachments 1 and 2); and

2) Adopt Resolution No. 6018(15) reaffirming and confirming the City's Zoning Code, enumerated under Title 17 of the LMC, is a permissive Zoning Code such that medical marijuana cultivation, as uses not specifically enumerated in the Zoning Code, are prohibited (the "Resolution") (Attachment 3).

Background:

Prior Medical Marijuana Regulations

In 1996, California voters adopted the Compassionate Use Act (CUA) as a ballot initiative, codified at Health & Safety Code section 11362.5. The CUA provides a limited defense from prosecution for cultivation and possession of marijuana. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153).

In 2004, California Senate Bill (SB) 420 went into effect. SB 420 was enacted by the Legislature to clarify the scope of the CUA and to allow California cities and counties to adopt and enforce rules and regulations consistent with SB 420 and the CUA. Those new regulations and rules became known as the Medical Marijuana Program ("MMP"), which among other things, enhanced the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects.

The California courts have found neither the CUA nor the MMP provide medical marijuana patients with an unfettered right to obtain, cultivate, or dispense marijuana for medical purposes. (*City of Riverside v. Inland Empire Patients Health and Wellness Center* (2013) 56 Cal.4th 729; *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975.) Rather, the statutes set up limited defenses to state criminal prosecution. The manufacture, distribution, or possession of marijuana remains unlawful and a federal crime under the Federal Controlled Substance Act (21 U.S.C. §§ 812, 841, 844).

In 2007, the City Council voted to prohibit medical marijuana dispensaries City-wide by adopting Ordinance No. 1540(07). That regulation remains lawful and will not be affected by the proposed LMC text amendments.

In 2013, the California Supreme Court found the CUA and MMP do not preempt a city's local regulatory authority and confirmed a city's ability to prohibit medical marijuana dispensaries within its boundaries. (*City of Riverside, supra,* 56 Cal.4th 729 [affirmed authority of cities to prohibit the operation of medical marijuana dispensaries within their jurisdiction through land use laws]; see also, *Maral supra,* 221 Cal.App.4th 975, 978 [state law does "not preempt a city's police power to prohibit the cultivation of all marijuana within that city"].)

New Marijuana Regulations – the Medical Marijuana Regulation and Safety Act

In September 2015, the state legislature enacted, and the Governor signed into law, three bills – Assembly Bill (AB) 243, AB 266 and SB 643 – which together form the Medical Marijuana Regulation and Safety Act (the "MMRSA"). The MMRSA creates a comprehensive state licensing system for the commercial cultivation, manufacture, retail sale, transport, distribution, delivery, and testing of medical cannabis. The statewide regulatory scheme is headed by the Bureau of Medical Marijuana Regulation within the Department of Consumer Affairs. The Department of Food and Agriculture will be responsible for regulating cultivation; the Department of Public Health for developing standards for manufacture, testing, and production and labeling of edibles; the Department of Pesticide Regulation for developing pesticide standards; and the Departments of Fish and Wildlife and State Water Board for protecting water quality.

Discussion:

Dual Licensing System

Although the Bureau of Medical Marijuana Regulation will issue the state licenses, the MMRSA provides for a system of dual licensing with the city or counties in which the business is located. Within approximately two years, all cultivation and distribution of medical marijuana will require one of seventeen different *state* licenses. The licenses will be valid for one year and must be renewed annually. A State license will not be

required for individual medical use and cultivation, or the provision of medical marijuana by a "caregiver" to no more than five "patients."

However, the new laws maintain the authority of local agencies to prohibit, regulate and/or license medical marijuana uses within their jurisdiction. The MMRSA expressly provides it is not intended "to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local permit or licensing requirements." (Business & Professions Code § 19315.) That is accomplished, in part, by the requirement that before one of the new medical marijuana state licenses will be issued, an applicant must have obtained a *local* license/permit for medical marijuana cultivation or distribution.

Pursuant to the following new statutes, local jurisdictions effectively will have a "veto" over whether a state license can be issued:

> (1) Business & Professions § 19320(b): "A licensee shall not commence [commercial cannabis] activity under the authority of a state license *until the applicant has obtained, in addition to the state license, a license or permit from the local jurisdiction in which he or she proposes to operate, following the requirements of the applicable local ordinance*."
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> (2) Health & Safety Code § 11362.777(b): "A person shall not cultivate medical marijuana without first obtaining . . . A license, permit, or other entitlement, specifically permitting cultivation pursuant to these provisions, *from the city*. . . in which the cultivation will occur."
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> (3) Business & Professions Code § 19316: "[Local jurisdictions] may adopt ordinances that establish additional standards, requirements, and regulations for local licenses and permits for commercial cannabis activity."
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> (4) Business & Professions Code § 19320(b): "Revocation of a local license, permit or authorization *shall terminate the ability of a medical cannabis business to operate within that local jurisdiction*. . . ."
>
> (5) Business & Professions Code § 19312: "Each licensing authority may suspend or revoke licenses. . . ."

The new regulatory regime is akin to the need to secure an alcohol license before serving alcohol – yet with local control over issuance of medical marijuana licenses. For example, the City of Fresno expressly prohibits all cultivation. Because of those local prohibitions, people in Fresno will be ineligible for the necessary state cultivation licenses. Similarly, if the LMC text amendments described herein are adopted, then the same will be true in Lompoc.

Time-Sensitive Cultivation Regulation

Some of the new laws created by the MMRSA will take effect on January 1, 2016. After that, the state will need several months (probably at least a year) to set up the necessary agencies, information systems, and regulations to actually begin issuing licenses. It is expected state licenses (if not preempted by local government regulations) will start being issued on January 1, 2018. In the interim, local governments may choose to adopt new ordinances to permit or license local businesses in preparation for state licensing – most of which are not time sensitive.

The issue of cultivation regulations, however, is time sensitive. The MMRSA, as currently written provides, ***if a city does not have cultivation regulations or a prohibition in place by March 1, 2016, then when the state begins issuing cultivation licenses (likely in 2018) an individual in that city can skip the need to first secure a local license/permit and apply directly for a state cultivation license***.

Specifically, new Health & Safety Code § 11362.777(c)(4) provides in part:

> "If a city. . . does not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana, either expressly or otherwise under principles of permissive zoning, or chooses not to administer a conditional permit program pursuant to this section, then commencing March 1, 2016, the division shall be the sole licensing authority for medical marijuana cultivation applicants in that city . . . ."

Thus, if a city presently has a permissive zoning code or express zoning ordinance which regulates or prohibits cultivation, then there is no need to do anything before March 1, 2016. It is important to note the new Health & Safety Code provision requires the express cultivation ban, to be effective, to be codified within a "land use" regulation. (New Health & Safety Code § 11362.777(b)(3).)

Summary of City Ordinance and Recommended Amendments

The City currently has an express prohibition on the establishment of medical marijuana dispensaries, both fixed and mobile, in the City. Those prohibitions are codified in the LMC at Title 9 (Public Peace and Safety), Chapter 9.36, "PROHIBITION OF MEDICAL MARIJUANA DISPENSARIES" (the "Ordinance"). The Ordinance prohibits the establishment and operation of medical marijuana dispensaries (LMC §§ 9.36.010-020) and deems those uses to be a "public nuisance" pursuant to the City's police powers, subject to abatement by the City (LMC § 9.36.030) as well as criminal and civil penalties (LMC § 9.36.040). This existing regulation will not be affected by many of the changes created by the MMRSA.

The primary issues of concern for the City relate to the following two areas of the law, which are addressed in the Amended Ordinance, along with other miscellaneous "tweaks" and clarifications:

(1) Marijuana Cultivation

If the City seeks to also maintain local control over cultivation, then a local cultivation ban is required. As noted, the MMRSA contains new regulations for the cultivation of medical marijuana which will go into effect on March 1, 2016, unless, prior to that date, the City exercises its authority under the MMRSA to expressly prohibit cultivation.

While the Ordinance currently bans medical marijuana *dispensaries* as a nuisance pursuant to the City's police powers, that regulation will not be sufficient to ban medical marijuana *cultivation* because (1) the Ordinance does not set forth an express cultivation ban and (2) even if it was amended to include an express ban (as proposed), that regulation may not be sufficient since an argument could be made the Amended Ordinance is not a "land use" regulation as provided under Health & Safety Code § 11362.777(b)(3).

In order to adopt a cultivation ban which complies with the new Health & Safety Code regulations, the Council must take the following two-fold approach:

(1) Adopt the Amended Ordinance prohibiting the "cultivation of marijuana and medical marijuana" City-wide; and

(2) Given that the Ordinance is not a part of the Zoning Code and, therefore, arguably not a "land use" ordinance, in an abundance of caution, also adopt a resolution affirming the City's Zoning Code is a permissive zoning code such that medical marijuana cultivation is prohibited.

The City's Zoning Code (LMC Title 17) provides for permissive zoning, because the LMC lists all permitted land uses. If a particular use is not listed, then it is generally prohibited. Lompoc's situation is therefore similar to the situation found in *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418. In *Naulls*, the court found Corona had permissive zoning, because of the language within its zoning code.

The permissive nature of the City's Zoning Code is important in regards to maintaining a local ban on cultivation, because even if the City adopts an express ban on medical marijuana cultivation – as proposed by the Amended Ordinance – that still is likely insufficient to avoid preemption by state law. Pursuant to the Amended Ordinance, the LMC will make the manufacture, cultivation, sale or storage of medical marijuana a nuisance, thus, implicitly banning cultivation. However, that regulation will be enacted solely through the City's police power and not through its land use authority. That is problematic, because Health & Safety Code § 1362.777(c) specifically provides, by

March 1, 2016, if the City does not have "land use" regulations or ordinances governing cultivation (either regulating or banning), it cedes authority to do so to the state. Thus, the City cannot rely *solely* upon those provisions to ensure medical marijuana cultivation is prohibited within the City.

As such, it is recommended, at the minimum, the City further affirm through a resolution, pursuant to the principles of permissive zoning, all marijuana cultivation is prohibited[1].

(2) Mobile Delivery of Marijuana

Mobile dispensaries are currently prohibited under the Ordinance. (*See*, LMC §§ 9.36.010, 9.36.020.) However, that prohibition merits clarification to accord with the new state regulatory scheme – which has created separate regulations for marijuana dispensaries and mobile delivery of marijuana.

The MMRSA provides, unless a local jurisdiction has an express ban on *local deliveries* of medical marijuana, then after the state begins issuing delivery licenses (likely starting in 2018) such a state delivery license will authorize delivery into that city from an out-of-area dispensary.

Accordingly, staff has also prepared amendments to the Ordinance which clarify the separate definitions for those uses and confirm the mobile delivery of marijuana and medical marijuana within the City are also prohibited. It should be noted transportation of marijuana through the City is still allowed by state regulation and cannot be banned though local ordinance. That means the City cannot prohibit "pass-through" deliveries, whereby an out-of-area dispensary drives through the City on its way to deliver to a customer in another out-of-area location.

The proposed amendments prohibiting the mobile delivery of marijuana and medical marijuana dispensaries, and prohibiting cultivation of medical marijuana within the City limits are consistent with the existing language of LMC Chapter 9.36 prohibiting medical marijuana dispensaries within the City. Further, it is recognized the use or possession of marijuana is a federal violation under the Controlled Substances Act and is classified as a "Schedule I Drug," which is defined as a drug or other substance that has a high potential for abuse. Furthermore, the Federal Controlled Substance Act makes it unlawful for any person to cultivate or dispense marijuana. The Controlled Substance

[1] That prohibition will not prevent a medical marijuana cardholder from cultivating medical marijuana within lawful limitations for personal use. Under the MMRSA, a state license will not be required for individual medical use and cultivation, or the provision of medical marijuana by a "caregiver" to no more than five "patients." The law limits individual cultivation by a cardholder to 100 square feet, and cultivation by a caregiver for a maximum of 5 patients to 500 square feet. This limitation on individual use is already the subject of a lawsuit which argues that such limits are contrary to Proposition 215 and thus cannot be imposed by the Legislature over the will of the voters.

Act contains no statutory exemption for the possession of marijuana for medical purposes.

Fiscal Impact:

The first reading and adoption of the Amended Ordinance and Resolution have no fiscal impact on the City or the City's General Fund. Failure to adopt the Amended Ordinance and Resolution would likely have a long-term negative fiscal impact effect on the City's General Fund due to enforcement costs related to an unfunded State mandate for cultivation of marijuana.

Conclusion:

Recently, the state legislature enacted the MMRSA to establish a statewide regulatory system for the licensing and operation of cultivation, processing, transportation, testing, distribution, and use of medical marijuana. The MMRSA consists of three bills that, among other things, create a dual licensing system, which allows the state to govern aspects of the operation such as cultivation and mobile delivery unless the City adopts land use regulations prohibiting or allowing these activities or uses.

In keeping with the City's existing medical marijuana regulations – which prohibit medical marijuana dispensaries – the proposed changes to the LMC and adoption of the proposed resolution will also prohibit cultivation of marijuana and medical marijuana and clarify the establishment of mobile delivery services by the dispensaries. Of course, those who carry valid medical marijuana cards will still be able to cultivate and use medical marijuana, as allowed by state law.

Respectfully submitted,

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Joseph W. Pannone, City Attorney

Attachments:
1) Ordinance No. 1621(16) (the Amended Ordinance)
2) Redline Version of Amended Ordinance
3) Resolution No. 6018(15)