CALL OF SPECIAL MEETING

Antioch City Council
Special Meeting

Pursuant to Government Code section 54956, I hereby call a Special Meeting of the Antioch City Council. Said meeting shall be held on the following date, time and place:

DATE: **Wednesday, November 1, 2017**

TIME: **7:00 P.M. Special Meeting**

PLACE: **Council Chambers**
200 "H" Street
Antioch, California 94509

The only items of business to be considered at such special meeting shall be set forth on the Special Meeting Agenda.

Dated: October 17, 2017

SEAN WRIGHT, Mayor
City of Antioch

Regular Meetings:
2nd and 4th Tuesday
of each month

Agenda prepared by:
Office of the City Clerk
(925) 779-7009

ANTIOCH CITY COUNCIL

SPECIAL MEETING

Council Chambers
200 "H" Street
Antioch, CA 94509

WEDNESDAY
NOVEMBER 1, 2017
7:00 P.M.

7:00 P.M. **ROLL CALL**

PLEDGE OF ALLEGIANCE

PUBLIC COMMENTS

PUBLIC HEARING

1. SECOND EXTENSION OF AN INTERIM URGENCY ORDINANCE ESTABLISHING A TEMPORARY MORATORIUM ON NON-MEDICAL MARIJUANA USES WITHIN THE CITY OF ANTIOCH

Recommended Action: It is recommended that the City Council take the following actions:

1) Accept and approve the report from the City Attorney and provide direction regarding a permanent ordinance regulating non-medical marijuana uses; and

2) Adopt the second extension of the interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses. ***(A 4/5 vote is required for adoption.)***

PUBLIC COMMENTS

STAFF COMMUNICATIONS

COUNCIL COMMUNICATIONS

ADJOURNMENT

The City Council meetings are accessible to those with disabilities. Auxiliary aides will be made available for persons with hearing or vision disabilities upon request in advance at (925) 779-7009 or TDD (925) 779-7081.

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Recommended Action: It is recommended that the City Council take the following actions:

1) Accept and approve the report from the City Attorney and provide direction regarding a permanent ordinance regulating non-medical marijuana uses; and

2) Adopt the second extension of the interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses. ***(A 4/5 vote is required for adoption.)***

STAFF REPORT

PUBLIC COMMENTS

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ADJOURNMENT

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STAFF REPORT TO THE CITY COUNCIL

DATE: Special Meeting of November 1, 2017

TO: Honorable Mayor and Members of the City Council

SUBMITTED BY: Derek Cole, Interim City Attorney

SUBJECT: Second Extension of an Interim Urgency Ordinance Establishing a Temporary Moratorium on Non-Medical Marijuana Uses within the City of Antioch

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RECOMMENDED ACTION

It is recommended that the City Council take the following actions:

1) Accept and approve the report from the City Attorney and provide direction regarding a permanent ordinance regulating non-medical marijuana uses; and

2) Adopt the extension of the interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses. ***(A 4/5 vote is required for adoption.***

STRATEGIC PURPOSE

This item will support the City's Crime Reduction Strategy. It also supports Strategy C-2 Blight Reduction by creating resources to address areas that experience nuisance conditions.

FISCAL IMPACT

No fiscal impact related to this item.

DISCUSSION

Last November, the City Council enacted a moratorium on all commercial marijuana land uses within City limits. The initial urgency ordinance adopted was, by law, limited to a duration of 45 days. In December, the Council extended the ordinance effectively for one year from the date of initial enactment (i.e., through November 7 of this year). At the November 1, 2017 Special Meeting, the Council shall consider whether to extend the ordinance for one additional year, i.e., through November 7, 2018.

The Community Development Department and Office of the City Attorney have continued to monitor the legal and planning developments regarding marijuana since the extension of the urgency ordinance last year. A workshop presentation was provided by the City Attorney in the Spring to discuss the various issues associated with commercial marijuana land uses, including planning and zoning issues as well as the prospects for taxation and revenue generation. The direction of the Council following

this meeting was for the City's Economic Development Commission to study the issue and provide an analysis of the financial issues for the Council's consideration. The Commission has not completed this analysis.

To ensure the Economic Development Commission can complete its analysis, and to allow for an assessment of the State licensing program, scheduled to begin in January 2018; it is recommended that the Council extend the urgency ordinance for one additional year. This will ensure Staff can fully evaluate and present to the Council the effects, impacts, and benefits of marijuana regulations when a permanent ordinance is presented in the forthcoming year.

For further information on this subject, this staff report attaches the previous two staff reports the City Attorney prepared for the initial adoption and first extension of the Moratorium Ordinance.

ATTACHMENTS

A. Interim Urgency Ordinance
B. Staff Report for initial adoption of Moratorium Ordinance, regular meeting of November 8, 2016
C. Staff Report for first extension of Moratorium Ordinance, regular meeting of December 13, 2016

Attachment "A"

ATTACHMENT A

ORDINANCE NO. ____-C-S

ADOPTION OF AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ANTIOCH EXTENDING A TEMPORARY MORATORIUM ON NON-MEDICAL MARIJUANA USES WITHIN THE CITY OF ANTIOCH PENDING COMPLETION OF AN UPDATE TO THE CITY'S ZONING ORDINANCE

The City Council of the City of Antioch does ordain as follows:

SECTION 1. Authority. This ordinance is adopted pursuant to the authority of Section 36937(b) and 65858(a) of the Government Code of the State of California, the Antioch Municipal Code, and the laws of the state of California.

SECTION 2. Findings. The City Council of the City of Antioch hereby finds, determines and declares as follows:

A. The City of Antioch may make and enforce all laws and regulations not in conflict with the general laws, and the City holds all rights and powers established by state law.

B. Proposition 64, known as the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act"), was adopted by the voters on November 8, 2016 and took effect on November 9. AUMA is now part of the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"), following legislation enacted in June 2017. MAUCRSA has decriminalized under state law recreational marijuana use, cultivation, and distribution and further established a licensing program for non-medical commercial cultivation, testing, and distribution of non-medical marijuana and the manufacturing of non-medical marijuana products. However, such licenses will not be issued at least until 2018.

C. The City of Antioch currently bans medical marijuana dispensaries and prohibits cultivation of marijuana for medical, non-recreational use pursuant to Title 5, Chapter 21 of the Antioch Municipal Code.

D. The Antioch Municipal Code does not have express provisions regarding non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery, and retail sales. As a result, the City Council adopted an Interim Urgency Ordinance on November 8, 2016 establishing a temporary moratorium on non-medical marijuana uses in the City of Antioch. The City Council extended this ordinance on December 13, 2016 effectively through November 7, 2017.

E. During the past several years, the City faced similar land use impacts and criminal activity related to medical marijuana uses, leading the City to adopt a temporary moratorium and eventually regular ordinances to address those issues.

F. It is reasonable to conclude that non-medical marijuana uses would cause similar adverse impacts on the public health, safety, and welfare in Antioch.

G. Despite the City's ban on non-medical marijuana uses and state criminal statutes related to marijuana cultivation and possession, the Antioch Police Department encountered eight (8) illegal marijuana grows, seized 2,478 marijuana plants and 12,153.1 grams of processed marijuana prior to the first extension of this ordinance in 2016. Since the first extension, the Police Department has continued to encounter illegal marijuana grows.

H. The cultivation of marijuana for personal use has the potential to lead to nuisances and criminal activity. Growing marijuana plants emit an odor that can be noxious and can interfere with the quiet enjoyment of neighboring properties. Also, marijuana cultivation can be attractive to burglars seeking to steal the plants, which can lead to violent confrontations with property owners.

I. It is imperative that the City retain local land use control over non-medical marijuana cultivation. Several California cities and counties have experienced serious adverse impacts associated with and resulting from medical marijuana dispensaries and cultivation sites. According to these communities and according to news stories widely reported, medical marijuana activities have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, and illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana activities. There have also been large numbers of complaints of odors related to the cultivation and storage of marijuana.

J. A California Police Chiefs Association compilation of police reports, news stories, and statistical research regarding crimes involving medical marijuana businesses and their secondary impacts on the community is contained in a 2009 white paper report, a copy of which is on file with the City Clerk.

K. The Police Foundation and the Colorado Association of Chiefs of Police issued a 2015 report entitled "Colorado's Legalization of Marijuana and the Impact on Public Safety: A Practical Guide for Law Enforcement," which outlined many of the numerous challenges faced by law enforcement when enforcing the laws surrounding legalization, to document solutions that have been proposed and put into effect, and outline problems that still need to be addressed; a copy of this memorandum is on file with the City Clerk.

L. In order to protect the public health, safety, and welfare, the City Council desires to amend the Municipal Code to address, in express terms, non-medical marijuana uses. In the wake of the adoption of Proposition 64 and MAUCRSA, the City Council hereby determines that the Municipal Code is in need of further review and revision to protect the public against potential negative health, safety, and welfare impacts and preserve local control over non-medical marijuana establishments. Marijuana currently is prohibited under federal law as a controlled substance.

M. Proposition 64 and MAUCRSA expressly preserve local jurisdictions' ability to adopt and enforce local ordinances to regulate non-medical marijuana establishments including local zoning and land use requirements, business license requirements, and the ability to completely prohibit the establishment or operation of one or more types of non-medical marijuana businesses.

N. Proposition 64 and MAUCRSA further recognize the City's ability to completely prohibit outdoor planting, harvesting, cultivation or processing of non-medical marijuana for personal use, and the City's ability to regulate indoor cultivation for personal use.

O. The City did not take a formal position on Proposition 64 but in order to preserve local control, the City confirms that such non-medical marijuana is prohibited within the City to the fullest extent permitted by law.

P. A permanent ordinance is necessary to address the public health and safety issues related to non-medical marijuana uses. Subsequent to the City Council's adoption of the interim urgency ordinance establishing a temporary moratorium on non-recreational marijuana uses on November 8, 2016, staff has begun to develop options for a permanent ordinance. However, the compacted time frame between now and the expiration of the extended ordinance on November 7, 2017 does not provide sufficient time to consider and adopt a regular zoning code amendment, which includes public notice, consideration by the Planning Commission, and first and second reading before the City Council. Consequently, an extension to the interim prohibition on cultivation of non-medical marijuana for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales and the issuance of any permits and/or entitlements relating to such uses is necessary for an additional period of one year. The loss of local land use control over marijuana cultivation would result in a current and immediate threat to the public health, safety, and welfare.

Q. Government Code sections 36937 and 65858 authorize the adoption of an interim urgency ordinance to protect the public health, safety, and welfare, and to prohibit land uses that may conflict with land use regulations that a city's legislative bodies are considering, studying, or intending to study within a reasonable time.

R. Failure to extend this moratorium could impair the orderly and effective implementation of contemplated amendments to the Municipal Code.

S. The City Council further finds that this moratorium is a matter of local and City-wide importance and is not directed towards any particular person or entity that seeks to cultivate marijuana in Antioch.

T. The proposed Ordinance conforms with the latest adopted general plan for the City in that a prohibition against non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales does not conflict with any allowable uses in the land use element and does not conflict with any policies or programs in any other element of the general plan.

U. The proposed Ordinance will protect the public health, safety, and welfare and promote the orderly development of the City in that prohibiting marijuana cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales will protect the City from the adverse impacts and negative secondary effects connected with these activities.

V. The proposed Ordinance is consistent with the Antioch Zoning Code which does not currently specify non-medical marijuana uses as permitted by right or with a conditional use permit in any zoning district.

W. Based on the foregoing, the City finds that there is a current and immediate threat to the public health, safety, or welfare and that this Ordinance is necessary in order to protect the City from the potential effects and impacts of non-medical marijuana uses in the City, potential increases in crime, impacts on public health and safety, the aesthetic impacts to the City, and other similar or related effects on property values and the quality of life in the City's neighborhoods.

X. The City Council finds that this Ordinance is authorized by the City's police powers. The City Council further finds that the length of the interim zoning regulations imposed by this Ordinance will not in any way deprive any person of rights granted by state or federal laws, because the interim zoning regulation is short in duration and essential to protect the public health, safety and welfare.

SECTION 3. Imposition of Temporary Moratorium. In accordance with the authority granted the City under Government Code sections 36937(b) and 65858 (a), (b), and pursuant to the findings stated herein, the City Council hereby finds that: (1) the foregoing findings are true and correct; and (2) there exists a current and immediate threat to the public health, safety, and welfare from unregulated marijuana cultivation for personal use and commercial marijuana businesses, operating in Antioch; and (3) this Ordinance is necessary for the immediate preservation of the public peace, health, and safety as set forth herein; and (4) hereby declares and imposes a temporary moratorium for the immediate preservation of the public health, safety and welfare as set forth below:

A. Definitions

COMMERCIAL MARIJUANA ACTIVITY includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, delivery or sale of marijuana and marijuana products as regulated by state law.

CULTIVATION means planting, growing, harvesting, drying, curing, grading, trimming or processing of marijuana plants, or any part thereof for non-medical, personal use or commercial purposes.

DELIVERY means the commercial transfer of marijuana or marijuana products to a customer. “Delivery” also includes the use by a retailer of any technology platform owned and controlled by the retailer, or independently licensed under California law, that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of marijuana or marijuana products.

DISTRIBUTION means the procurement, sale, and transport of marijuana or marijuana products between entities for commercial use purposes.

LICENSEE means the holder of any state-issued license related to marijuana activities.

MANUFACTURE means to compound, blend, extract, infuse, or otherwise make or prepare a marijuana product.

MANUFACTURER means a person that conducts the production, preparation, propagation, or compounding of marijuana or marijuana products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages marijuana or marijuana products or labels or re-labels its container, that holds a state license pursuant to this division.

MARIJUANA means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Marijuana” does not include: (1) Industrial hemp, as defined in Section 11018.5 of the California Health & Safety Code; or (2) The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.

MARIJUANA PRODUCT means marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including but not limited to concentrated cannabis, or an edible or topical product containing marijuana or concentrated cannabis and other ingredients.

MARIJUANA TESTING SERVICE means a laboratory, facility or entity in the state that offers or performs tests of marijuana or marijuana products, including the equipment provided by such laboratory, facility, or entity, and that is both of the following: 1) accredited by an accrediting body that is independent from all other persons involved in commercial marijuana activity in the state; 2) registered with the California Department of Public Health.

MICROBUSINESS means a marijuana business that cultivates marijuana on an area less than 10,000 square feet acts as a licensed distributor, Level 1 manufacturer as defined by state law, and retailer pursuant to state law.

RETAILER means a person or entity that engages in retail sale and delivery of marijuana or marijuana products to customers.

SELL, SALE, and TO SELL means any transaction whereby, for any consideration, title to marijuana is transferred from one person to another, and includes the delivery of marijuana or marijuana products pursuant to an order placed for the purchase of the same and soliciting or receiving an order for the same, but does not include the return of marijuana or marijuana products by a licensee to the licensee from whom such marijuana or marijuana product was purchased.

B. Prohibitions. The restrictions on medical marijuana facilities in Title 5, Chapter 21 of the Antioch Municipal Code and other references to "marijuana" or "medical marijuana" throughout the Code shall apply equally to non-medical marijuana to the fullest extent permitted by law.

C. Cultivation of non-medical marijuana for personal use. Cultivation of marijuana for personal use is prohibited in all zones in the City to the fullest extent permitted by law. Cultivation of non-medical marijuana outdoors upon the grounds of a private residence is prohibited in all zones. Cultivation of non-medical marijuana within a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure is prohibited in all zones unless conducted in full compliance with state law.

D. Commercial cultivation. Commercial cultivation of marijuana is prohibited in all zones in the City to the fullest extent permitted by law.

E. Manufacture. Commercial manufacture of marijuana or marijuana products is prohibited in all zones in the City to the fullest extent permitted by law.

F. Testing Service. Marijuana testing service is a prohibited use in all zones in the City to the fullest extent permitted by law.

G. Retailer. Marijuana retailer is a prohibited use in all zones in the City to the fullest extent permitted by law.

H. Distributor. Marijuana distributor is a prohibited use in all zones in the City to the fullest extent permitted by law.

I. Microbusiness. Marijuana microbusiness is a prohibited use in all zones in the City to the fullest extent permitted by law.

J. Commercial marijuana activities. All commercial marijuana activities for which the state may issue a license are prohibited in all zones in the City to the fullest extent permitted by law.

K. Distribution or delivery of marijuana by state licensees. Distribution or delivery of marijuana, by a state licensee, to a recipient located within the city of Antioch is prohibited to the fullest extent permitted by law.

L. In addition to all other enforcement or legal remedies available to the City, any use or condition caused or permitted to exist in violation of any of the provisions of this Ordinance shall be and is hereby declared a public nuisance and may be abated by the City.

SECTION 4. CEQA. This Ordinance is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) (CEQA) because it can be seen with certainty that there is no possibility the adoption and implementation of this Ordinance may have a significant effect on the environment, and the Ordinance is exempt from CEQA pursuant to CEQA Guidelines Sections 15061(b)(1), 15061(b)(2), and 15061(b)(3). Moreover, the adoption of this Ordinance is further exempt from CEQA because the Ordinance does not change existing City law and practice. The City Council is the decision making body on this Ordinance, and before taking action on it, using its independent judgment, finds such CEQA exemptions to apply.

SECTION 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 6. Effective Date. This ordinance shall take effect on November 8, 2017 upon its adoption by not less than a four-fifths vote of the Antioch City Council but shall be of no further force and effect one year from its date of adoption.

SECTION 7. Report of Interim Moratorium. Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of this Interim Ordinance, the City Council will issue a written report describing the measures taken to alleviate the conditions which led to the adoption of this Interim Ordinance.

SECTION 8. Declaration of Urgency. This ordinance is hereby declared to be an urgency measure necessary for the immediate protection of the public health, safety and welfare. This Council hereby finds that there is a current and immediate threat to the public health, safety and welfare. The reasons for this urgency are declared and set forth in Section 2 of this Ordinance and are incorporated herein by reference.

SECTION 9. Publication; Certification. The City Clerk shall certify to the adoption of this Ordinance and cause same to be published in accordance with State law.

* * * * * *

I HEREBY CERTIFY that the foregoing Interim Urgency Ordinance was introduced and adopted as an urgency measure pursuant to the terms of California Government Code Sections 36937(b) and 65858(a) at a Special Meeting of the City Council of the City of Antioch on the 1st day of November 2017, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Sean Wright, Mayor of the City of Antioch

ATTEST:

Arne Simonsen, CMC, City Clerk of the City of Antioch

Attachment "B"

ATTACHMENT B

STAFF REPORT TO THE CITY COUNCIL

DATE: Regular Meeting of November 8, 2016

TO: Honorable Mayor and Members of the City Council

SUBMITTED BY: Michael G. Vigilia, City Attorney
Forrest Ebbs, Community Development Director

SUBJECT: Adoption of an Interim Urgency Ordinance Establishing a Temporary Moratorium on Non-Medical Marijuana Uses within the City of Antioch

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RECOMMENDED ACTION

It is recommended that the City Council:

1) Introduce the interim urgency ordinance establishing a temporary moratorium on Non-Medical Marijuana Uses within the City of Antioch by title only; and

2) Adopt the interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses. ***(A 4/5 vote is required for adoption.)***

STRATEGIC PURPOSE

This item will support the City's Crime Reduction Strategy. It also supports Strategy C-2 Blight Reduction by creating resources to address areas that experience nuisance conditions.

FISCAL IMPACT

No fiscal impact related to this item.

DISCUSSION

Proposition 64

Proposition 64, known as the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act"), is on the November 8 ballot for consideration by the voters. The AUMA will legalize non-medical marijuana use, possession and cultivation by persons 21 years of age or older. The AUMA also creates a regulatory framework for commercial non-medical marijuana activities. Assuming the AUMA is approved by a majority of voters, the provisions related to personal use, possession and cultivation of non-medical marijuana will take effect on November 9. Commercial non-medical marijuana activities will also be legal on November 9 however the state will not begin issuing licenses to businesses until January 1, 2018.

In order to preserve local control to the greatest extent possible and allow staff sufficient time to evaluate the various options for regulation of non-medical marijuana, staff recommends adoption of an interim urgency ordinance that establishes a moratorium on non-medical marijuana uses. The moratorium specifically prohibits the following non-medical marijuana activities for personal use: outdoor cultivation for personal use, indoor cultivation for personal use that does not comply with state law. The following commercial non-medical marijuana uses are prohibited by the moratorium: cultivation; manufacture; testing; retail; distribution/delivery; microbusiness; and any commercial marijuana activity that may be licensed by the state.

Antioch's Prior Experience with Medical Marijuana Regulation

The City Council has previously addressed the public health and safety concerns related to medical marijuana uses in support of the City's prohibition of medical marijuana dispensaries and cultivation of medical marijuana. The City first enacted a temporary moratorium on medical marijuana facilities on April 26, 2011 and subsequently extended it on May 24, 2011. A permanent ordinance banning medical marijuana facilities but allowing limited cultivation was enacted on October 22, 2013. The ordinance was amended to prohibit all medical marijuana cultivation on January 26, 2016.

During the most recent amendment to the City's medical marijuana ordinance the Police Chief testified that marijuana cultivation raised quality of life and safety issues such as: theft of marijuana plants from private property; violent crime, including homicides, related to efforts to steal marijuana from private property; theft of utilities to provide energy for illegal marijuana cultivation; increased fire hazards; and, noxious odors from marijuana plants.

Even with the City's current prohibitions against medical marijuana uses and state criminal statutes related to marijuana cultivation and possession, the City continues to experience significant marijuana related activity. At the October 25, 2016 City Council Meeting the Police Chief provided a quarterly update related to the activities of the Antioch Police Department. Since the beginning of 2016 the Antioch Police Department has encountered eight (8) illegal marijuana grows, seized 2,478 marijuana plants and 12,153.1 grams of processed marijuana. (see Exhibit A to Attachment A).

Antioch's experiences are not new or unique. In 2009 the California Police Chiefs Association's Task Force on Marijuana Dispensaries published a "White Paper on Marijuana Dispensaries" that police reports, news stories, and statistical research regarding crimes involving medical marijuana businesses and their secondary impacts on the community. (see Exhibit B to Attachment A).

Colorado's Experience with Recreational Marijuana Legalization

The state of Colorado legalized recreational marijuana in 2012. In 2015 the Colorado Association of Chiefs of Police published a report describing the adverse community impacts related to recreational marijuana uses including unsafe construction and electrical wiring, noxious fumes and odors, and increased crime in and around marijuana establishments. (see Exhibit C to Attachment A).

Enactment of Urgency Ordinance

Based on the City's prior experience in regulating medical marijuana, the continued negative impacts that marijuana creates on the community despite the City's prohibition on medical marijuana uses and state criminal law prohibitions, the recent experience of the state of Colorado with respect to recreational marijuana legalization, and the absence of any regulations within the City of Antioch addressing non-medical marijuana uses, the potential legalization of recreational marijuana in California by Proposition 64 poses a significant and imminent public health and safety threat that must be addressed.

Government Code sections 36937(b) and 65858 authorize the enactment of an interim urgency ordinance for the immediate protection public health, safety and welfare to prohibit any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.

The urgency ordinance may be introduced and adopted at the same meeting and will take immediate effect upon a 4/5 vote of the Council. The moratorium will be in effect for a period of 45 days and can be extended initially for a period of 10 months and 15 days with a second extension of up to one year. Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of this moratorium, staff will provide the City Council with a written report describing the measures taken to alleviate the conditions which led to the adoption of the urgency ordinance.

ATTACHMENTS

A. Interim Urgency Ordinance

Exhibit A – Police Statistics Third Quarter Report 2016, presented by Chief Allan Cantando during October 25, 2016 City Council Meeting.

Exhibit B – "White Paper on Marijuana Dispensaries" by California Police Chiefs Association's Task Force on Marijuana Dispensaries.

Exhibit C – **"**Colorado's Legalization of Marijuana and the Impact on Public Safety: A Practical Guide for Law Enforcement" by the Colorado Association of Chiefs of Police.

ATTACHMENT "A"

ORDINANCE NO. _____

AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ANTIOCH ESTABLISHING A TEMPORARY MORATORIUM ON NON-MEDICAL MARIJUANA USES WITHIN THE CITY OF ANTIOCH PENDING COMPLETION OF AN UPDATE TO THE CITY'S ZONING ORDINANCE

The City Council of the City of Antioch does ordain as follows:

SECTION 1. Authority. This ordinance is adopted pursuant to the authority of Section 36937(b) and 65858(a) of the Government Code of the State of California, the Antioch Municipal Code, and the laws of the state of California.

SECTION 2. Findings. The City Council of the City of Antioch hereby finds, determines and declares as follows:

A. The City of Antioch may make and enforce all laws and regulations not in conflict with the general laws, and the City holds all rights and powers established by state law.

B. Proposition 64, known as the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act"), is on the November 8, 2016 ballot for consideration by the voters. If it is approved by a majority of voters, the measure will take effect the day after the election. The AUMA would decriminalize under state law recreational marijuana use, cultivation, and distribution and further establish licensing program for non-medical commercial cultivation, testing, and distribution of non-medical marijuana and the manufacturing of non-medical marijuana products. However, such licenses will not be issued at least until 2018.

C. The City of Antioch currently bans medical marijuana dispensaries and prohibits cultivation of marijuana for medical, non-recreational use pursuant to Title 5, Chapter 21 of the Antioch Municipal Code.

D. The Antioch Municipal Code does not have express provisions regarding non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales.

E. During the past several years, the City faced similar land use impacts and criminal activity related to medical marijuana uses, leading the City to adopt a temporary moratorium and eventually regular ordinances to address those issues.

F. It is reasonable to conclude that non-medical marijuana uses would cause similar adverse impacts on the public health, safety, and welfare in Antioch.

G. Despite the City's ban on non-medical marijuana uses and state criminal statutes related to marijuana cultivation and possession, the Antioch Police Department has encountered eight (8) illegal marijuana grows, seized 2,478 marijuana plants and 12,153.1 grams of processed marijuana since the beginning of 2016. An excerpt of the report is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

H. The cultivation of marijuana for personal use has the potential to lead to nuisances and criminal activity. Growing marijuana plants emit an odor that can be noxious and can interfere with the quiet enjoyment of neighboring properties. Also, marijuana cultivation can be attractive to burglars seeking to steal the plants, which can lead to violent confrontations with property owners.

I. It is imperative that the City retain local land use control over non-medical marijuana cultivation. Several California cities and counties have experienced serious adverse impacts associated with and resulting from medical marijuana dispensaries and cultivation sites. According to these communities and according to news stories widely reported, medical marijuana activities have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, and illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana activities. There have also been large numbers of complaints of odors related to the cultivation and storage of marijuana.

J. A California Police Chiefs Association compilation of police reports, news stories, and statistical research regarding crimes involving medical marijuana businesses and their secondary impacts on the community is contained in a 2009 white paper report which is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

K. The Police Foundation and the Colorado Association of Chiefs of Police issued a 2015 report entitled "Colorado's Legalization of Marijuana and the Impact on Public Safety: A Practical Guide for Law Enforcement," which outlined many of the summarize the numerous challenges faced by law enforcement when enforcing the laws surrounding legalization, to document solutions that have been proposed and put into effect, and outline problems that still need to be addressed; a copy of this memorandum is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

L. In order to protect the public health, safety, and welfare, the City Council desires to amend the Municipal Code to address, in express terms, non-medical marijuana uses. In the event that Proposition 64 passes, the City Council hereby determines that the Municipal Code is in need of further review and revision to protect the public against potential negative health, safety, and welfare impacts and preserve local control over non-medical marijuana establishments. Non-medical marijuana currently is prohibited under both state and federal law.

M. Proposition 64 expressly preserves local jurisdictions' ability to adopt and enforce local ordinances to regulate non-medical marijuana establishments including local zoning and land use requirements, business license requirements, and the ability to completely prohibit the establishment or operation of one or more types of non-medical marijuana businesses.

N. Proposition 64 further recognizes the City's ability to completely prohibit outdoor planting, harvesting, cultivation or processing of non-medical marijuana for personal use, and the City's ability to regulate indoor cultivation for personal use.

O. The City does not take a formal position on Proposition 64, but in order to preserve local control, the City confirms that such non-medical marijuana is prohibited within the City to the fullest extent permitted by law.

P. Non-medical marijuana use, cultivation, and distribution is prohibited by both state and federal law. A regular ordinance is unnecessary if Proposition 64 does not pass. Moreover, the compacted time frame between now and the November General Election does not provide sufficient time to consider and adopt a regular zoning code amendment, which includes public notice, consideration by the Planning Commission, and first and second reading before the City Council, an interim prohibition on recreational use of marijuana and the issuance of any permits and/or entitlements relating to marijuana cultivation is necessary for a period of 45 days. The loss of local land use control over marijuana cultivation would result in a current and immediate threat to the public health, safety, and welfare.

Q. Government Code sections 36937 and 65858 authorize the adoption of an interim urgency ordinance to protect the public health, safety, and welfare, and to prohibit land uses that may conflict with land use regulations that a city's legislative bodies are considering, studying, or intending to study within a reasonable time.

R. Failure to adopt this moratorium could impair the orderly and effective implementation of contemplated amendments to the Municipal Code.

S. The City Council further finds that this moratorium is a matter of local and City-wide importance and is not directed towards any particular person or entity that seeks to cultivate marijuana in Antioch.

T. The proposed Ordinance conforms with the latest adopted general plan for the City in that a prohibition against non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales does not conflict with any allowable uses in the land use element and does not conflict with any policies or programs in any other element of the general plan.

U. The proposed Ordinance will protect the public health, safety, and welfare and promote the orderly development of the City in that prohibiting marijuana cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales will protect the City from the adverse impacts and negative secondary effects connected with these activities.

V. The proposed Ordinance is consistent with the Antioch Zoning Code which does not currently specify non-medical marijuana uses as permitted by right or with a conditional use permit in any zoning district.

W. Based on the foregoing, the City finds that there is a current and immediate threat to the public health, safety, or welfare and that this Ordinance is necessary in order to protect the City from the potential effects and impacts of non-medical marijuana uses in the City, potential increases in crime, impacts on public health and safety, the aesthetic impacts to the City, and other similar or related effects on property values and the quality of life in the City's neighborhoods.

X. The City Council finds that this Ordinance is authorized by the City's police powers. The City Council further finds that the length of the interim zoning regulations imposed by this Ordinance will not in any way deprive any person of rights granted by state or federal laws, because the interim zoning regulation is short in duration and essential to protect the public health, safety and welfare.

SECTION 3. Imposition of Temporary Moratorium. In accordance with the authority granted the City under Government Code sections 36937(b) and 65858 (a), (b), and pursuant to the findings stated herein, the City Council hereby finds that: (1) the foregoing findings are true and correct; and (2) there exists a current and immediate threat to the public health, safety, and welfare from unregulated marijuana cultivation for personal use and commercial marijuana businesses, operating in Antioch; and (3) this Ordinance is necessary for the immediate preservation of the public peace, health, and safety as set forth herein; and (4) hereby declares and imposes a temporary moratorium for the immediate preservation of the public health, safety and welfare as set forth below:

A. Definitions

COMMERCIAL MARIJUANA ACTIVITY includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, delivery or sale of marijuana and marijuana products as regulated by state law.

CULTIVATION means planting, growing, harvesting, drying, curing, grading, trimming or processing of marijuana plants, or any part thereof for non-medical, personal use or commercial purposes.

DELIVERY means the commercial transfer of marijuana or marijuana products to a customer. "Delivery" also includes the use by a retailer of any technology platform owned and controlled by the retailer, or independently licensed under California law, that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of marijuana or marijuana products.

DISTRIBUTION means the procurement, sale, and transport of marijuana or marijuana products between entities for commercial use purposes.

LICENSEE means the holder of any state-issued license related to marijuana activities.

MANUFACTURE means to compound, blend, extract, infuse, or otherwise make or prepare a marijuana product.

MANUFACTURER means a person that conducts the production, preparation, propagation, or compounding of marijuana or marijuana products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages marijuana or marijuana products or labels or re-labels its container, that holds a state license pursuant to this division.

MARIJUANA means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Marijuana” does not include:
(1) Industrial hemp, as defined in Section 11018.5 of the California Health & Safety Code; or (2) The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.

MARIJUANA PRODUCT means marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including but not limited to concentrated cannabis, or an edible or topical product containing marijuana or concentrated cannabis and other ingredients.

MARIJUANA TESTING SERVICE means a laboratory, facility or entity in the state that offers or performs tests of marijuana or marijuana products, including the equipment provided by such laboratory, facility, or entity, and that is both of the following: 1) accredited by an accrediting body that is independent from all other persons involved in commercial marijuana activity in the state; 2) registered with the California Department of Public Health.

MICROBUSINESS means a marijuana business that cultivates marijuana on an area less than 10,000 square feet acts as a licensed distributor, Level 1 manufacturer as defined by state law, and retailer pursuant to state law.

RETAILER means a person or entity that engages in retail sale and delivery of marijuana or marijuana products to customers.

SELL, SALE, and TO SELL means any transaction whereby, for any consideration, title to marijuana is transferred from one person to another, and includes the delivery of marijuana or marijuana products pursuant to an order placed for the purchase of the same and soliciting or receiving an order for the same, but does not include the return

of marijuana or marijuana products by a licensee to the licensee from whom such marijuana or marijuana product was purchased.

B. Prohibitions. The restrictions on medical marijuana facilities in Title 5, Chapter 21 of the Antioch Municipal Code and other references to "marijuana" or "medical marijuana" throughout the Code shall apply equally to non-medical marijuana to the fullest extent permitted by law.

C. Cultivation of non-medical marijuana for personal use. Cultivation of marijuana for personal use is prohibited in all zones in the City to the fullest extent permitted by law. Cultivation of non-medical marijuana outdoors upon the grounds of a private residence is prohibited in all zones. Cultivation of non-medical marijuana within a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure is prohibited in all zones unless conducted in full compliance with state law.

D. Commercial cultivation. Commercial cultivation of marijuana is prohibited in all zones in the City to the fullest extent permitted by law.

E. Manufacture. Commercial manufacture of marijuana or marijuana products is prohibited in all zones in the City to the fullest extent permitted by law.

F. Testing Service. Marijuana testing service is a prohibited use in all zones in the City to the fullest extent permitted by law.

G. Retailer. Marijuana retailer is a prohibited use in all zones in the City to the fullest extent permitted by law.

H. Distributor. Marijuana distributor is a prohibited use in all zones in the City to the fullest extent permitted by law.

I. Microbusiness. Marijuana microbusiness is a prohibited use in all zones in the City to the fullest extent permitted by law.

J. Commercial marijuana activities. All commercial marijuana activities for which the state may issue a license are prohibited in all zones in the City to the fullest extent permitted by law.

K. Distribution or delivery of marijuana by state licensees. Distribution or delivery of marijuana, by a state licensee, to a recipient located within the city of Antioch is prohibited to the fullest extent permitted by law.

L. In addition to all other enforcement or legal remedies available to the City, any use or condition caused or permitted to exist in violation of any of the provisions of this Ordinance shall be and is hereby declared a public nuisance and may be abated by the City.

SECTION 4. CEQA. This Ordinance is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) (CEQA) because it can be seen with certainty that there is no possibility the adoption and implementation of this Ordinance may have a significant effect on the environment, and the Ordinance is exempt from CEQA pursuant to CEQA Guidelines Sections 15061(b)(1), 15061(b)(2), and 15061(b)(3). Moreover, the adoption of this Ordinance is further exempt from CEQA because the Ordinance does not change existing City law and practice. The City Council is the decision making body on this Ordinance, and before taking action on it, using its independent judgment, finds such CEQA exemptions to apply.

SECTION 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 6. Effective Date. This ordinance shall take effect immediately upon its adoption by not less than a four-fifths vote of the Antioch City Council but shall be of no further force and effect 45 days from its date of adoption unless the City Council, after notice and public hearing as provided under Government Code section 65858(a), (b) and adoption of the findings required by Government Code section 65858(c), subsequently extends this Ordinance.

SECTION 7. Report of Interim Moratorium. Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of this Interim Ordinance, the City Council will issue a written report describing the measures taken to alleviate the conditions which led to the adoption of this Interim Ordinance.

SECTION 8. Declaration of Urgency. This ordinance is hereby declared to be an urgency measure necessary for the immediate protection of the public health, safety and welfare. This Council hereby finds that there is a current and immediate threat to the public health, safety and welfare. The reasons for this urgency are declared and set forth in Section 2 of this Ordinance and are incorporated herein by reference.

SECTION 9. Publication; Certification. The City Clerk shall certify to the adoption of this Ordinance and cause same to be published in accordance with State law.

* * * * * *

I HEREBY CERTIFY that the foregoing Interim Urgency Ordinance was introduced and adopted as an urgency measure pursuant to the terms of California Government Code Sections 36937(b) and 65858(a) at a regular meeting of the City Council of the City of Antioch on the 8th day of November, 2016, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Wade Harper, Mayor of the City of Antioch

ATTEST:

Arne Simonsen, City Clerk of the City of Antioch

EXHIBIT A

ANTIOCH
California

ALLAN CANTANDO
Chief of Police

CITY COUNCIL REPORT

January - September 2016

SPECIAL OPERATIONS UNIT
2016 – 9 Months

# Arrests	31
Consensual Contacts	2
Search Warrants	15
Probation/Parole Searches	6
PRCS	17
Guns Seized	18
Marijuana Grows	8
Marijuana (Plants) Seized	2478
Marijuana (Processed) Seized	12153.1g
Meth Seized	799.37g
Cocaine Seized	189g
Heroin Seized	107.6g
Ecstasy Seized	61.8g
Prescription Drugs (pills)	408

EXHIBIT B

WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION'S TASK FORCE ON MARIJUANA DISPENSARIES

ACKNOWLEDGMENTS

Beyond any question, this White Paper is the product of a major cooperative effort among representatives of numerous law enforcement agencies and allies who share in common the goal of bringing to light the criminal nexus and attendant societal problems posed by marijuana dispensaries that until now have been too often hidden in the shadows. The critical need for this project was first recognized by the California Police Chiefs Association, which put its implementation in the very capable hands of CPCA's Executive Director Leslie McGill, City of Modesto Chief of Police Roy Wasden, and City of El Cerrito Chief of Police Scott Kirkland to spearhead. More than 30 people contributed to this project as members of CPCA's Medical Marijuana Dispensary Crime/Impact Issues Task Force, which has been enjoying the hospitality of Sheriff John McGinnis at regular meetings held at the Sacramento County Sheriff's Department's Headquarters Office over the past three years about every three months. The ideas for the White Paper's components came from this group, and the text is the collaborative effort of numerous persons both on and off the task force. Special mention goes to Riverside County District Attorney Rod Pacheco and Riverside County Deputy District Attorney Jacqueline Jackson, who allowed their Office's fine White Paper on Medical Marijuana: History and Current Complications to be utilized as a partial guide, and granted permission to include material from that document. Also, Attorneys Martin Mayer and Richard Jones of the law firm of Jones & Mayer are thanked for preparing the pending legal questions and answers on relevant legal issues that appear at the end of this White Paper. And, I thank recently retired San Bernardino County Sheriff Gary Penrod for initially assigning me to contribute to this important work.

Identifying and thanking everyone who contributed in some way to this project would be well nigh impossible, since the cast of characters changed somewhat over the years, and some unknown individuals also helped meaningfully behind the scenes. Ultimately, developing a *White Paper on Marijuana Dispensaries* became a rite of passage for its creators as much as a writing project. At times this daunting, and sometimes unwieldy, multi-year project had many task force members, including the White Paper's editor, wondering if a polished final product would ever really reach fruition. But at last it has! If any reader is enlightened and spurred to action to any degree by the White Paper's important and timely subject matter, all of the work that went into this collaborative project will have been well worth the effort and time expended by the many individuals who worked harmoniously to make it possible.

Some of the other persons and agencies who contributed in a meaningful way to this group venture over the past three years, and deserve acknowledgment for their helpful input and support, are:

George Anderson, California Department of Justice
Jacob Appelsmith, Office of the California Attorney General
John Avila, California Narcotics Officers Association
Phebe Chu, Office of San Bernardino County Counsel
Scott Collins, Los Angeles County District Attorney's Office
Cathy Coyne, California State Sheriffs' Association
Lorrac Craig, Trinity County Sheriff's Department
Jim Denney, California State Sheriffs' Association
Thomas Dewey, California State University—Humboldt Police Department
Dana Filkowski, Contra Costa County District Attorney's Office
John Gaines, California Department of Justice/Bureau of Narcotics Enforcement
Craig Gundlach, Modesto Police Department
John Harlan, Los Angeles County District Attorney's Office—Major Narcotics Division

Nate Johnson, California State University Police
Mike Kanalakis, Monterey County Sheriff's Office
Bob Kochly, Contra Costa County Office of District Attorney
Tommy LaNier, The National Marijuana Initiative, HIDTA
Carol Leveroni, California Peace Officers Association
Kevin McCarthy, Los Angeles Police Department
Randy Mendoza, Arcata Police Department
Mike Nivens, California Highway Patrol
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Mark Pazin, Merced County Sheriff's Department
Michael Regan, El Cerrito Police Department
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Kent Shaw, California Department of Justice/Bureau of Narcotics Enforcement
Crystal Spencer, California Department of Justice, Conference Planning Unit
Sam Spiegel, Folsom Police Department
Valerie Taylor, ONDCP
Thomas Toller, California District Attorneys Association
Martin Vranicar, Jr., California District Attorneys Association

April 22, 2009

Dennis Tilton, Editor

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by

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INTRODUCTION

Proposition 215, an initiative authorizing the limited possession, cultivation, and use of marijuana by patients and their care providers for certain medicinal purposes recommended by a physician without subjecting such persons to criminal punishment, was passed by California voters in 1996. This was supplemented by the California State Legislature's enactment in 2003 of the Medical Marijuana Program Act (SB 420) that became effective in 2004. The language of Proposition 215 was codified in California as the Compassionate Use Act, which added section 11362.5 to the California Health & Safety Code. Much later, the language of Senate Bill 420 became the Medical Marijuana Program Act (MMPA), and was added to the California Health & Safety Code as section 11362.7 *et seq.* Among other requirements, it purports to direct all California counties to set up and administer a voluntary identification card system for medical marijuana users and their caregivers. Some counties have already complied with the mandatory provisions of the MMPA, and others have challenged provisions of the Act or are awaiting outcomes of other counties' legal challenges to it before taking affirmative steps to follow all of its dictates. And, with respect to marijuana dispensaries, the reaction of counties and municipalities to these nascent businesses has been decidedly mixed. Some have issued permits for such enterprises. Others have refused to do so within their jurisdictions. Still others have conditioned permitting such operations on the condition that they not violate any state or federal law, or have reversed course after initially allowing such activities within their geographical borders by either limiting or refusing to allow any further dispensaries to open in their community. This White Paper explores these matters, the apparent conflicts between federal and California law, and the scope of both direct and indirect adverse impacts of marijuana dispensaries in local communities. It also recounts several examples that could be emulated of what some governmental officials and law enforcement agencies have already instituted in their jurisdictions to limit the proliferation of marijuana dispensaries and to mitigate their negative consequences.

FEDERAL LAW

Except for very limited and authorized research purposes, federal law through the Controlled Substances Act absolutely prohibits the use of marijuana for any legal purpose, and classifies it as a banned Schedule I drug. It cannot be legally prescribed as medicine by a physician. And, the federal regulation supersedes any state regulation, so that under federal law California medical marijuana statutes do not provide a legal defense for cultivating or possessing marijuana—even with a physician's recommendation for medical use.

CALIFORNIA LAW

Although California law generally prohibits the cultivation, possession, transportation, sale, or other transfer of marijuana from one person to another, since late 1996 after passage of an initiative (Proposition 215) later codified as the Compassionate Use Act, it has provided a limited affirmative defense to criminal prosecution for those who cultivate, possess, or use limited amounts of marijuana for medicinal purposes as qualified patients with a physician's recommendation or their designated primary caregiver or cooperative. Notwithstanding these limited exceptions to criminal culpability, California law is notably silent on any such available defense for a storefront marijuana dispensary, and California Attorney General Edmund G. Brown, Jr. has recently issued guidelines that generally find marijuana dispensaries to be unprotected and illegal drug-trafficking enterprises except in the rare instance that one can qualify as a true cooperative under California law. A primary caregiver must consistently and regularly assume responsibility for the housing, health, or safety of an authorized medical marijuana user, and nowhere does California law authorize cultivating or providing marijuana—medical or non-medical—for profit.

California's Medical Marijuana Program Act (Senate Bill 420) provides further guidelines for mandated county programs for the issuance of identification cards to authorized medical marijuana users on a voluntary basis, for the chief purpose of giving them a means of certification to show law enforcement officers if such persons are investigated for an offense involving marijuana. This system is currently under challenge by the Counties of San Bernardino and San Diego and Sheriff Gary Penrod, pending a decision on review by the U.S. Supreme Court, as is California's right to permit any legal use of marijuana in light of federal law that totally prohibits any personal cultivation, possession, sale, transportation, or use of this substance whatsoever, whether for medical or non-medical purposes.

PROBLEMS POSED BY MARIJUANA DISPENSARIES

Marijuana dispensaries are commonly large money-making enterprises that will sell marijuana to most anyone who produces a physician's written recommendation for its medical use. These recommendations can be had by paying unscrupulous physicians a fee and claiming to have most any malady, even headaches. While the dispensaries will claim to receive only donations, no marijuana will change hands without an exchange of money. These operations have been tied to organized criminal gangs, foster large grow operations, and are often multi-million-dollar profit centers.

Because they are repositories of valuable marijuana crops and large amounts of cash, several operators of dispensaries have been attacked and murdered by armed robbers both at their storefronts and homes, and such places have been regularly burglarized. Drug dealing, sales to minors, loitering, heavy vehicle and foot traffic in retail areas, increased noise, and robberies of customers just outside dispensaries are also common ancillary byproducts of their operations. To repel store invasions, firearms are often kept on hand inside dispensaries, and firearms are used to hold up their proprietors. These dispensaries are either linked to large marijuana grow operations or encourage home grows by buying marijuana to dispense. And, just as destructive fires and unhealthful mold in residential neighborhoods are often the result of large indoor home grows designed to supply dispensaries, money laundering also naturally results from dispensaries' likely unlawful operations.

LOCAL GOVERNMENTAL RESPONSES

Local governmental bodies can impose a moratorium on the licensing of marijuana dispensaries while investigating this issue; can ban this type of activity because it violates federal law; can use zoning to control the dispersion of dispensaries and the attendant problems that accompany them in unwanted areas; and can condition their operation on not violating any federal or state law, which is akin to banning them, since their primary activities will always violate federal law as it now exists—and almost surely California law as well.

LIABILITY

While highly unlikely, local public officials, including county supervisors and city council members, could potentially be charged and prosecuted for aiding and abetting criminal acts by authorizing and licensing marijuana dispensaries if they do not qualify as "cooperatives" under California law, which would be a rare occurrence. Civil liability could also result.

ENFORCEMENT OF MARIJUANA LAWS

While the Drug Enforcement Administration has been very active in raiding large-scale marijuana dispensaries in California in the recent past, and arresting and prosecuting their principals under federal law in selective cases, the new U.S. Attorney General, Eric Holder, Jr., has very recently announced a major change of federal position in the enforcement of federal drug laws with respect to marijuana dispensaries. It is to target for prosecution only marijuana dispensaries that are exposed as fronts for drug trafficking. It remains to be seen what standards and definitions will be used to determine what indicia will constitute a drug trafficking operation suitable to trigger investigation and enforcement under the new federal administration.

Some counties, like law enforcement agencies in the County of San Diego and County of Riverside, have been aggressive in confronting and prosecuting the operators of marijuana dispensaries under state law. Likewise, certain cities and counties have resisted granting marijuana dispensaries business licenses, have denied applications, or have imposed moratoria on such enterprises. Here, too, the future is uncertain, and permissible legal action with respect to marijuana dispensaries may depend on future court decisions not yet handed down.

Largely because the majority of their citizens have been sympathetic and projected a favorable attitude toward medical marijuana patients, and have been tolerant of the cultivation and use of marijuana, other local public officials in California cities and counties, especially in Northern California, have taken a "hands off" attitude with respect to prosecuting marijuana dispensary operators or attempting to close down such operations. But, because of the life safety hazards caused by ensuing fires that have often erupted in resultant home grow operations, and the violent acts that have often shadowed dispensaries, some attitudes have changed and a few political entities have reversed course after having previously licensed dispensaries and authorized liberal permissible amounts of marijuana for possession by medical marijuana patients in their jurisdictions. These "patients" have most often turned out to be young adults who are not sick at all, but have secured a physician's written recommendation for marijuana use by simply paying the required fee demanded for this document without even first undergoing a physical examination. Too often "medical marijuana" has been used as a smokescreen for those who want to legalize it and profit off it, and storefront dispensaries established as cover for selling an illegal substance for a lucrative return.

WHITE PAPER ON MARIJUANA DISPENSARIES

by

CALIFORNIA POLICE CHIEFS ASSOCIATION

Editor: Dennis Tilton, M.A.Ed., M.A.Lit., M.C.J., J.D.
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Sheriff's Legal Counsel (Retired), San Bernardino County Sheriff's Department

INTRODUCTION

In November of 1996, California voters passed Proposition 215. The initiative set out to make marijuana available to people with certain illnesses. The initiative was later supplemented by the Medical Marijuana Program Act. Across the state, counties and municipalities have varied in their responses to medical marijuana. Some have allowed businesses to open and provide medical marijuana. Others have disallowed all such establishments within their borders. Several once issued business licenses allowing medical marijuana stores to operate, but no longer do so. This paper discusses the legality of both medical marijuana and the businesses that make it available, and more specifically, the problems associated with medical marijuana and marijuana dispensaries, under whatever name they operate.

FEDERAL LAW

Federal law clearly and unequivocally states that all marijuana-related activities are illegal. Consequently, all people engaged in such activities are subject to federal prosecution. The United States Supreme Court has ruled that this federal regulation supersedes any state's regulation of marijuana – even California's. (*Gonzales v. Raich* (2005) 125 S.Ct. 2195, 2215.) "The Supremacy Clause unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." (*Gonzales v. Raich, supra.*) Even more recently, the 9th Circuit Court of Appeals found that there is no fundamental right under the United States Constitution to even use medical marijuana. (*Raich v. Gonzales* (9th Cir. 2007) 500 F.3d 850, 866.)

In *Gonzales v. Raich,* the High Court declared that, despite the attempts of several states to partially legalize marijuana, it continues to be wholly illegal since it is classified as a Schedule I drug under federal law. As such, there are no exceptions to its illegality. (21 USC secs. 812(c), 841(a)(1).) Over the past thirty years, there have been several attempts to have marijuana reclassified to a different schedule which would permit medical use of the drug. All of these attempts have failed. (*See Gonzales v. Raich* (2005) 125 S.Ct. 2195, fn 23.) The mere categorization of marijuana as "medical" by some states fails to carve out any legally recognized exception regarding the drug. Marijuana, in any form, is neither valid nor legal.

Clearly the United States Supreme Court is the highest court in the land. Its decisions are final and binding upon all lower courts. The Court invoked the United States Supremacy Clause and the Commerce Clause in reaching its decision. The Supremacy Clause declares that all laws made in pursuance of the Constitution shall be the "supreme law of the land" and shall be legally superior to any conflicting provision of a state constitution or law.[1] The Commerce Clause states that "the

Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2]

Gonzales v. Raich addressed the concerns of two California individuals growing and using marijuana under California's medical marijuana statute. The Court explained that under the Controlled Substances Act marijuana is a Schedule I drug and is strictly regulated.[3] "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment."[4] (21 USC sec. 812(b)(1).) The Court ruled that the Commerce Clause is applicable to California individuals growing and obtaining marijuana for their own personal, medical use. Under the Supremacy Clause, the federal regulation of marijuana, pursuant to the Commerce Clause, supersedes any state's regulation, including California's. The Court found that the California statutes did not provide any federal defense if a person is brought into federal court for cultivating or possessing marijuana.

Accordingly, there is no federal exception for the growth, cultivation, use or possession of marijuana and all such activity remains illegal.[5] California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 do not create an exception to this federal law. All marijuana activity is absolutely illegal and subject to federal regulation and prosecution. This notwithstanding, on March 19, 2009, U.S. Attorney General Eric Holder, Jr. announced that under the new Obama Administration the U.S. Department of Justice plans to target for prosecution only those marijuana dispensaries that use medical marijuana dispensing as a front for dealers of illegal drugs.[6]

CALIFORNIA LAW

Generally, the possession, cultivation, possession for sale, transportation, distribution, furnishing, and giving away of marijuana is unlawful under California state statutory law. (See Cal. Health & Safety Code secs. 11357-11360.) But, on November 5, 1996, California voters adopted Proposition 215, an initiative statute authorizing the medical use of marijuana.[7] The initiative added California Health and Safety code section 11362.5, which allows "seriously ill Californians the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . . ."[8] The codified section is known as the Compassionate Use Act of 1996.[9] Additionally, the State Legislature passed Senate Bill 420 in 2003. It became the Medical Marijuana Program Act and took effect on January 1, 2004.[10] This act expanded the definitions of "patient" and "primary caregiver"[11] and created guidelines for identification cards.[12] It defined the amount of marijuana that "patients," and "primary caregivers" can possess.[13] It also created a limited affirmative defense to criminal prosecution for qualifying individuals that collectively gather to cultivate medical marijuana,[14] as well as to the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana for a person who qualifies as a "patient," a "primary caregiver," or as a member of a legally recognized "cooperative," as those terms are defined within the statutory scheme. Nevertheless, there is no provision in any of these laws that authorizes or protects the establishment of a "dispensary" or other storefront marijuana distribution operation.

Despite their illegality in the federal context, the medical marijuana laws in California are specific. The statutes craft narrow affirmative defenses for particular individuals with respect to enumerated marijuana activity. All conduct, and people engaging in it, that falls outside of the statutes' parameters remains illegal under California law. Relatively few individuals will be able to assert the affirmative defense in the statute. To use it a person must be a "qualified patient," "primary caregiver," or a member of a "cooperative." Once they are charged with a crime, if a person can prove an applicable legal status, they are entitled to assert this statutory defense.

Former California Attorney General Bill Lockyer has also spoken about medical marijuana, and strictly construed California law relating to it. His office issued a bulletin to California law enforcement agencies on June 9, 2005. The office expressed the opinion that *Gonzales v. Raich* did not address the validity of the California statutes and, therefore, had no effect on California law. The office advised law enforcement to not change their operating procedures. Attorney General Lockyer made the recommendation that law enforcement neither arrest nor prosecute "individuals within the legal scope of California's Compassionate Use Act." Now the current California Attorney General, Edmund G. Brown, Jr., has issued guidelines concerning the handling of issues relating to California's medical marijuana laws and marijuana dispensaries. The guidelines are much tougher on storefront dispensaries—generally finding them to be unprotected, illegal drug-trafficking enterprises if they do not fall within the narrow legal definition of a "cooperative"—than on the possession and use of marijuana upon the recommendation of a physician.

When California's medical marijuana laws are strictly construed, it appears that the decision in *Gonzales v. Raich* does affect California law. However, provided that federal law does not preempt California law in this area, it does appear that the California statutes offer some legal protection to "individuals within the legal scope of" the acts. The medical marijuana laws speak to patients, primary caregivers, and true collectives. These people are expressly mentioned in the statutes, and, if their conduct comports to the law, they may have some state legal protection for specified marijuana activity. Conversely, all marijuana establishments that fall outside the letter and spirit of the statutes, including dispensaries and storefront facilities, are not legal. These establishments have no legal protection. Neither the former California Attorney General's opinion nor the current California Attorney General's guidelines present a contrary view. Nevertheless, without specifically addressing marijuana dispensaries, Attorney General Brown has sent his deputies attorney general to defend the codified Medical Marijuana Program Act against court challenges, and to advance the position that the state's regulations promulgated to enforce the provisions of the codified Compassionate Use Act (Proposition 215), including a statewide database and county identification card systems for marijuana patients authorized by their physicians to use marijuana, are all valid.

1. Conduct

California Health and Safety Code sections 11362.765 and 11362.775 describe the conduct for which the affirmative defense is available. If a person qualifies as a "patient," "primary caregiver," or is a member of a legally recognized "cooperative," he or she has an affirmative defense to possessing a defined amount of marijuana. Under the statutes no more than eight ounces of dried marijuana can be possessed. Additionally, either six mature or twelve immature plants may be possessed.[15] If a person claims patient or primary caregiver status, and possesses more than this amount of marijuana, he or she can be prosecuted for drug possession. The qualifying individuals may also cultivate, plant, harvest, dry, and/or process marijuana, but only while still strictly observing the permitted amount of the drug. The statute may also provide a limited affirmative defense for possessing marijuana for sale, transporting it, giving it away, maintaining a marijuana house, knowingly providing a space where marijuana can be accessed, and creating a narcotic nuisance.[16]

However, for anyone who cannot lay claim to the appropriate status under the statutes, all instances of marijuana possession, cultivation, planting, harvesting, drying, processing, possession for the purposes of sales, completed sales, giving away, administration, transportation, maintaining of marijuana houses, knowingly providing a space for marijuana activity, and creating a narcotic nuisance continue to be illegal under California law.

2. Patients and Cardholders

A dispensary obviously is not a patient or cardholder. A "qualified patient" is an individual with a physician's recommendation that indicates marijuana will benefit the treatment of a qualifying illness. (Cal. H&S Code secs. 11362.5(b)(1)(A) and 11362.7(f).) Qualified illnesses include cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or *any other illness for which marijuana provides relief.*[17] A physician's recommendation that indicates medical marijuana will benefit the treatment of an illness is required before a person can claim to be a medical marijuana patient. Accordingly, such proof is also necessary before a medical marijuana affirmative defense can be claimed.

A "person with an identification card" means an individual who is a qualified patient who has applied for and received a valid identification card issued by the State Department of Health Services. (Cal. H&S Code secs. 11362.7(c) and 11362.7(g).)

3. Primary Caregivers

The only person or entity authorized to receive compensation for services provided to patients and cardholders is a primary caregiver. (Cal. H&S Code sec. 11362.77(c).) However, nothing in the law authorizes any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.765(a).) It is important to note that it is almost impossible for a storefront marijuana business to gain true primary caregiver status. Businesses that call themselves "cooperatives," but function like storefront dispensaries, suffer this same fate. In *People v. Mower,* the court was very clear that the defendant had to prove he was a primary caregiver in order to raise the medical marijuana affirmative defense. Mr. Mower was prosecuted for supplying two people with marijuana.[18] He claimed he was their primary caregiver under the medical marijuana statutes. This claim required him to prove he "**consistently** had assumed responsibility for either one's **housing, health, or safety**" before he could assert the defense.[19] (Emphasis added.)

The key to being a primary caregiver is not simply that marijuana is provided for a patient's health; the responsibility for the health must be consistent; it must be independent of merely providing marijuana for a qualified person; and such a primary caregiver-patient relationship must begin before or contemporaneously with the time of assumption of responsibility for assisting the individual with marijuana. (*People v. Mentch* (2008) 45 Cal.4th 274, 283.) Any relationship a storefront marijuana business has with a patient is much more likely to be transitory than consistent, and to be wholly lacking in providing for a patient's health needs beyond just supplying him or her with marijuana.

A "primary caregiver" is an individual or facility that has "consistently assumed responsibility for the housing, health, or safety of a patient" over time. (Cal. H&S Code sec. 11362.5(e).) "Consistency" is the key to meeting this definition. A patient can elect to patronize any dispensary that he or she chooses. The patient can visit different dispensaries on a single day or any subsequent day. The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. But, in light of the holding in *People v. Mentch*, *supra*, to qualify as a primary caregiver, more aid to a person's health must occur beyond merely dispensing marijuana to a given customer.

Additionally, if more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. And, in most circumstances the primary caregiver must be at least 18 years of age.

The courts have found that the act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. (*See People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390: "One maintaining a source of marijuana supply, from which all members of the public qualified as permitted medicinal users may or may not discretionarily elect to make purchases, does not thereby become the party 'who has consistently assumed responsibility for the housing, health, or safety' of that purchaser as section 11362.5(e) requires.")

The California Legislature had the opportunity to legalize the existence of dispensaries when setting forth what types of facilities could qualify as "primary caregivers." Those included in the list clearly show the Legislature's intent to restrict the definition to one involving a significant and long-term commitment to the patient's health, safety, and welfare. The only facilities which the Legislature authorized to serve as "primary caregivers" are clinics, health care facilities, residential care facilities, home health agencies, and hospices which actually provide medical care or supportive services to qualified patients. (Cal. H&S Code sec. 11362.7(d)(1).) Any business that cannot prove that its relationship with the patient meets these requirements is not a primary caregiver. Functionally, the business is a drug dealer and is subject to prosecution as such.

4. Cooperatives and Collectives

According to the California Attorney General's recently issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use*, unless they meet stringent requirements, dispensaries also cannot reasonably claim to be cooperatives or collectives. In passing the Medical Marijuana Program Act, the Legislature sought, in part, to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation programs. (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 881.) The Act added section 11362.775, which provides that "Patients and 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" for the crimes of marijuana possession, possession for sale, transportation, sale, furnishing, cultivation, and maintenance of places for storage, use, or distribution of marijuana. However, there is no authorization for any individual or group to cultivate or distribute marijuana for profit. (Cal. H&S Code sec. 11362.77(a).) If a dispensary is only a storefront distribution operation open to the general public, and there is no indication that it has been involved with growing or cultivating marijuana for the benefit of members as a non-profit enterprise, it will not qualify as a cooperative to exempt it from criminal penalties under California's marijuana laws.

Further, the common dictionary definition of "collectives" is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; capital investment receives either no return or a limited return; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy, or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[20] Marijuana businesses, of any kind, do not normally meet this legal definition.

Based on the foregoing, it is clear that virtually all marijuana dispensaries are not legal enterprises under either federal **or** state law.

LAWS IN OTHER STATES

Besides California, at the time of publication of this White Paper, thirteen other states have enacted medical marijuana laws on their books, whereby to some degree marijuana recommended or prescribed by a physician to a specified patient may be legally possessed. These states are Alaska, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington. And, possession of marijuana under one ounce has now been decriminalized in Massachusetts.[21]

STOREFRONT MARIJUANA DISPENSARIES AND COOPERATIVES

Since the passage of the Compassionate Use Act of 1996, many storefront marijuana businesses have opened in California.[22] Some are referred to as dispensaries, and some as cooperatives; but it is how they operate that removes them from any umbrella of legal protection. These facilities operate as if they are pharmacies. Most offer different types and grades of marijuana. Some offer baked goods that contain marijuana.[23] Monetary donations are collected from the patient or primary caregiver when marijuana or food items are received. The items are not technically sold since that would be a criminal violation of the statutes.[24] These facilities are able to operate because they apply for and receive business licenses from cities and counties.

Federally, all existing storefront marijuana businesses are subject to search and closure since they violate federal law.[25] Their mere existence violates federal law. Consequently, they have no right to exist or operate, and arguably cities and counties in California have no authority to sanction them.

Similarly, in California there is no apparent authority for the existence of these storefront marijuana businesses. The Medical Marijuana Program Act of 2004 allows *patients* and *primary caregivers* to grow and cultivate marijuana, and no one else.[26] Although California Health and Safety Code section 11362.775 offers some state legal protection for true collectives and cooperatives, no parallel protection exists in the statute for any storefront business providing any narcotic.

The common dictionary definition of collectives is that they are organizations jointly managed by those using its facilities or services. Legally recognized cooperatives generally possess "the following features: control and ownership of each member is substantially equal; members are limited to those who will avail themselves of the services furnished by the association; transfer of ownership interests is prohibited or limited; *capital investment receives either no return or a limited return*; economic benefits pass to the members on a substantially equal basis or on the basis of their patronage of the association; members are not personally liable for obligations of the association in the absence of a direct undertaking or authorization by them; death, bankruptcy or withdrawal of one or more members does not terminate the association; and [the] services of the association are furnished primarily for the use of the members."[27] Marijuana businesses, of any kind, do not meet this legal definition.

Actual medical dispensaries are commonly defined as offices in hospitals, schools, or other institutions from which medical supplies, preparations, and treatments are dispensed. Hospitals, hospices, home health care agencies, and the like are specifically included in the code as primary caregivers as long as they have "consistently assumed responsibility for the housing, health, or safety" of a patient.[28] Clearly, it is doubtful that any of the storefront marijuana businesses currently

existing in California can claim that status. Consequently, they are not primary caregivers and are subject to prosecution under both California and federal laws.

HOW EXISTING DISPENSARIES OPERATE

Despite their clear illegality, some cities do have existing and operational dispensaries. Assuming, *arguendo*, that they may operate, it may be helpful to review the mechanics of the business. The former Green Cross dispensary in San Francisco illustrates how a typical marijuana dispensary works.[29]

A guard or employee may check for medical marijuana cards or physician recommendations at the entrance. Many types and grades of marijuana are usually available. Although employees are neither pharmacists nor doctors, sales clerks will probably make recommendations about what type of marijuana will best relieve a given medical symptom. Baked goods containing marijuana may be available and sold, although there is usually no health permit to sell baked goods. The dispensary will give the patient a form to sign declaring that the dispensary is their "primary caregiver" (a process fraught with legal difficulties). The patient then selects the marijuana desired and is told what the "contribution" will be for the product. The California Health & Safety Code specifically prohibits the sale of marijuana to a patient, so "contributions" are made to reimburse the dispensary for its time and care in making "product" available. However, if a calculation is made based on the available evidence, it is clear that these "contributions" can easily add up to millions of dollars per year. That is a very large cash flow for a "non-profit" organization denying any participation in the retail sale of narcotics. Before its application to renew its business license was denied by the City of San Francisco, there were single days that Green Cross sold $45,000 worth of marijuana. On Saturdays, Green Cross could sell marijuana to forty-three patients an hour. The marijuana sold at the dispensary was obtained from growers who brought it to the store in backpacks. A medium-sized backpack would hold approximately $16,000 worth of marijuana. Green Cross used many different marijuana growers.

It is clear that dispensaries are running as if they are businesses, not legally valid cooperatives. Additionally, they claim to be the "primary caregivers" of patients. This is a spurious claim. As discussed above, the term "primary caregiver" has a very specific meaning and defined legal qualifications. A primary caregiver is an individual who has "consistently assumed responsibility for the housing, health, or safety of a patient." [30] The statutory definition includes some clinics, health care facilities, residential care facilities, and hospices. If more than one patient designates the same person as the primary caregiver, all individuals must reside in the same city or county. In most circumstances the primary caregiver must be at least 18 years of age.

It is almost impossible for a storefront marijuana business to gain true primary caregiver status. A business would have to prove that it "**consistently** had assumed responsibility for [a patient's] **housing, health, or safety**."[31] The key to being a primary caregiver is not simply that marijuana is provided for a patient's health: the responsibility for the patient's health must be **consistent**.

As seen in the Green Cross example, a storefront marijuana business's relationship with a patient is most likely transitory. In order to provide a qualified patient with marijuana, a storefront marijuana business must create an instant "primary caregiver" relationship with him. The very fact that the relationship is instant belies any consistency in their relationship and the requirement that housing, health, or safety is consistently provided. Courts have found that a patient's act of signing a piece of paper declaring that someone is a primary caregiver does not necessarily make that person one. The

consistent relationship demanded by the statute is mere fiction if it can be achieved between an individual and a business that functions like a narcotic retail store.

ADVERSE SECONDARY EFFECTS OF MARIJUANA DISPENSARIES AND SIMILIARLY OPERATING COOPERATIVES

Of great concern are the adverse secondary effects of these dispensaries and storefront cooperatives. They are many. Besides flouting federal law by selling a prohibited Schedule I drug under the Controlled Substances Act, marijuana dispensaries attract or cause numerous ancillary social problems as byproducts of their operation. The most glaring of these are other criminal acts.

ANCILLARY CRIMES

A. ARMED ROBBERIES AND MURDERS

Throughout California, many violent crimes have been committed that can be traced to the proliferation of marijuana dispensaries. These include armed robberies and murders. For example, as far back as 2002, two home occupants were shot in Willits, California in the course of a home-invasion robbery targeting medical marijuana.[32] And, a series of four armed robberies of a marijuana dispensary in Santa Barbara, California occurred through August 10, 2006, in which thirty dollars and fifteen baggies filled with marijuana on display were taken by force and removed from the premises in the latest holdup. The owner said he failed to report the first three robberies because "medical marijuana is such a controversial issue." [33]

On February 25, 2004, in Mendocino County two masked thugs committed a home invasion robbery to steal medical marijuana. They held a knife to a 65-year-old man's throat, and though he fought back, managed to get away with large amounts of marijuana. They were soon caught, and one of the men received a sentence of six years in state prison.[34] And, on August 19, 2005, 18-year-old Demarco Lowrey was "shot in the stomach" and "bled to death" during a gunfight with the business owner when he and his friends attempted a takeover robbery of a storefront marijuana business in the City of San Leandro, California. The owner fought back with the hooded home invaders, and a gun battle ensued. Demarco Lowery was hit by gunfire and "dumped outside the emergency entrance of Children's Hospital Oakland" after the shootout.[35] He did not survive.[36]

Near Hayward, California, on September 2, 2005, upon leaving a marijuana dispensary, a patron of the CCA Cannabis Club had a gun put to his head as he was relieved of over $250 worth of pot. Three weeks later, another break-in occurred at the Garden of Eden Cannabis Club in September of 2005.[37]

Another known marijuana-dispensary-related murder occurred on November 19, 2005. Approximately six gun- and bat-wielding burglars broke into Les Crane's home in Laytonville, California while yelling, "This is a raid." Les Crane, who owned two storefront marijuana businesses, was at home and shot to death. He received gunshot wounds to his head, arm, and abdomen.[38] Another man present at the time was beaten with a baseball bat. The murderers left the home after taking an unknown sum of U.S. currency and a stash of processed marijuana.[39]

Then, on January 9, 2007, marijuana plant cultivator Rex Farrance was shot once in the chest and killed in his own home after four masked intruders broke in and demanded money. When the homeowner ran to fetch a firearm, he was shot dead. The robbers escaped with a small amount of

cash and handguns. Investigating officers counted 109 marijuana plants in various phases of cultivation inside the house, along with two digital scales and just under 4 pounds of cultivated marijuana.[40]

More recently in Colorado, Ken Gorman, a former gubernatorial candidate and dispenser of marijuana who had been previously robbed over twelve times at his home in Denver, was found murdered by gunshot inside his home. He was a prominent proponent of medical marijuana and the legalization of marijuana.[41]

B. BURGLARIES

In June of 2007, after two burglarizing youths in Bellflower, California were caught by the homeowner trying to steal the fruits of his indoor marijuana grow, he shot one who was running away, and killed him.[42] And, again in January of 2007, Claremont Councilman Corey Calaycay went on record calling marijuana dispensaries "crime magnets" after a burglary occurred in one in Claremont, California.[43]

On July 17, 2006, the El Cerrito City Council voted to ban all such marijuana facilities. It did so after reviewing a nineteen-page report that detailed a rise in crime near these storefront dispensaries in other cities. The crimes included robberies, assaults, burglaries, murders, and attempted murders.[44] Even though marijuana storefront businesses do not currently exist in the City of Monterey Park, California, it issued a moratorium on them after studying the issue in August of 2006.[45] After allowing these establishments to operate within its borders, the City of West Hollywood, California passed a similar moratorium. The moratorium was "prompted by incidents of armed burglary at some of the city's eight existing pot stores and complaints from neighbors about increased pedestrian and vehicle traffic and noise . . . ."[46]

C. TRAFFIC, NOISE, AND DRUG DEALING

Increased noise and pedestrian traffic, including nonresidents in pursuit of marijuana, and out of area criminals in search of prey, are commonly encountered just outside marijuana dispensaries,[47] as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marijuana centers regularly attract marijuana growers, drug users, and drug traffickers.[48] Sharing just purchased marijuana outside dispensaries also regularly takes place.[49]

Rather than the "seriously ill," for whom medical marijuana was expressly intended,[50] "'perfectly healthy' young people frequenting dispensaries" are a much more common sight.[51] Patient records seized by law enforcement officers from dispensaries during raids in San Diego County, California in December of 2005 "showed that 72 percent of patients were between 17 and 40 years old . . . ."[52] Said one admitted marijuana trafficker, "The people I deal with are the same faces I was dealing with 12 years ago but now, because of Senate Bill 420, they are supposedly legit. I can totally see why cops are bummed."[53]

Reportedly, a security guard sold half a pound of marijuana to an undercover officer just outside a dispensary in Morro Bay, California.[54] And, the mere presence of marijuana dispensaries encourages illegal growers to plant, cultivate, and transport ever more marijuana, in order to supply and sell their crops to these storefront operators in the thriving medical marijuana dispensary market, so that the national domestic marijuana yield has been estimated to be 35.8 billion dollars, of which a 13.8 billion dollar share is California grown.[55] It is a big business. And, although the operators of some dispensaries will claim that they only accept monetary contributions for the products they

dispense, and do not sell marijuana, a patron will not receive any marijuana until an amount of money acceptable to the dispensary has changed hands.

D. ORGANIZED CRIME, MONEY LAUNDERING, AND FIREARMS VIOLATIONS

Increasingly, reports have been surfacing about organized crime involvement in the ownership and operation of marijuana dispensaries, including Asian and other criminal street gangs and at least one member of the Armenian Mafia.[56] The dispensaries or "pot clubs" are often used as a front by organized crime gangs to traffic in drugs and launder money. One such gang whose territory included San Francisco and Oakland, California reportedly ran a multi-million dollar business operating ten warehouses in which vast amounts of marijuana plants were grown.[57] Besides seizing over 9,000 marijuana plants during surprise raids on this criminal enterprise's storage facilities, federal officers also confiscated three firearms,[58] which seem to go hand in hand with medical marijuana cultivation and dispensaries.[59]

Marijuana storefront businesses have allowed criminals to flourish in California. In the summer of 2007, the City of San Diego cooperated with federal authorities and served search warrants on several marijuana dispensary locations. In addition to marijuana, many weapons were recovered, including a stolen handgun and an M-16 assault rifle.[60] The National Drug Intelligence Center reports that marijuana growers are employing armed guards, using explosive booby traps, and murdering people to shield their crops. Street gangs of all national origins are involved in transporting and distributing marijuana to meet the ever increasing demand for the drug.[61] Active Asian gangs have included members of Vietnamese organized crime syndicates who have migrated from Canada to buy homes throughout the United States to use as grow houses.[62]

Some or all of the processed harvest of marijuana plants nurtured in these homes then wind up at storefront marijuana dispensaries owned and operated by these gangs. Storefront marijuana businesses are very dangerous enterprises that thrive on ancillary grow operations.

Besides fueling marijuana dispensaries, some monetary proceeds from the sale of harvested marijuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal business operations like prostitution, extortion, and drug trafficking.[63] Money from residential grow operations is also sometimes traded by criminal gang members for firearms, and used to buy drugs, personal vehicles, and additional houses for more grow operations,[64] and along with the illegal income derived from large-scale organized crime-related marijuana production operations comes widespread income tax evasion.[65]

E. POISONINGS

Another social problem somewhat unique to marijuana dispensaries is poisonings, both intentional and unintentional. On August 16, 2006, the Los Angeles Police Department received two such reports. One involved a security guard who ate a piece of cake extended to him from an operator of a marijuana clinic as a "gift," and soon afterward felt dizzy and disoriented.[66] The second incident concerned a UPS driver who experienced similar symptoms after accepting and eating a cookie given to him by an operator of a different marijuana clinic.[67]

OTHER ADVERSE SECONDARY IMPACTS IN THE IMMEDIATE VICINITY OF DISPENSARIES

Other adverse secondary impacts from the operation of marijuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marijuana to arriving patrons; marijuana smoking in public and in front of children in the vicinity of dispensaries; loitering and nuisances; acquiring marijuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries; the sale at dispensaries of other illegal drugs besides marijuana; an increase in traffic accidents and driving under the influence arrests in which marijuana is implicated; and the failure of marijuana dispensary operators to report robberies to police.[68]

SECONDARY ADVERSE IMPACTS IN THE COMMUNITY AT LARGE

A. UNJUSTIFIED AND FICTITIOUS PHYSICIAN RECOMMENDATIONS

California's legal requirement under California Health and Safety Code section 11362.5 that a physician's recommendation is required for a patient or caregiver to possess medical marijuana has resulted in other undesirable outcomes: wholesale issuance of recommendations by unscrupulous physicians seeking a quick buck, and the proliferation of forged or fictitious physician recommendations. Some doctors link up with a marijuana dispensary and take up temporary residence in a local hotel room where they advertise their appearance in advance, and pass out medical marijuana use recommendations to a line of "patients" at "about $150 a pop."[69] Other individuals just make up their own phony doctor recommendations,[70] which are seldom, if ever, scrutinized by dispensary employees for authenticity. Undercover DEA agents sporting fake medical marijuana recommendations were readily able to purchase marijuana from a clinic.[71] Far too often, California's medical marijuana law is used as a smokescreen for healthy pot users to get their desired drug, and for proprietors of marijuana dispensaries to make money off them, without suffering any legal repercussions.[72]

On March 11, 2009, the Osteopathic Medical Board of California adopted the proposed decision revoking Dr. Alfonso Jimenez's Osteopathic Physician's and Surgeon's Certificate and ordering him to pay $74,323.39 in cost recovery. Dr. Jimenez operated multiple marijuana clinics and advertised his services extensively on the Internet. Based on information obtained from raids on marijuana dispensaries in San Diego, in May of 2006, the San Diego Police Department ran two undercover operations on Dr. Jimenez's clinic in San Diego. In January of 2007, a second undercover operation was conducted by the Laguna Beach Police Department at Dr. Jimenez's clinic in Orange County. Based on the results of the undercover operations, the Osteopathic Medical Board charged Dr. Jimenez with gross negligence and repeated negligent acts in the treatment of undercover operatives posing as patients. After a six-day hearing, the Administrative Law Judge (ALJ) issued her decision finding that Dr. Jimenez violated the standard of care by committing gross negligence and repeated negligence in care, treatment, and management of patients when he, among other things, issued medical marijuana recommendations to the undercover agents without conducting adequate medical examinations, failed to gain proper informed consent, and failed to consult with any primary care and/or treating physicians or obtain and review prior medical records before issuing medical marijuana recommendations. The ALJ also found Dr. Jimenez engaged in dishonest behavior by preparing false and/or misleading medical records and disseminating false and misleading advertising to the public, including representing himself as a "Cannabis Specialist" and "Qualified Medical Marijuana Examiner" when no such formal specialty or qualification existed. Absent any

requested administrative agency reconsideration or petition for court review, the decision was to become effective April 24, 2009.

B. PROLIFERATION OF GROW HOUSES IN RESIDENTIAL AREAS

In recent years the proliferation of grow houses in residential neighborhoods has exploded. This phenomenon is country wide, and ranges from the purchase for purpose of marijuana grow operations of small dwellings to "high priced McMansions . . . ."[73] Mushrooming residential marijuana grow operations have been detected in California, Connecticut, Florida, Georgia, New Hampshire, North Carolina, Ohio, South Carolina, and Texas.[74] In 2007 alone, such illegal operations were detected and shut down by federal and state law enforcement officials in 41 houses in California, 50 homes in Florida, and 11 homes in New Hampshire.[75] Since then, the number of residences discovered to be so impacted has increased exponentially. Part of this recent influx of illicit residential grow operations is because the "THC-rich 'B.C. bud' strain" of marijuana originally produced in British Columbia "can be grown only in controlled indoor environments," and the Canadian market is now reportedly saturated with the product of "competing Canadian gangs," often Asian in composition or outlaw motorcycle gangs like the Hells Angels.[76] Typically, a gutted house can hold about 1,000 plants that will each yield almost half a pound of smokable marijuana; this collectively nets about 500 pounds of usable marijuana per harvest, with an average of three to four harvests per year.[77] With a street value of $3,000 to $5,000 per pound" for high-potency marijuana, and such multiple harvests, "a successful grow house can bring in between $4.5 million and $10 million a year . . . ."[78] The high potency of hydroponically grown marijuana can command a price as much as six times higher than commercial grade marijuana.[79]

C. LIFE SAFETY HAZARDS CREATED BY GROW HOUSES

In Humboldt County, California, structure fires caused by unsafe indoor marijuana grow operations have become commonplace. The city of Arcata, which sports four marijuana dispensaries, was the site of a house fire in which a fan had fallen over and ignited a fire; it had been turned into a grow house by its tenant. Per Arcata Police Chief Randy Mendosa, altered and makeshift "no code" electrical service connections and overloaded wires used to operate high-powered grow lights and fans are common causes of the fires. Large indoor marijuana growing operations can create such excessive draws of electricity that PG&E power pole transformers are commonly blown. An average 1,500-square-foot tract house used for growing marijuana can generate monthly electrical bills from $1,000 to $3,000 per month. From an environmental standpoint, the carbon footprint from greenhouse gas emissions created by large indoor marijuana grow operations should be a major concern for every community in terms of complying with Air Board AB-32 regulations, as well as other greenhouse gas reduction policies. Typically, air vents are cut into roofs, water seeps into carpeting, windows are blacked out, holes are cut in floors, wiring is jury-rigged, and electrical circuits are overloaded to operate grow lights and other apparatus. When fires start, they spread quickly.

The May 31, 2008 edition of the *Los Angeles Times* reported, "Law enforcement officials estimate that as many as 1,000 of the 7,500 homes in this Humboldt County community are being used to cultivate marijuana, slashing into the housing stock, spreading building-safety problems and sowing neighborhood discord." Not surprisingly, in this bastion of liberal pot possession rules that authorized the cultivation of up to 99 plants for medicinal purpose, most structural fires in the community of Arcata have been of late associated with marijuana cultivation.[80] Chief of Police Mendosa clarified that the actual number of marijuana grow houses in Arcata has been an ongoing subject of public debate. Mendosa added, "We know there are numerous grow houses in almost every neighborhood in and around the city, which has been the source of constant citizen complaints." House fires caused by

grower-installed makeshift electrical wiring or tipped electrical fans are now endemic to Humboldt County.[81]

Chief Mendosa also observed that since marijuana has an illicit street value of up to $3,000 per pound, marijuana grow houses have been susceptible to violent armed home invasion robberies. Large-scale marijuana grow houses have removed significant numbers of affordable houses from the residential rental market. When property owners discover their rentals are being used as grow houses, the residences are often left with major structural damage, which includes air vents cut into roofs and floors, water damage to floors and walls, and mold. The June 9, 2008 edition of the *New York Times* shows an unidentified Arcata man tending his indoor grow; the man claimed he can make $25,000 every three months by selling marijuana grown in the bedroom of his rented house.[82] Claims of ostensible medical marijuana growing pursuant to California's medical marijuana laws are being advanced as a mostly false shield in an attempt to justify such illicit operations.

Neither is fire an uncommon occurrence at grow houses elsewhere across the nation. Another occurred not long ago in Holiday, Florida.[83] To compound matters further, escape routes for firefighters are often obstructed by blocked windows in grow houses, electric wiring is tampered with to steal electricity, and some residences are even booby-trapped to discourage and repel unwanted intruders.[84]

D. INCREASED ORGANIZED GANG ACTIVITIES

Along with marijuana dispensaries and the grow operations to support them come members of organized criminal gangs to operate and profit from them. Members of an ethnic Chinese drug gang were discovered to have operated 50 indoor grow operations in the San Francisco Bay area, while Cuban-American crime organizations have been found to be operating grow houses in Florida and elsewhere in the South. A Vietnamese drug ring was caught operating 19 grow houses in Seattle and Puget Sound, Washington.[85] In July of 2008, over 55 Asian gang members were indicted for narcotics trafficking in marijuana and ecstasy, including members of the Hop Sing Gang that had been actively operating marijuana grow operations in Elk Grove and elsewhere in the vicinity of Sacramento, California.[86]

E. EXPOSURE OF MINORS TO MARIJUANA

Minors who are exposed to marijuana at dispensaries or residences where marijuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it. In grow houses, children are exposed to dangerous fire and health conditions that are inherent in indoor grow operations.[87] Dispensaries also sell marijuana to minors.[88]

F. IMPAIRED PUBLIC HEALTH

Indoor marijuana grow operations emit a skunk-like odor,[89] and foster generally unhealthy conditions like allowing chemicals and fertilizers to be placed in the open, an increased carbon dioxide level within the grow house, and the accumulation of mold, [90] all of which are dangerous to any children or adults who may be living in the residence,[91] although many grow houses are uninhabited.

G. LOSS OF BUSINESS TAX REVENUE

When business suffers as a result of shoppers staying away on account of traffic, blight, crime, and the undesirability of a particular business district known to be frequented by drug users and traffickers, and organized criminal gang members, a city's tax revenues necessarily drop as a direct consequence.

H. DECREASED QUALITY OF LIFE IN DETERIORATING NEIGHBORHOODS, BOTH BUSINESS AND RESIDENTIAL

Marijuana dispensaries bring in the criminal element and loiterers, which in turn scare off potential business patrons of nearby legitimate businesses, causing loss of revenues and deterioration of the affected business district. Likewise, empty homes used as grow houses emit noxious odors in residential neighborhoods, project irritating sounds of whirring fans,[92] and promote the din of vehicles coming and going at all hours of the day and night. Near harvest time, rival growers and other uninvited enterprising criminals sometimes invade grow houses to beat "clip crews" to the site and rip off mature plants ready for harvesting. As a result, violence often erupts from confrontations in the affected residential neighborhood.[93]

ULTIMATE CONCLUSIONS REGARDING ADVERSE SECONDARY EFFECTS

On balance, any utility to medical marijuana patients in care giving and convenience that marijuana dispensaries may appear to have on the surface is enormously outweighed by a much darker reality that is punctuated by the many adverse secondary effects created by their presence in communities, recounted here. These drug distribution centers have even proven to be unsafe for their own proprietors.

POSSIBLE LOCAL GOVERNMENTAL RESPONSES TO MARIJUANA DISPENSARIES

A. IMPOSED MORATORIA BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While in the process of investigating and researching the issue of licensing marijuana dispensaries, as an interim measure city councils may enact date-specific moratoria that expressly prohibit the presence of marijuana dispensaries, whether for medical use or otherwise, and prohibiting the sale of marijuana in any form on such premises, anywhere within the incorporated boundaries of the city until a specified date. Before such a moratorium's date of expiration, the moratorium may then either be extended or a city ordinance enacted completely prohibiting or otherwise restricting the establishment and operation of marijuana dispensaries, and the sale of all marijuana products on such premises.

County supervisors can do the same with respect to marijuana dispensaries sought to be established within the unincorporated areas of a county. Approximately 80 California cities, including the cities of Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill, and 6 counties, including Contra Costa County, have enacted moratoria banning the existence of marijuana dispensaries. In a novel approach, the City of Arcata issued a moratorium on any new dispensaries in the downtown area, based on no agricultural activities being permitted to occur there.[94]

B. IMPOSED BANS BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

While the Compassionate Use Act of 1996 permits seriously ill persons to legally obtain and use marijuana for medical purposes upon a physician's recommendation, it is silent on marijuana dispensaries and does not expressly authorize the sale of marijuana to patients or primary caregivers.

Neither Proposition 215 nor Senate Bill 420 specifically authorizes the dispensing of marijuana in any form from a storefront business. And, no state statute presently exists that expressly permits the licensing or operation of marijuana dispensaries.[95] Consequently, approximately 39 California cities, including the Cities of Concord and San Pablo, and 2 counties have prohibited marijuana dispensaries within their respective geographical boundaries, while approximately 24 cities, including the City of Martinez, and 7 counties have allowed such dispensaries to do business within their jurisdictions. Even the complete prohibition of marijuana dispensaries within a given locale cannot be found to run afoul of current California law with respect to permitted use of marijuana for medicinal purposes, so long as the growing or use of medical marijuana by a city or county resident in conformance with state law is not proscribed.[96]

In November of 2004, the City of Brampton in Ontario, Canada passed The Grow House Abatement By-law, which authorized the city council to appoint inspectors and local police officers to inspect suspected grow houses and render safe hydro meters, unsafe wiring, booby traps, and any violation of the Fire Code or Building Code, and remove discovered controlled substances and ancillary equipment designed to grow and manufacture such substances, at the involved homeowner's cost.[97] And, after state legislators became appalled at the proliferation of for-profit residential grow operations, the State of Florida passed the Marijuana Grow House Eradication act (House Bill 173) in June of 2008. The governor signed this bill into law, making owning a house for the purpose of cultivating, packaging, and distributing marijuana a third-degree felony; growing 25 or more marijuana plants a second-degree felony; and growing "25 or more marijuana plants in a home with children present" a first-degree felony.[98] It has been estimated that approximately 17,500 marijuana grow operations were active in late 2007.[99] To avoid becoming a dumping ground for organized crime syndicates who decide to move their illegal grow operations to a more receptive legislative environment, California and other states might be wise to quickly follow suit with similar bills, for it may already be happening.[100]

C. IMPOSED RESTRICTED ZONING AND OTHER REGULATION BY ELECTED LOCAL GOVERNMENTAL OFFICIALS

If so inclined, rather than completely prohibit marijuana dispensaries, through their zoning power city and county officials have the authority to restrict owner operators to locate and operate so-called "medical marijuana dispensaries" in prescribed geographical areas of a city or designated unincorporated areas of a county, and require them to meet prescribed licensing requirements before being allowed to do so. This is a risky course of action though for would-be dispensary operators, and perhaps lawmakers too, since federal authorities do not recognize any lawful right for the sale, purchase, or use of marijuana for medical use or otherwise anywhere in the United States, including California. Other cities and counties have included as a condition of licensure for dispensaries that the operator shall "violate no federal or state law," which puts any applicant in a "Catch-22" situation since to federal authorities any possession or sale of marijuana is automatically a violation of federal law.

Still other municipalities have recently enacted or revised comprehensive ordinances that address a variety of medical marijuana issues. For example, according to the City of Arcata Community

Development Department in Arcata, California, in response to constant citizen complaints from what had become an extremely serious community problem, the Arcata City Council revised its Land Use Standards for Medical Marijuana Cultivation and Dispensing. In December of 2008, City of Arcata Ordinance #1382 was enacted. It includes the following provisions:

"Categories:

1. Personal Use
2. Cooperatives or Collectives

Medical Marijuana for Personal Use: An individual qualified patient shall be allowed to cultivate medical marijuana within his/her private residence in conformance with the following standards:

1. Cultivation area shall not exceed 50 square feet and not exceed ten feet (10') in height.
   a. Cultivation lighting shall not exceed 1200 watts;
   b. Gas products (CO_2, butane, etc.) for medical marijuana cultivation or processing is prohibited.
   c. Cultivation and sale is prohibited as a Home Occupation (sale or dispensing is prohibited).
   d. Qualified patient shall reside in the residence where the medical marijuana cultivation occurs;
   e. Qualified patient shall not participate in medical marijuana cultivation in any other residence.
   f. Residence kitchen, bathrooms, and primary bedrooms shall not be used primarily for medical marijuana cultivation;
   g. Cultivation area shall comply with the California Building Code § 1203.4 Natural Ventilation or § 402.3 Mechanical Ventilation.
   h. The medical marijuana cultivation area shall not adversely affect the health or safety of the nearby residents.
2. City Zoning Administrator my approve up to 100 square foot:
   a. Documentation showing why the 50 square foot cultivation area standard is not feasible.
   b. Include written permission from the property owner.
   c. City Building Official must inspect for California Building Code and Fire Code.
   d. At a minimum, the medical marijuana cultivation area shall be constructed with a 1-hour firewall assembly of green board.
   e. Cultivation of medical marijuana for personal use is limited to detached single family residential properties, or the medical marijuana cultivation area shall be limited to a garage or self-contained outside accessory building that is secured, locked, and fully enclosed.

Medical Marijuana Cooperatives or Collectives.

1. Allowed with a Conditional Use Permit.
2. In Commercial, Industrial, and Public Facility Zoning Districts.
3. Business form must be a cooperative or collective.
4. Existing cooperative or collective shall be in full compliance within one year.
5. Total number of medical marijuana cooperatives or collectives is limited to four and ultimately two.
6. Special consideration if located within
   a. A 300 foot radius from any existing residential zoning district,
   b. Within 500 feet of any other medical marijuana cooperative or collective.

c. Within 500 feet from any existing public park, playground, day care, or school.

7. Source of medical marijuana.
   a. Permitted Cooperative or Collective. On-site medical marijuana cultivation shall not exceed twenty-five (25) percent of the total floor area, but in no case greater than 1,500 square feet and not exceed ten feet (10') in height.
   b. Off-site Permitted Cultivation. Use Permit application and be updated annually.
   c. Qualified Patients. Medical marijuana acquired from an individual qualified patient shall received no monetary remittance, and the qualified patient is a member of the medical marijuana cooperative or collective. Collective or cooperative may credit its members for medical marijuana provided to the collective or cooperative, which they may allocate to other members.
8. Operations Manual at a minimum include the following information:
   a. Staff screening process including appropriate background checks.
   b. Operating hours.
   c. Site, floor plan of the facility.
   d. Security measures located on the premises, including but not limited to, lighting, alarms, and automatic law enforcement notification.
   e. Screening, registration and validation process for qualified patients.
   f. Qualified patient records acquisition and retention procedures.
   g. Process for tracking medical marijuana quantities and inventory controls including on-site cultivation, processing, and/or medical marijuana products received from outside sources.
   h. Measures taken to minimize or offset energy use from the cultivation or processing of medical marijuana.
   i. Chemicals stored, used and any effluent discharged into the City's wastewater and/or storm water system.
9. Operating Standards.
   a. No dispensing medical marijuana more than twice a day.
   b. Dispense to an individual qualified patient who has a valid, verified physician's recommendation. The medical marijuana cooperative or collective shall verify that the physician's recommendation is current and valid.
   c. Display the client rules and/or regulations at each building entrance.
   d. Smoking, ingesting or consuming medical marijuana on the premises or in the vicinity is prohibited.
   e. Persons under the age of eighteen (18) are precluded from entering the premises.
   f. No on-site display of marijuana plants.
   g. No distribution of live plants, starts and clones on through Use Permit.
   h. Permit the on-site display or sale of marijuana paraphernalia only through the Use Permit.
   i. Maintain all necessary permits, and pay all appropriate taxes. Medical marijuana cooperatives or collectives shall also provide invoices to vendors to ensure vendor's tax liability responsibility;
   j. Submit an "Annual Performance Review Report" which is intended to identify effectiveness of the approved Use Permit, Operations Manual, and Conditions of Approval, as well as the identification and implementation of additional procedures as deemed necessary.
   k. Monitoring review fees shall accompany the "Annual Performance Review Report" for costs associated with the review and approval of the report.
10. Permit Revocation or Modification. A use permit may be revoked or modified for non-compliance with one or more of the items described above."

LIABILITY ISSUES

With respect to issuing business licenses to marijuana storefront facilities a very real issue has arisen: counties and cities are arguably aiding and abetting criminal violations of federal law. Such actions clearly put the counties permitting these establishments in very precarious legal positions. Aiding and abetting a crime occurs when someone commits a crime, the person aiding that crime knew the criminal offender intended to commit the crime, and the person aiding the crime intended to assist the criminal offender in the commission of the crime.

The legal definition of aiding and abetting could be applied to counties and cities allowing marijuana facilities to open. A county that has been informed about the *Gonzales v. Raich* decision knows that all marijuana activity is federally illegal. Furthermore, such counties know that individuals involved in the marijuana business are subject to federal prosecution. When an individual in California cultivates, possesses, transports, or uses marijuana, he or she is committing a federal crime.

A county issuing a business license to a marijuana facility knows that the people there are committing federal crimes. The county also knows that those involved in providing and obtaining marijuana are intentionally violating federal law.

This very problem is why some counties are re-thinking the presence of marijuana facilities in their communities. There is a valid fear of being prosecuted for aiding and abetting federal drug crimes. Presently, two counties have expressed concern that California's medical marijuana statutes have placed them in such a precarious legal position. Because of the serious criminal ramifications involved in issuing business permits and allowing storefront marijuana businesses to operate within their borders, San Diego and San Bernardino Counties filed consolidated lawsuits against the state seeking to prevent the State of California from enforcing its medical marijuana statutes which potentially subject them to criminal liability, and squarely asserting that California medical marijuana laws are preempted by federal law in this area. After California's medical marijuana laws were all upheld at the trial level, California's Fourth District Court of Appeal found that the State of California could mandate counties to adopt and enforce a voluntary medical marijuana identification card system, and the appellate court bypassed the preemption issue by finding that San Diego and San Bernardino Counties lacked standing to raise this challenge to California's medical marijuana laws. Following this state appellate court decision, independent petitions for review filed by the two counties were both denied by the California Supreme Court.

Largely because of the quandary that county and city peace officers in California face in the field when confronted with alleged medical marijuana with respect to enforcement of the total federal criminal prohibition of all marijuana, and state exemption from criminal penalties for medical marijuana users and caregivers, petitions for a writ of certiorari were then separately filed by the two counties seeking review of this decision by the United States Supreme Court in the consolidated cases of *County of San Diego, County of San Bernardino, and Gary Penrod, as Sheriff of the County of San Bernardino v. San Diego Norml, State of California, and Sandra Shewry, Director of the California Department of Health Services in her official capacity*, Ct.App. Case No. D-5-333.) The High Court has requested the State of California and other interested parties to file responsive briefs to the two counties' and Sheriff Penrod's writ petitions before it decides whether to grant or deny review of these consolidated cases. The petitioners would then be entitled to file a reply to any filed response. It is anticipated that the U.S. Supreme Court will formally grant or deny review of these consolidated cases in late April or early May of 2009.

In another case, *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, although the federal preemption issue was not squarely raised or addressed in its decision, California's Fourth District Court of Appeal found that public policy considerations allowed a city standing to challenge a state trial court's order directing the return by a city police department of seized medical marijuana to a person determined to be a patient. After the court-ordered return of this federally banned substance was upheld at the intermediate appellate level, and not accepted for review by the California Supreme Court, a petition for a writ of certiorari was filed by the City of Garden Grove to the U.S. Supreme Court to consider and reverse the state appellate court decision. But, that petition was also denied. However, the case of *People v. Kelly* (2008) 163 Cal.App.4th 124—in which a successful challenge was made to California's Medical Marijuana Program's maximum amounts of marijuana and marijuana plants permitted to be possessed by medical marijuana patients (Cal. H&S Code sec. 11362.77 *et seq.*), which limits were found at the court of appeal level to be without legal authority for the state to impose—has been accepted for review by the California Supreme Court on the issue of whether this law was an improper amendment to Proposition 215's Compassionate Use Act of 1996.

A SAMPLING OF EXPERIENCES WITH MARIJUANA DISPENSARIES

1. MARIJUANA DISPENSARIES-THE SAN DIEGO STORY

After the passage of Proposition 215 in 1996, law enforcement agency representatives in San Diego, California met many times to formulate a comprehensive strategy of how to deal with cases that may arise out of the new law. In the end it was decided to handle the matters on a case-by-case basis. In addition, questionnaires were developed for patient, caregiver, and physician interviews. At times patients without sales indicia but large grows were interviewed and their medical records reviewed in making issuing decisions. In other cases where sales indicia and amounts supported a finding of sales the cases were pursued. At most, two cases a month were brought for felony prosecution.

In 2003, San Diego County's newly elected District Attorney publicly supported Prop. 215 and wanted her newly created Narcotics Division to design procedures to ensure patients were not caught up in case prosecutions. As many already know, law enforcement officers rarely arrest or seek prosecution of a patient who merely possesses personal use amounts. Rather, it is those who have sales amounts in product or cultivation who are prosecuted. For the next two years the District Attorney's Office proceeded as it had before. But, on the cases where the patient had too many plants or product but not much else to show sales—the DDAs assigned to review the case would interview and listen to input to respect the patient's and the DA's position. Some cases were rejected and others issued but the case disposition was often generous and reflected a "sin no more" view.

All of this changed after the passage of SB 420. The activists and pro-marijuana folks started to push the envelope. Dispensaries began to open for business and physicians started to advertise their availability to issue recommendations for the purchase of medical marijuana. By spring of 2005 the first couple of dispensaries opened up—but they were discrete. This would soon change. By that summer, 7 to 10 dispensaries were open for business, and they were selling marijuana openly. In fact, the local police department was doing a small buy/walk project and one of its target dealers said he was out of pot but would go get some from the dispensary to sell to the undercover officer (UC); he did. It was the proliferation of dispensaries and ancillary crimes that prompted the San Diego Police Chief (the Chief was a Prop. 215 supporter who sparred with the Fresno DEA in his prior job over this issue) to authorize his officers to assist DEA.

The Investigation

San Diego DEA and its local task force (NTF) sought assistance from the DA's Office as well as the U.S. Attorney's Office. Though empathetic about being willing to assist, the DA's Office was not sure how prosecutions would fare under the provisions of SB 420. The U.S. Attorney had the easier road but was noncommittal. After several meetings it was decided that law enforcement would work on using undercover operatives (UCs) to buy, so law enforcement could see exactly what was happening in the dispensaries.

The investigation was initiated in December of 2005, after NTF received numerous citizen complaints regarding the crime and traffic associated with "medical marijuana dispensaries." The City of San Diego also saw an increase in crime related to the marijuana dispensaries. By then approximately 20 marijuana dispensaries had opened and were operating in San Diego County, and investigations on 15 of these dispensaries were initiated.

During the investigation, NTF learned that all of the business owners were involved in the transportation and distribution of large quantities of marijuana, marijuana derivatives, and marijuana food products. In addition, several owners were involved in the cultivation of high grade marijuana. The business owners were making significant profits from the sale of these products and not properly reporting this income.

Undercover Task Force Officers (TFO's) and SDPD Detectives were utilized to purchase marijuana and marijuana food products from these businesses. In December of 2005, thirteen state search warrants were executed at businesses and residences of several owners. Two additional follow-up search warrants and a consent search were executed the same day. Approximately 977 marijuana plants from seven indoor marijuana grows, 564.88 kilograms of marijuana and marijuana food products, one gun, and over $58,000 U.S. currency were seized. There were six arrests made during the execution of these search warrants for various violations, including outstanding warrants, possession of marijuana for sale, possession of psilocybin mushrooms, obstructing a police officer, and weapons violations. However, the owners and clerks were not arrested or prosecuted at this time—just those who showed up with weapons or product to sell.

Given the fact most owners could claim mistake of law as to selling (though not a legitimate defense, it could be a jury nullification defense) the DA's Office decided not to file cases at that time. It was hoped that the dispensaries would feel San Diego was hostile ground and they would do business elsewhere. Unfortunately this was not the case. Over the next few months seven of the previously targeted dispensaries opened, as well as a slew of others. Clearly prosecutions would be necessary.

To gear up for the re-opened and new dispensaries prosecutors reviewed the evidence and sought a second round of UC buys wherein the UC would be buying for themselves and they would have a second UC present at the time acting as UC1's caregiver who also would buy. This was designed to show the dispensary was not the caregiver. There is no authority in the law for organizations to act as primary caregivers. Caregivers must be individuals who care for a marijuana patient. A primary caregiver is defined by Proposition 215, as codified in H&S Code section 11362.5(e), as, "For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." The goal was to show that the stores were only selling marijuana, and not providing care for the hundreds who bought from them.

In addition to the caregiver-controlled buys, another aim was to put the whole matter in perspective for the media and the public by going over the data that was found in the raided dispensary records, as well as the crime statistics. An analysis of the December 2005 dispensary records showed a breakdown of the purported illness and youthful nature of the patients. The charts and other PR aspects played out after the second take down in July of 2006.

The final attack was to reveal the doctors (the gatekeepers for medical marijuana) for the fraud they were committing. UCs from the local PD went in and taped the encounters to show that the pot docs did not examine the patients and did not render care at all; rather they merely sold a medical MJ recommendation whose duration depended upon the amount of money paid.

In April of 2006, two state and two federal search warrants were executed at a residence and storage warehouse utilized to cultivate marijuana. Approximately 347 marijuana plants, over 21 kilograms of marijuana, and $2,855 U.S. currency were seized.

Due to the pressure from the public, the United States Attorney's Office agreed to prosecute the owners of the businesses with large indoor marijuana grows and believed to be involved in money laundering activities. The District Attorney's Office agreed to prosecute the owners in the other investigations.

In June of 2006, a Federal Grand Jury indicted six owners for violations of Title 21 USC, sections 846 and 841(a)(1), Conspiracy to Distribute Marijuana; sections 846 and 841(a), Conspiracy to Manufacture Marijuana; and Title 18 USC, Section 2, Aiding and Abetting.

In July of 2006, 11 state and 11 federal search warrants were executed at businesses and residences associated with members of these businesses. The execution of these search warrants resulted in the arrest of 19 people, seizure of over $190,000 in U.S. currency and other assets, four handguns, one rifle, 405 marijuana plants from seven grows, and over 329 kilograms of marijuana and marijuana food products.

Following the search warrants, two businesses reopened. An additional search warrant and consent search were executed at these respective locations. Approximately 20 kilograms of marijuana and 32 marijuana plants were seized.

As a result, all but two of the individuals arrested on state charges have pled guilty. Several have already been sentenced and a few are still awaiting sentencing. All of the individuals indicted federally have also pled guilty and are awaiting sentencing.

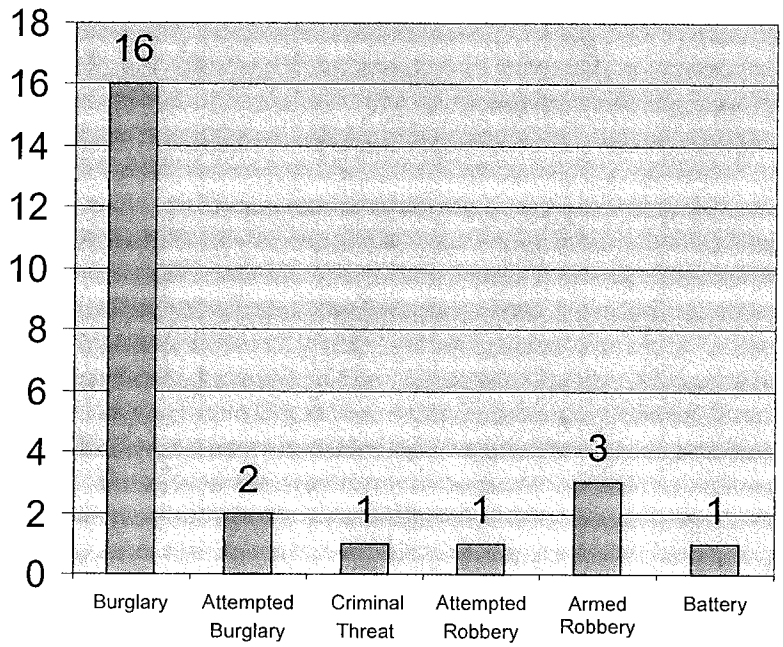
After the July 2006 search warrants a joint press conference was held with the U.S. Attorney and District Attorney, during which copies of a complaint to the medical board, photos of the food products which were marketed to children, and the charts shown below were provided to the media.

Directly after these several combined actions, there were no marijuana distribution businesses operating in San Diego County. Law enforcement agencies in the San Diego region have been able to successfully dismantle these businesses and prosecute the owners. As a result, medical marijuana advocates have staged a number of protests demanding DEA allow the distribution of marijuana. The closure of these businesses has reduced crime in the surrounding areas.

The execution of search warrants at these businesses sent a powerful message to other individuals operating marijuana distribution businesses that they are in violation of both federal law **and** California law.

Press Materials:

Reported Crime at Marijuana Dispensaries
From January 1, 2005 through June 23, 2006



Information showing the dispensaries attracted crime:

The marijuana dispensaries were targets of violent crimes because of the amount of marijuana, currency, and other contraband stored inside the businesses. From January 1, 2005 through June 23, 2006, 24 violent crimes were reported at marijuana dispensaries. An analysis of financial records seized from the marijuana dispensaries showed several dispensaries were grossing over $300,000 per month from selling marijuana and marijuana food products. The majority of customers purchased marijuana with cash.

Crime statistics inadequately reflect the actual number of crimes committed at the marijuana dispensaries. These businesses were often victims of robberies and burglaries, but did not report the crimes to law enforcement on account of fear of being arrested for possession of marijuana in excess of Prop. 215 guidelines. NTF and the San Diego Police Department (SDPD) received numerous citizen complaints regarding every dispensary operating in San Diego County.

Because the complaints were received by various individuals, the exact number of complaints was not recorded. The following were typical complaints received:

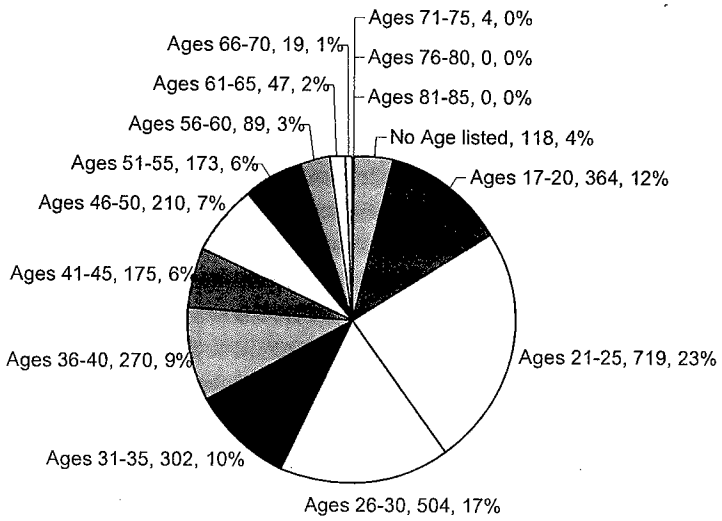
- high levels of traffic going to and from the dispensaries
- people loitering in the parking lot of the dispensaries
- people smoking marijuana in the parking lot of the dispensaries

- vandalism near dispensaries
- threats made by dispensary employees to employees of other businesses
- citizens worried they may become a victim of crime because of their proximity to dispensaries

In addition, the following observations (from citizen activists assisting in data gathering) were made about the marijuana dispensaries:

- Identification was not requested for individuals who looked under age 18
- Entrance to business was not refused because of lack of identification
- Individuals were observed loitering in the parking lots
- Child-oriented businesses and recreational areas were situated nearby
- Some businesses made no attempt to verify a submitted physician's recommendation

Dispensary Patients By Age



An analysis of patient records seized during search warrants at several dispensaries show that 52% of the customers purchasing marijuana were between the ages of 17 to 30. 63% of primary caregivers purchasing marijuana were between the ages of 18 through 30. Only 2.05% of customers submitted a physician's recommendation for AIDS, glaucoma, or cancer.

Why these businesses were deemed to be criminal--not compassionate:

The medical marijuana businesses were deemed to be criminal enterprises for the following reasons:

- Many of the business owners had histories of drug and violence-related arrests.
- The business owners were street-level marijuana dealers who took advantage of Prop. 215 in an attempt to legitimize marijuana sales for profit.
- Records, or lack of records, seized during the search warrants showed that all the owners were not properly reporting income generated from the sales of marijuana. Many owners were involved in money laundering and tax evasion.
- The businesses were selling to individuals without serious medical conditions.
- There are no guidelines on the amount of marijuana which can be sold to an individual. For

example, an individual with a physician's recommendation can go to as many marijuana distribution businesses and purchase as much marijuana as he/she wants.

- California law allows an individual to possess 6 mature or 12 immature plants per qualified person. However, the San Diego Municipal Code states a "caregiver" can only provide care to 4 people, including themselves; this translates to 24 mature or 48 immature plants total. Many of these dispensaries are operating large marijuana grows with far more plants than allowed under law. Several of the dispensaries had indoor marijuana grows inside the businesses, with mature and/or immature marijuana plants over the limits.
- State law allows a qualified patient or primary caregiver to possess no more than eight ounces of dried marijuana per qualified patient. However, the San Diego Municipal Code allows primary caregivers to possess no more than two pounds of processed marijuana. Under either law, almost every marijuana dispensary had over two pounds of processed marijuana during the execution of the search warrants.
- Some marijuana dispensaries force customers to sign forms designating the business as their primary caregiver, in an attempt to circumvent the law.

2. EXPERIENCES WITH MARIJUANA DISPENSARIES IN RIVERSIDE COUNTY

There were some marijuana dispensaries operating in the County of Riverside until the District Attorney's Office took a very aggressive stance in closing them. In Riverside, anyone that is not a "qualified patient" or "primary caregiver" under the Medical Marijuana Program Act who possesses, sells, or transports marijuana is being prosecuted.

Several dispensary closures illustrate the impact this position has had on marijuana dispensaries. For instance, the Palm Springs Caregivers dispensary (also known as Palm Springs Safe Access Collective) was searched after a warrant was issued. All materials inside were seized, and it was closed down and remains closed. The California Caregivers Association was located in downtown Riverside. Very shortly after it opened, it was also searched pursuant to a warrant and shut down. The CannaHelp dispensary was located in Palm Desert. It was searched and closed down early in 2007. The owner and two managers were then prosecuted for marijuana sales and possession of marijuana for the purpose of sale. However, a judge granted their motion to quash the search warrant and dismissed the charges. The District Attorney's Office then appealed to the Fourth District Court of Appeal. Presently, the Office is waiting for oral arguments to be scheduled.

Dispensaries in the county have also been closed by court order. The Healing Nations Collective was located in Corona. The owner lied about the nature of the business in his application for a license. The city pursued and obtained an injunction that required the business to close. The owner appealed to the Fourth District Court of Appeal, which ruled against him. (*City of Corona v. Ronald Naulls et al.*, Case No. E042772.)

3. MEDICAL MARIJUANA DISPENSARY ISSUES IN CONTRA COSTA COUNTY CITIES AND IN OTHER BAY AREA COUNTIES

Several cities in Contra Costa County, California have addressed this issue by either banning dispensaries, enacting moratoria against them, regulating them, or taking a position that they are simply not a permitted land use because they violate federal law. Richmond, El Cerrito, San Pablo, Hercules, and Concord have adopted permanent ordinances banning the establishment of marijuana dispensaries. Antioch, Brentwood, Oakley, Pinole, and Pleasant Hill have imposed moratoria against dispensaries. Clayton, San Ramon, and Walnut Creek have not taken any formal action regarding the establishment of marijuana dispensaries but have indicated that marijuana dispensaries

are not a permitted use in any of their zoning districts as a violation of federal law. Martinez has adopted a permanent ordinance regulating the establishment of marijuana dispensaries.

The Counties of Alameda, Santa Clara, and San Francisco have enacted permanent ordinances regulating the establishment of marijuana dispensaries. The Counties of Solano, Napa, and Marin have enacted neither regulations nor bans. A brief overview of the regulations enacted in neighboring counties follows.

A. Alameda County

Alameda County has a nineteen-page regulatory scheme which allows the operation of three permitted dispensaries in unincorporated portions of the county. Dispensaries can only be located in commercial or industrial zones, or their equivalent, and may not be located within 1,000 feet of other dispensaries, schools, parks, playgrounds, drug recovery facilities, or recreation centers. Permit issuance is controlled by the Sheriff, who is required to work with the Community Development Agency and the Health Care Services agency to establish operating conditions for each applicant prior to final selection. Adverse decisions can be appealed to the Sheriff and are ruled upon by the same panel responsible for setting operating conditions. That panel's decision may be appealed to the Board of Supervisors, whose decision is final (subject to writ review in the Superior Court per CCP sec. 1094.5). Persons violating provisions of the ordinance are guilty of a misdemeanor.

B. Santa Clara County

In November of 1998, Santa Clara County passed an ordinance permitting dispensaries to exist in unincorporated portions of the county with permits first sought and obtained from the Department of Public Health. In spite of this regulation, neither the County Counsel nor the District Attorney's Drug Unit Supervisor believes that Santa Clara County has had *any* marijuana dispensaries in operation at least through 2006.

The only permitted activities are the on-site cultivation of medical marijuana and the distribution of medical marijuana/medical marijuana food stuffs. No retail sales of any products are permitted at the dispensary. Smoking, ingestion or consumption is also prohibited on site. All doctor recommendations for medical marijuana must be verified by the County's Public Health Department.

C. San Francisco County

In December of 2001, the Board of Supervisors passed Resolution No. 012006, declaring San Francisco to be a "Sanctuary for Medical Cannabis." City voters passed Proposition S in 2002, directing the city to explore the possibility of establishing a medical marijuana cultivation and distribution program run by the city itself.

San Francisco dispensaries must apply for and receive a permit from the Department of Public Health. They may only operate as a collective or cooperative, as defined by California Health and Safety Code section 11362.7 (see discussion in section 4, under "California Law" above), and may only sell or distribute marijuana to members. Cultivation, smoking, and making and selling food products may be allowed. Permit applications are referred to the Departments of Planning, Building Inspection, and Police. Criminal background checks are required but exemptions could still allow the operation of dispensaries by individuals with prior convictions for violent felonies or who have had prior permits suspended or revoked. Adverse decisions can be appealed to the Director of

Public Health and the Board of Appeals. It is unclear how many dispensaries are operating in the city at this time.

D. Crime Rates in the Vicinity of MariCare

Sheriff's data have been compiled for "Calls for Service" within a half-mile radius of 127 Aspen Drive, Pacheco. However, in research conducted by the El Cerrito Police Department and relied upon by Riverside County in recently enacting its ban on dispensaries, it was recognized that not all crimes related to medical marijuana take place in or around a dispensary. Some take place at the homes of the owners, employees, or patrons. Therefore, these statistics cannot paint a complete picture of the impact a marijuana dispensary has had on crime rates.

The statistics show that the overall number of calls decreased (3,746 in 2005 versus 3,260 in 2006). However, there have been **increases** in the numbers of crimes which appear to be related to a business which is an attraction to a criminal element. Reports of commercial burglaries increased (14 in 2005, 24 in 2006), as did reports of residential burglaries (13 in 2005, 16 in 2006) and miscellaneous burglaries (5 in 2005, 21 in 2006).

Tender Holistic Care (THC marijuana dispensary formerly located on N. Buchanan Circle in Pacheco) was forcibly burglarized on June 11, 2006. $4,800 in cash was stolen, along with marijuana, hash, marijuana food products, marijuana pills, marijuana paraphernalia, and marijuana plants. The total loss was estimated to be $16,265.

MariCare was also burglarized within two weeks of opening in Pacheco. On April 4, 2006, a window was smashed after 11:00 p.m. while an employee was inside the business, working late to get things organized. The female employee called "911" and locked herself in an office while the intruder ransacked the downstairs dispensary and stole more than $200 worth of marijuana. Demetrio Ramirez indicated that since they were just moving in, there wasn't much inventory.

Reports of vehicle thefts increased (4 in 2005, 6 in 2006). Disturbance reports increased in nearly all categories (Fights: 5 in 2005, 7 in 2006; Harassment: 4 in 2005, 5 in 2006; Juveniles: 4 in 2005, 21 in 2006; Loitering: 11 in 2005, 19 in 2006; Verbal: 7 in 2005, 17 in 2006). Littering reports increased from 1 in 2005 to 5 in 2006. Public nuisance reports increased from 23 in 2005 to 26 in 2006.

These statistics reflect the complaints and concerns raised by nearby residents. Residents have reported to the District Attorney's Office, as well as to Supervisor Piepho's office, that when calls are made to the Sheriff's Department, the offender has oftentimes left the area before law enforcement can arrive. This has led to less reporting, as it appears to local residents to be a futile act and residents have been advised that law enforcement is understaffed and cannot always timely respond to all calls for service. As a result, Pacheco developed a very active, visible Neighborhood Watch program. The program became much more active in 2006, according to Doug Stewart. Volunteers obtained radios and began frequently receiving calls directly from local businesses and residents who contacted them **instead** of law enforcement. It is therefore significant that there has still been an increase in many types of calls for law enforcement service, although the overall number of calls has decreased.

Other complaints from residents included noise, odors, smoking/consuming marijuana in the area, littering and trash from the dispensary, loitering near a school bus stop and in the nearby church parking lot, observations that the primary patrons of MariCare appear to be individuals under age 25,

and increased traffic. Residents observed that the busiest time for MariCare appeared to be from 4:00 p.m. to 6:00 p.m. On a typical Friday, 66 cars were observed entering MariCare's facility; 49 of these were observed to contain additional passengers. The slowest time appeared to be from 1:00 p.m. to 3:00 p.m. On a typical Saturday, 44 cars were counted during this time, and 29 of these were observed to have additional passengers. MariCare has claimed to serve 4,000 "patients."

E. Impact of Proposed Ordinance on MedDelivery Dispensary, El Sobrante

It is the position of Contra Costa County District Attorney Robert J. Kochly that a proposed ordinance should terminate operation of the dispensary in El Sobrante because the land use of that business would be inconsistent with both state and federal law. However, the Community Development Department apparently believes that MedDelivery can remain as a "legal, non-conforming use."

F. Banning Versus Regulating Marijuana Dispensaries in Unincorporated Contra Costa County

It is simply bad public policy to allow the proliferation of any type of business which is illegal and subject to being raided by federal and/or state authorities. In fact, eight locations associated with the New Remedies dispensary in San Francisco and Alameda Counties were raided in October of 2006, and eleven Southern California marijuana clinics were raided by federal agents on January 18, 2007. The Los Angeles head of the federal Drug Enforcement Administration told CBS News after the January raids that "Today's enforcement operations show that these establishments are nothing more than drug-trafficking organizations bringing criminal activities to our neighborhoods and drugs near our children and schools." A Lafayette, California resident who owned a business that produced marijuana-laced foods and drinks for marijuana clubs was sentenced in federal court to five years and 10 months behind bars as well as a $250,000 fine. Several of his employees were also convicted in that case.

As discussed above, there is absolutely no exception to the federal prohibition against marijuana cultivation, possession, transportation, use, and distribution. Neither California's voters nor its Legislature authorized the existence or operation of marijuana dispensing businesses when given the opportunity to do so. These enterprises cannot fit themselves into the few, narrow exceptions that were created by the Compassionate Use Act and Medical Marijuana Program Act.

Further, the presence of marijuana dispensing businesses contributes substantially to the existence of a secondary market for illegal, street-level distribution of marijuana. This fact was even recognized by the United States Supreme Court: "The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." (*Gonzales v. Raich, supra,* 125 S.Ct. at p. 2214.)

As outlined below, clear evidence has emerged of such a secondary market in Contra Costa County.

- In September of 2004, police responded to reports of two men pointing a gun at cars in the parking lot at Monte Vista High School during an evening football game/dance. Two 19-year-old Danville residents were located in the parking lot (which was full of vehicles and pedestrians) and in possession of a silver Airsoft pellet pistol designed to replicate a

real Walther semi-automatic handgun. Marijuana, hash, and hash oil with typical dispensary packaging and labeling were also located in the car, along with a gallon bottle of tequila (1/4 full), a bong with burned residue, and rolling papers. The young men admitted to having consumed an unknown amount of tequila at the park next to the school and that they both pointed the gun at passing cars "as a joke." They fired several BBs at a wooden fence in the park when there were people in the area. The owner of the vehicle admitted that the marijuana was his and that he was **not** a medicinal marijuana user. He was able to buy marijuana from his friend "Brandon," who used a Proposition 215 card to purchase from a cannabis club in Hayward.

- In February of 2006, Concord police officers responded to a report of a possible drug sale in progress. They arrested a high school senior for two outstanding warrants as he came to buy marijuana from the cannabis club located on Contra Costa Boulevard. The young man explained that he had a cannabis club card that allowed him to purchase marijuana, and admitted that he planned to re-sell some of the marijuana to friends. He also admitted to possession of nearly 7 grams of cocaine which was recovered. A 21-year-old man was also arrested on an outstanding warrant. In his car was a marijuana grinder, a baggie of marijuana, rolling papers, cigars, and a "blunt" (hollowed out cigar filled with marijuana for smoking) with one end burned. The 21-year-old admitted that he did **not** have a physician's recommendation for marijuana.

- Also in February of 2006, a 17-year-old Monte Vista High School senior was charged with felony furnishing of marijuana to a child, after giving a 4-year-old boy a marijuana-laced cookie. The furnishing occurred on campus, during a child development class.

- In March of 2006, police and fire responded to an explosion at a San Ramon townhouse and found three young men engaged in cultivating and manufacturing "honey oil" for local pot clubs. Marijuana was also being sold from the residence. Honey oil is a concentrated form of cannabis chemically extracted from ground up marijuana with extremely volatile **butane** and a special "honey oil" extractor tube. The butane extraction operation ***exploded*** with such force that it blew the garage door partially off its hinges. Sprinklers in the residence kept the fire from spreading to the other homes in the densely packed residential neighborhood. At least one of the men was employed by Ken Estes, owner of the Dragonfly Holistic Solutions pot clubs in Richmond, San Francisco, and Lake County. They were making the "honey oil" with marijuana and butane that they brought up from one of Estes' San Diego pot clubs after it was shut down by federal agents.

- Also in March of 2006, a 16-year-old El Cerrito High School student was arrested after selling pot cookies to fellow students on campus, many of whom became ill. At least four required hospitalization. The investigation revealed that the cookies were made with a butter obtained outside a marijuana dispensary (a secondary sale). Between March of 2004 and May of 2006, the El Cerrito Police Department conducted seven investigations at the high school and junior high school, resulting in the arrest of eight juveniles for selling or possessing with intent to sell marijuana on or around the school campuses.

- In June of 2006, Moraga police officers made a traffic stop for suspected driving under the influence of alcohol. The car was seen drifting over the double yellow line separating north and southbound traffic lanes and driving in the bike lane. The 20-year-old driver denied having consumed any alcohol, as he was the "designated driver." When asked about his bloodshot, watery, and droopy eyes, the college junior explained that he had

smoked marijuana earlier (confirmed by blood tests). The young man had difficulty performing field sobriety tests, slurred his speech, and was ultimately arrested for driving under the influence. He was in possession of a falsified California Driver's License, marijuana, hash, a marijuana pipe, a scale, and $12,288. The marijuana was in packaging from the Compassionate Collective of Alameda County, a Hayward dispensary. He explained that he buys the marijuana at "Pot Clubs," sells some, and keeps the rest. He only sells to close friends. About $3,000 to $4,000 of the cash was from playing high-stakes poker, but the rest was earned selling marijuana while a freshman at Arizona State University. The 18-year-old passenger had half an ounce of marijuana in her purse and produced a doctor's recommendation to a marijuana club in Oakland, the authenticity of which could not be confirmed.

Another significant concern is the proliferation of marijuana usage at community schools. In February of 2007, the Healthy Kids Survey for Alameda and Contra Costa Counties found that youthful substance abuse is more common in the East Bay's more affluent areas. These areas had higher rates of high school juniors who admitted having been high from drugs. The regional manager of the study found that the affluent areas had higher alcohol and marijuana use rates. *USA Today* recently reported that the percentage of 12th Grade students who said they had used marijuana has increased since 2002 (from 33.6% to 36.2% in 2005), and that marijuana was the most-used illicit drug among that age group in 2006. KSDK News Channel 5 reported that high school students are finding easy access to medical marijuana cards and presenting them to school authorities as a legitimate excuse for getting high. School Resource Officers for Monte Vista and San Ramon Valley High Schools in Danville have reported finding marijuana in prescription bottles and other packaging from Alameda County dispensaries. Marijuana has also been linked to psychotic illnesses.[101] A risk factor was found to be starting marijuana use in adolescence.

For all of the above reasons, it is advocated by District Attorney Kochly that a ban on land uses which violate state or federal law is the most appropriate solution for the County of Contra Costa.

4. SANTA BARBARA COUNTY

According to Santa Barbara County Deputy District Attorney Brian Cota, ten marijuana dispensaries are currently operating within Santa Barbara County. The mayor of the City of Santa Barbara, who is an outspoken medical marijuana supporter, has stated that the police must place marijuana **behind** every other police priority. This has made it difficult for the local District Attorney's Office. Not many marijuana cases come to it for filing. The District Attorney's Office would like more regulations placed on the dispensaries. However, the majority of Santa Barbara County political leaders and residents are very liberal and do not want anyone to be denied access to medical marijuana if they say they need it. Partly as a result, no dispensaries have been prosecuted to date.

5. SONOMA COUNTY

Stephan R. Passalocqua, District Attorney for the County of Sonoma, has recently reported the following information related to distribution of medical marijuana in Sonoma County. In 1997, the Sonoma County Law Enforcement Chiefs Association enacted the following medical marijuana guidelines: a qualified patient is permitted to possess three pounds of marijuana and grow 99 plants in a 100-square-foot canopy. A qualified caregiver could possess or grow the above-mentioned amounts for each qualified patient. These guidelines were enacted after Proposition 215 was overwhelmingly passed by the voters of California, and after two separate unsuccessful prosecutions in Sonoma County. Two Sonoma County juries returned "not guilty" verdicts for three defendants

who possessed substantially large quantities of marijuana (60 plants in one case and over 900 plants in the other) where they asserted a medical marijuana defense. These verdicts, and the attendant publicity, demonstrated that the community standards are vastly different in Sonoma County compared to other jurisdictions.

On November 6, 2006, and authorized by Senate Bill 420, the Sonoma County Board of Supervisors specifically enacted regulations that allow a qualified person holding a valid identification card to possess up to three pounds of dried cannabis a year and cultivate 30 plants per qualified patient. No individual from any law enforcement agency in Sonoma County appeared at the hearing, nor did any representative publicly oppose this resolution.

With respect to the *People v. Sashon Jenkins* case, the defendant provided verified medical recommendations for five qualified patients prior to trial. At the time of arrest, Jenkins said that he had a medical marijuana card and was a care provider for multiple people, but was unable to provide specific documentation. Mr. Jenkins had approximately 10 pounds of dried marijuana and was growing 14 plants, which number of plants is consistent with the 2006 Sonoma County Board of Supervisors' resolution.

At a preliminary hearing held In January of 2007, the defense called five witnesses who were proffered as Jenkins' "patients" and who came to court with medical recommendations. Jenkins also testified that he was their caregiver. After the preliminary hearing, the assigned prosecutor conducted a thorough review of the facts and the law, and concluded that a Sonoma County jury would not return a "guilty" verdict in this case. Hence, no felony information was filed. With respect to the return of property issue, the prosecuting deputy district attorney never agreed to release the marijuana despite dismissing the case.

Other trial dates are pending in cases where medical marijuana defenses are being alleged. District Attorney Passalacqua has noted that, given the overwhelming passage of proposition 215, coupled with at least one United States Supreme Court decision that has not struck it down to date, these factors present current challenges for law enforcement, but that he and other prosecutors will continue to vigorously prosecute drug dealers within the boundaries of the law.

6. ORANGE COUNTY

There are 15 marijuana dispensaries in Orange County, and several delivery services. Many of the delivery services operate out of the City of Long Beach in Los Angeles County. Orange County served a search warrant on one dispensary, and closed it down. A decision is being made whether or not to file criminal charges in that case. It is possible that the United States Attorney will file on that dispensary since it is a branch of a dispensary that the federal authorities raided in San Diego County.

The Orange County Board of Supervisors has ordered a study by the county's Health Care Department on how to comply with the Medical Marijuana Program Act. The District Attorney's Office's position is that any activity under the Medical Marijuana Program Act beyond the mere issuance of identification cards violates federal law. The District Attorney's Office has made it clear to County Counsel that if any medical marijuana provider does not meet a strict definition of "primary caregiver" that person will be prosecuted.

PENDING LEGAL QUESTIONS

Law enforcement agencies throughout the state, as well as their legislative bodies, have been struggling with how to reconcile the Compassionate Use Act ("CUA"), Cal. Health & Safety Code secs. 11362.5, et seq., with the federal Controlled Substances Act ("CSA"), 21 U.S.C. sec. 801, et seq., for some time. Pertinent questions follow.

QUESTION

1. **Is it possible for a storefront marijuana dispensary to be legally operated under the Compassionate Use Act of 1996 (Health & Saf. Code sec. 11362.5) and the Medical Marijuana Program Act (Health & Saf. Code secs. 11362.7-11362.83?**

ANSWER

1. **Storefront marijuana dispensaries may be legally operated under the CUA and the Medical Marijuana Program Act ("MMPA"), Cal. Health & Safety Code secs. 11362.7-11362.83, as long as they are "cooperatives" under the MMPA.**

ANALYSIS

The question posed does not specify what services or products are available at a "storefront" marijuana dispensary. The question also does not specify the business structure of a "dispensary." A "dispensary" is often commonly used nowadays as a generic term for a facility that distributes medical marijuana.

The term "dispensary" is also used specifically to refer to marijuana facilities that are operated more like a retail establishment, that are open to the public and often "sell" medical marijuana to qualified patients or caregivers. By use of the term "store front dispensary," the question may be presuming that this type of facility is being operated. For purposes of this analysis, we will assume that a "dispensary" is a generic term that does not contemplate any particular business structure.[1] Based on that assumption, a "dispensary" might provide "assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person" and be within the permissible limits of the CUA and the MMPA. (Cal. Health & Safety Code sec. 11362.765 (b)(3).)

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[1] As the term "dispensary" is commonly used and understood, marijuana dispensaries would *not* be permitted under the CUA or the MMPA, since they "sell" medical marijuana and are not operated as true "cooperatives."

The CUA permits a "patient" or a "patient's primary caregiver" to possess or cultivate marijuana for personal medical purposes with the recommendation of a physician. (Cal. Health & Safety Code sec. 11362.5 (d).) Similarly, the MMPA provides that "patients" or designated "primary caregivers" who have voluntarily obtained a valid medical marijuana identification card shall not be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana in specified quantities. (Cal. Health & Safety Code sec. 11362.71 (d) & (e).) A "storefront dispensary" would not fit within either of these categories.

However, the MMPA also provides that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who *associate* within the State of California in order collectively or *cooperatively* to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under section 11357 [possession], 11358 [planting, harvesting or processing], 11359 [possession for sale], 11360 [unlawful transportation, importation, sale or gift], 11366 [opening or maintaining place for trafficking in controlled substances], 11366.5 [providing place for manufacture or distribution of controlled substance; Fortifying building to suppress law enforcement entry], or 11570 [Buildings or places deemed nuisances subject to abatement]." (Cal. Health & Safety Code sec. 11362.775.) (Emphasis added).)

Since medical marijuana cooperatives are permitted pursuant to the MMPA, a "storefront dispensary" that would qualify as a cooperative *would* be permissible under the MMPA. (Cal. Health & Safety Code sec. 11362.775. See also *People v. Urziceanu* (2005) 132 Cal. App. 4th 747 (finding criminal defendant was entitled to present defense relating to operation of medical marijuana cooperative).) In granting a re-trial, the appellate court in *Urziceanu* found that the defendant could present evidence which might entitle him to a defense under the MMPA as to the operation of a medical marijuana cooperative, including the fact that the "cooperative" verified physician recommendations and identities of individuals seeking medical marijuana and individuals obtaining medical marijuana paid membership fees, reimbursed defendant for his costs in cultivating the medical marijuana by way of donations, and volunteered at the "cooperative." (*Id.* at p. 785.)

Whether or not "sales" are permitted under *Urziceanu* and the MMPA is unclear. The *Urziceanu* Court did note that the incorporation of section 11359, relating to marijuana "sales," in section 11362.775, allowing the operation of cooperatives, "contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." Whether "reimbursement" may be in the form only of donations, as were the facts presented in *Urziceanu*, or whether "purchases" could be made for medical marijuana, it does seem clear that a medical marijuana "cooperative" may not make a "profit," but may be restricted to being reimbursed for actual costs in providing the marijuana to its members and, if there are any "profits," these may have to be reinvested in the "cooperative" or shared by its members in order for a dispensary to

be truly considered to be operating as a "cooperative."[2] If these requirements are satisfied as to a "storefront" dispensary, then it will be permissible under the MMPA. Otherwise, it will be a violation of both the CUA and the MMPA.

QUESTION

2. If the governing body of a city, county, or city and county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, can an individual board or council member be found to be acting illegally and be subject to federal criminal charges, including aiding and abetting, or state criminal charges?

ANSWER

2. If a city, county, or city and county authorizes and regulates marijuana dispensaries, individual members of the legislative bodies may be held criminally liable under state or federal law.[3]

ANALYSIS

A. *Federal Law*

Generally, legislators of federal, state, and local legislative bodies are absolutely immune from liability for legislative acts. (U.S. Const., art. I, sec. 6 (Speech and Debate Clause, applicable to members of Congress); Fed. Rules Evid., Rule 501 (evidentiary privilege against admission of legislative acts); *Tenney v. Brandhove* (1951) 341 U.S. 367 (legislative immunity applicable to state legislators); *Bogan v. Scott-Harris* (1998) 523 U.S. 44 (legislative immunity applicable to local legislators).) However, while federal legislators are absolutely immune from *both* criminal *and* civil liability for purely legislative acts, local legislators are *only* immune from *civil* liability under federal law. (*United States v. Gillock* (1980) 445 U.S. 360.)

Where the United States Supreme Court has held that federal regulation of marijuana by way of the CSA, including any "medical" use of marijuana, is within Congress' Commerce Clause power, federal law stands as a bar to local action in direct violation of the CSA. (*Gonzales v. Raich* (2005) 545 U.S. 1.) In fact, the CSA itself provides that federal regulations do not

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[2] A "cooperative" is defined as follows: An enterprise or organization that is owned or managed jointly by those who use its facilities or services. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, by Houghton Mifflin Company (4th Ed. 2000).

[3] Indeed, the same conclusion would seem to result from the adoption by state legislators of the MMPA itself, in authorizing the issuance of medical marijuana identification cards. (Cal. Health & Safety Code secs. 11362.71, et seq.)

exclusively occupy the field of drug regulation "unless there is a positive conflict between that provision of this title [the CSA] and that state law so that the two cannot consistently stand together." (21 U.S.C. sec. 903.)

Based on the above provisions, then, legislative action by local legislators *could* subject the individual legislators to federal criminal liability. Most likely, the only violation of the CSA that could occur as a result of an ordinance approved by local legislators authorizing and regulating medical marijuana would be aiding and abetting a violation of the CSA.

The elements of the offense of aiding and abetting a criminal offense are: (1) specific intent to facilitate commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of an offense. (*United States v. Raper* (1982) 676 F.2d 841; *United States v. Staten* (1978) 581 F.2d 878.)

Criminal aiding and abetting liability, under 18 U.S.C. section 2, requires proof that the defendants in some way associated themselves with the illegal venture; that they participated in the venture as something that they wished to bring about; and that they sought by their actions to make the venture succeed. (*Central Bank, N.A. v. First Interstate Bank, N.A.* (1994) 511 U.S. 164.) Mere furnishing of company to a person engaged in a crime does not render a companion an aider or abettor. (*United States v. Garguilo* (2d Cir. 1962) 310 F.2d 249.) In order for a defendant to be an aider and abettor he must know that the activity condemned by law is actually occurring and must intend to help the perpetrator. (*United States v. McDaniel* (9th Cir. 1976) 545 F.2d 642.) To be guilty of aiding and abetting, the defendant must willfully seek, by some action of his own, to make a criminal venture succeed. (*United States v. Ehrenberg* (E.D. Pa. 1973) 354 F. Supp. 460 *cert. denied* (1974) 94 S. Ct. 1612.)

The question, as posed, may presume that the local legislative body has acted in a manner that affirmatively supports marijuana dispensaries. As phrased by Senator Kuehl, the question to be answered by the Attorney General's Office assumes that a local legislative body has adopted an ordinance that "authorizes" medical marijuana facilities. What if a local public entity adopts an ordinance that explicitly indicates that it does *not* authorize, legalize, or permit any dispensary that is in violation of federal law regarding controlled substances? If the local public entity grants a permit, regulates, or imposes locational requirements on marijuana dispensaries with the announced understanding that it does not thereby allow any *illegal* activity and that dispensaries are required to comply with all applicable laws, including federal laws, then the public entity should be entitled to expect that all laws will be obeyed.

It would seem that a public entity is not intentionally acting to encourage or aid acts in violation of the CSA merely because it has adopted an ordinance which regulates dispensaries; even the issuance of a "permit," if it is expressly *not* allowing violations of federal law, cannot necessarily support a charge or conviction of aiding and abetting violation of the CSA. A public entity should be entitled to presume that dispensaries will obey all applicable laws and that lawful business will be conducted at dispensaries. For instance, dispensaries could very well *not* engage in actual medical marijuana distribution, but instead engage in education and awareness activities as to the medical effects of marijuana; the sale of other, legal products that aid in the suffering of

ailing patients; or even activities directed at effecting a change in the federal laws relating to regulation of marijuana as a Schedule I substance under the CSA.

These are examples of legitimate business activities, and First Amendment protected activities at that, in which dispensaries could engage relating to medical marijuana, but *not* apparently in violation of the CSA. Public entities should be entitled to presume that legitimate activities can and will be engaged in by dispensaries that are permitted and/or regulated by local regulations. In fact, it seems counterintuitive that local public entities within the state should be expected to be the watchdogs of federal law; in the area of controlled substances, at least, local public entities do not have an affirmative obligation to discern whether businesses are violating federal law.

The California Attorney General's Office will note that the State Board of Equalization ("BOE") has already done precisely what has been suggested in the preceding paragraph. In a special notice issued by the BOE this year, it has indicated that sellers of medical marijuana must obtain a seller's permit. (See http://www.boe.ca.gov/news/pdf/medseller2007.pdf (Special Notice: Important Information for Sellers of Medical Marijuana).) As the Special Notice explicitly indicates to medical marijuana facilities, "[h]aving a seller's permit does not mean you have authority to make unlawful sales. The permit only provides a way to remit any sales and use taxes due. The permit states, 'NOTICE TO PERMITTEE: You are required to obey all federal and state laws that regulate or control your business. This permit does not allow you to do otherwise.'"

The above being said, however, there is no guarantee that criminal charges would not actually be brought by the federal government or that persons so charged could not be successfully prosecuted. It does seem that arguments contrary to the above conclusions could be persuasive in convicting local legislators. By permitting and/or regulating marijuana dispensaries by local ordinance, some legitimacy and credibility may be granted by governmental issuance of permits or authorizing and allowing dispensaries to exist or locate within a jurisdiction.[4]

All of this discussion, then, simply demonstrates that individual board or council members can, indeed, be found criminally liable under federal law for the adoption of an ordinance authorizing and regulating marijuana dispensaries that promote the use of marijuana as medicine. The actual likelihood of prosecution, and its potential success, may depend on the particular facts of the regulation that is adopted.

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[4] Of course, the question arises as to how far any such liability be taken. Where can the line be drawn between any permit or regulation adopted specifically with respect to marijuana dispensaries and other permits or approvals routinely, and often *ministerially*, granted by local public entities, such as building permits or business licenses, which are discussed *infra*? If local public entities are held responsible for adopting an ordinance authorizing and/or regulating marijuana dispensaries, cannot local public entities also be subject to liability for providing general public services for the illegal distribution of "medical" marijuana? Could a local public entity that knew a dispensary was distributing "medical" marijuana in compliance with state law be criminally liable if it provided electricity, water, and trash services to that dispensary? How can such actions really be distinguished from the adoption of an ordinance that authorizes and/or regulates marijuana dispensaries?

B. *State Law*

Similarly, under California law, aside from the person who directly commits a criminal offense, no other person is guilty as a principal unless he aids and abets. (*People v. Dole* (1898) 122 Cal. 486; *People v. Stein* (1942) 55 Cal. App. 2d 417.) A person who innocently aids in the commission of the crime cannot be found guilty. (*People v. Fredoni* (1910) 12 Cal. App. 685.)

To authorize a conviction as an aider and abettor of crime, it must be shown not only that the person so charged aided and assisted in the commission of the offense, but also that he abetted the act— that is, that he criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act. (*People v. Terman* (1935) 4 Cal. App. 2d 345.) To "abet" another in commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of the offense. (*People v. Best* (1941) 43 Cal. App. 2d 100.) "Abet" implies knowledge of the wrongful purpose of the perpetrator of the crime. (*People v. Stein, supra.*)

To be guilty of an offense committed by another person, the accused must not only aid such perpetrator by assisting or supplementing his efforts, but must, with knowledge of the wrongful purpose of the perpetrator, abet by inciting or encouraging him. (*People v. Le Grant* (1946) 76 Cal. App. 2d 148, 172; *People v. Carlson* (1960) 177 Cal. App. 2d 201.)

The conclusion under state law aiding and abetting would be similar to the analysis above under federal law. Similar to federal law immunities available to local legislators, discussed above, state law immunities provide some protection for local legislators. Local legislators are certainly immune from civil liability relating to legislative acts; it is unclear, however, whether they would also be immune from criminal liability. (*Steiner v. Superior Court*, 50 Cal.App.4th 1771 (assuming, but finding no California authority relating to a "criminal" exception to absolute immunity for legislators under state law).)[5] Given the apparent state of the law, local legislators could only be certain that they would be immune from civil liability and could not be certain that

[5] Although the *Steiner* Court notes that "well-established federal law supports the exception," when federal case authority is applied in a state law context, there may be a different outcome. Federal authorities note that one purpose supporting criminal immunity as to federal legislators from federal prosecution is the separation of powers doctrine, which does not apply in the context of *federal* criminal prosecution of *local* legislators. However, if a state or county prosecutor brought criminal charges against a local legislator, the separation of powers doctrine may bar such prosecution. (Cal. Const., art. III, sec. 3.) As federal authorities note, bribery, or other criminal charges that do not depend upon evidence of, and cannot be said to further, any legislative acts, can still be prosecuted against legislators. (See *Bruce v. Riddle* (4th Cir. 1980) 631 F.2d 272, 279 ["Illegal acts such as bribery are obviously not in aid of legislative activity and legislators can claim no immunity for illegal acts."]; *United States v. Brewster*, 408 U.S. 501 [indictment for bribery not dependent upon how legislator debated, voted, or did anything in chamber or committee; prosecution need only show acceptance of money for promise to vote, not carrying through of vote by legislator]; *United States v. Swindall* (11th Cir. 1992) 971 F.2d

they would be at all immune from criminal liability under state law. However, there would not be any criminal violation if an ordinance adopted by a local public entity were in compliance with the CUA and the MMPA. An ordinance authorizing and regulating medical marijuana would not, by virtue solely of its subject matter, be a violation of state law; only if the ordinance itself permitted some activity inconsistent with state law relating to medical marijuana would there be a violation of state law that could subject local legislators to criminal liability under state law.

QUESTION

3. If the governing body of a city, city and county, or county approves an ordinance authorizing and regulating marijuana dispensaries to implement the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, and subsequently a particular dispensary is found to be violating state law regarding sales and trafficking of marijuana, could an elected official on the governing body be guilty of state criminal charges?

ANSWER

3. After adoption of an ordinance authorizing or regulating marijuana dispensaries, elected officials could not be found criminally liable under state law for the subsequent violation of state law by a particular dispensary.

ANALYSIS

Based on the state law provisions referenced above relating to aiding and abetting, it does not seem that a local public entity would be liable for any actions of a marijuana dispensary in violation of state law. Since an ordinance authorizing and/or regulating marijuana dispensaries would necessarily only be authorizing and/or regulating to the extent already *permitted* by state law, local elected officials could not be found to be aiding and abetting a *violation* of state law. In fact, the MMPA clearly contemplates local regulation of dispensaries. (Cal. Health & Safety Code sec. 11362.83 ("Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.").) Moreover, as discussed above, there may be legislative immunity applicable to the legislative acts of individual elected officials in adopting an ordinance, especially where it is consistent with state law regarding marijuana dispensaries that dispense crude marijuana as medicine.

1531, 1549 [evidence of legislative acts was essential element of proof and thus immunity applies].) Therefore, a criminal prosecution that relates *solely* to legislative acts cannot be maintained under the separation of powers rationale for legislative immunity.

QUESTION

4. Does approval of such an ordinance open the jurisdictions themselves to civil or criminal liability?

ANSWER

4. Approving an ordinance authorizing or regulating marijuana dispensaries may subject the jurisdictions to civil or criminal liability.

ANALYSIS

Under federal law, criminal liability is created solely by statute. (*Dowling v. United States* (1985) 473 U.S. 207, 213.) Although becoming more rare, municipalities have been, and still may be, criminally prosecuted for violations of federal law, where the federal law provides not just a penalty for imprisonment, but a penalty for monetary sanctions. (See Green, Stuart P., *The Criminal Prosecution of Local Governments*, 72 N.C. L. Rev. 1197 (1994) (discussion of history of municipal criminal prosecution).)

The CSA prohibits persons from engaging in certain acts, including the distribution and possession of Schedule I substances, of which marijuana is one. (21 U.S.C. sec. 841.) A person, for purposes of the CSA, includes "any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or other legal entity." (21 C.F.R. sec. 1300.01 (34). See also 21 C.F.R. sec. 1301.02 ("Any term used in this part shall have the definition set forth in section 102 of the Act (21 U.S.C. 802) or part 1300 of this chapter.").) By its very terms, then, the CSA may be violated by a local public entity. If the actions of a local public entity otherwise satisfy the requirements of aiding and abetting a violation of the CSA, as discussed above, then local public entities may, indeed, be subject to criminal prosecution for a violation of federal law.

Under either federal or state law, local public entities would not be subject to civil liability for the mere adoption of an ordinance, a legislative act. As discussed above, local legislators are absolutely immune from civil liability for legislative acts under both federal and state law. In addition, there is specific immunity under state law relating to any issuance or denial of permits.

QUESTION

5. Does the issuance of a business license to a marijuana dispensary involve any additional civil or criminal liability for a city or county and its elected governing body?

ANSWER

5. Local public entities will likely *not* be liable for the issuance of business licenses to marijuana dispensaries that plan to dispense crude marijuana as medicine.

ANALYSIS

Business licenses are imposed by cities within the State of California oftentimes solely for revenue purposes, but are permitted by state law to be imposed for revenue, regulatory, or for both revenue and regulatory purposes. (Cal. Gov. Code sec. 37101.) Assuming a business license ordinance is for revenue purposes only, it seems that a local public entity would not have any liability for the mere collection of a tax, whether on legal or illegal activities. However, any liability that would attach would be analyzed the same as discussed above. In the end, a local public entity could hardly be said to have aided and abetted the distribution or possession of marijuana in violation of the CSA by its mere collection of a generally applicable tax on all business conducted within the entity's jurisdiction.

OVERALL FINDINGS

All of the above further exemplifies the catch-22 in which local public entities are caught, in trying to reconcile the CUA and MMPA, on the one hand, and the CSA on the other. In light of the existence of the CUA and the MMPA, and the resulting fact that medical marijuana *is* being used by individuals in California, local public entities have a need and desire to regulate the location and operation of medical marijuana facilities within their jurisdiction.[6] [102]

However, because of the divergent views of the CSA and California law regarding whether there is any accepted "medical" use of marijuana, state and local legislators, as well as local public entities themselves, could be subject to criminal liability for the adoption of statutes or ordinances furthering the possession, cultivation, distribution, transportation (and other act prohibited under the CSA) as to marijuana. Whether federal prosecutors would pursue federal criminal charges against state and/or local legislators or local public entities remains to be seen. But, based on past practices of locally based U.S. Attorneys who have required seizures of large amounts of marijuana before federal filings have been initiated, this can probably be considered unlikely.

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[6] Several compilations of research regarding the impacts of marijuana dispensaries have been prepared by the California Police Chiefs Association and highlight some of the practical issues facing local public entities in regulating these facilities. Links provided are as follows: "Riverside County Office of the District Attorney," [White Paper, Medical Marijuana: History and Current Complications, September 2006];"Recent Information Regarding Marijuana and Dispensaries [El Cerrito Police Department Memorandum, dated January 12, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Marijuana Memorandum" [El Cerrito Police Department Memorandum, dated April 18, 2007, from Commander M. Regan, to Scott C. Kirkland, Chief of Police]; "Law Enforcement Concerns to Medical Marijuana Dispensaries" [Impacts of Medical Marijuana Dispensaries on communities between 75,000 and 100,000 population: Survey and council agenda report, City of Livermore].

CONCLUSIONS

In light of the United States Supreme Court's decision and reasoning in *Gonzales v. Raich*, the United States Supremacy Clause renders California's Compassionate Use Act of 1996 and Medical Marijuana Program Act of 2004 suspect. No state has the power to grant its citizens the right to violate federal law. People have been, and continue to be, federally prosecuted for marijuana crimes. The authors of this White Paper conclude that medical marijuana is not legal under federal law, despite the current California scheme, and wait for the United States Supreme Court to ultimately rule on this issue.

Furthermore, storefront marijuana businesses are prey for criminals and create easily identifiable victims. The people growing marijuana are employing illegal means to protect their valuable cash crops. Many distributing marijuana are hardened criminals.[103] Several are members of stepped criminal street gangs and recognized organized crime syndicates, while others distributing marijuana to the businesses are perfect targets for thieves and robbers. They are being assaulted, robbed, and murdered. Those buying and using medical marijuana are also being victimized. Additionally, illegal so-called "medical marijuana dispensaries" have the potential for creating liability issues for counties and cities. All marijuana dispensaries should generally be considered illegal and should not be permitted to exist and engage in business within a county's or city's borders. Their presence poses a clear violation of federal and state law; they invite more crime; and they compromise the health and welfare of law-abiding citizens.

ENDNOTES

[1] U.S. Const.. art. VI, cl. 2.
[2] U.S. Const., art. I, sec. 8, cl. 3.
[3] *Gonzales v. Raich* (2005) 125 S.Ct. 2195 at p. 2204.
[4] *Gonzales v. Raich*. See also *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 121 S.Ct. 1711, 1718.
[5] *Gonzales v. Raich* (2005) 125 S.Ct. 2195; see also *United States v. Oakland Cannabis Buyers' Cooperative* 121 S.Ct. 1711.
[6] Josh Meyer & Scott Glover, "U.S. won't prosecute medical pot sales," *Los Angeles Times*, 19 March 2009, available at http://www.latimes.com/news/local/la-me-medpot19-2009mar19,0,4987571.story
[7] See *People v. Mower* (2002) 28 Cal.4th 457, 463.
[8] Health and Safety Code section 11362.5(b) (1) (A). All references hereafter to the Health and Safety Code are by section number only.
[9] H&S Code sec. 11362.5(a).
[10] H&S Code sec. 11362.7 *et. seq.*
[11] H&S Code sec. 11362.7.
[12] H&S Code secs. 11362.71–11362.76.
[13] H&S Code sec. 11362.77.
[14] H&S Code secs. 11362.765 and 11362.775; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 at p. 786.
[15] H&S Code sec. 11362.77; whether or not this section violates the California Constitution is currently under review by the California Supreme Court. See *People v. Kelly* (2008) 82 Cal.Rptr.3d 167 and *People v. Phomphakdy* (2008) 85 Cal.Rptr. 3d 693.
[16] H&S Code secs. 11357, 11358, 11359, 11360, 11366, 11366.5, and 11570.
[17] H&S Code sec. 11362.7(h) gives a more comprehensive list – AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, and any other chronic or persistent medical symptom that either substantially limits the ability of a person to conduct one or more life activities (as defined in the ADA) or may cause serious harm to the patient's safety or physical or mental health if not alleviated.
[18] *People v.* Mower (2002) 28 Cal.4th 457 at p. 476.
[19] *Id.* Emphasis added.
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[24] H&S Code sec. 11362.765(c); see, e.g., *People v.Urziceanu*, 132 Cal.App.4th 747 at p. 764.
[25] *Gonzales v. Raich, supra,* 125 S.Ct. at page 2195.
[26] *People v. Urziceanu* (2005) 132 Cal.App.4th 747; see also H&S Code sec. 11362.765.
[27] Israel Packel, 4-5. Italics added.
[28] H&S Code sec. 11362.7(d)(1).
[29] See, e.g., McClure, "Fuming Over Pot Clubs," *California Lawyer Magazine*, June 2006.
[30] H&S Code secs. 11362.5(e) and 11362.7(d)(1), (2),(3), and (e); see also *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1395.
[31] *People v. Mower,* 28 Cal.4th at 476. Emphasis added.
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EXHIBIT C

COLORADO'S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY:

A Practical Guide for Law Enforcement

POLICE FOUNDATION

COLORADO ASSOCIATION OF CHIEFS OF POLICE

COLORADO'S LEGALIZATION OF MARIJUANA AND THE IMPACT ON PUBLIC SAFETY:

A Practical Guide for Law Enforcement

This report was prepared by the Police Foundation and the Colorado Association of Chiefs of Police.

The opinions and findings in this document are those of the authors and do not necessarily represent the official position or policies of the Colorado Association of Chiefs of Police, the law enforcement agencies named in the report, or the State of Colorado. Any products, services or companies mentioned in this report are used for illustrative purposes only and are not endorsed by the Police Foundation or the Colorado Association of Chiefs of Police.

Websites and sources referenced in this publication provided useful information at the time of this writing. The authors do not necessarily endorse the information of the sponsoring organizations or other materials from these sources.

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Letter From President Jim Bueermann, Police Foundation

Dear Colleagues,

This past spring, I was contacted by Chief Marc Vasquez of the Erie Police Department in Colorado to discuss the issues and challenges that Colorado law enforcement was experiencing as the state underwent the task of implementing the recent laws legalizing marijuana. In January 2014, after 14 years with legal medical marijuana use, Colorado became the first state to allow those over the age of 21 to grow and use recreational marijuana. State and law enforcement officials feared that this would lead to a huge increase in criminal behavior. Others predicted that the elimination of arrests for marijuana would bring a huge savings for police and the justice system.

To date, these predictions have not been borne out. It is early to tell what effect legalized marijuana will have on crime and public safety overall. Nonetheless, Colorado law enforcement officials have observed some concerning trends in drug use, most notably with youth and young adults. Law enforcement officials also say they are spending increased amounts of time and funds on the challenges of enforcing the new laws surrounding legal marijuana.

Both nationally and in Colorado, there is almost no significant research or data collection to determine the impact of legalized marijuana on public safety. We at the Police Foundation believe Colorado's experience and subsequent knowledge as they implement legalized marijuana will be beneficial to share with law enforcement officials and policy makers across the nation. Understanding that there are lessons to be learned and shared with the larger law enforcement community, the Police Foundation partnered with the Colorado Association of Chiefs of Police in publishing this guide - "Colorado's Legalization of Marijuana and the Impact on Public Safety: A Practical Guide for Law Enforcement."

Eighteen years ago, California became the first state to approve legalized medical marijuana. Since that time 22 other states have approved medical marijuana measures – nearly half of the nation. Four states and the District of Columbia have approved the legalization of recreational marijuana use. We are moving rapidly to a new era in how we manage marijuana sales and the larger industry growing underfoot, and we hope this guidebook can illustrate the challenges for local law enforcement and help those about to engage in this type of policy to learn from Colorado. Law enforcement is charged with ensuring public safety while enforcing the new regulations, which includes both the limitations and definitions under a new law. This guide is not a discussion on whether marijuana should be legalized, but rather a review of the challenges presented to Colorado law enforcement in the wake of legalized marijuana.

Colorado law enforcement has been tasked to balance critical issues such as opposing state and federal marijuana laws; illegal trafficking of Colorado marijuana across state lines; ensuring public safety of growing operations and extraction businesses in residential areas; to name a few.

Resolving the issues resulting from legalized marijuana may benefit from a community policing approach – including partners from the medical, health, criminal justice, city and county government, and other marijuana stakeholders. The collective wisdom of these partnerships can potentially provide a consensus on policies and practices for ensuring safety.

The Police Foundation intends that this guide will assist not only Colorado police and sheriffs, but will contribute to the growing dialogue as law enforcement officials, state and local policy makers across the nation consider legalizing marijuana in their states and localities.

Sincerely,

Jim Bueermann
President

Letter From Chief Marc Vasquez, Erie Police Department

Dear Colleagues,

Colorado's journey down the path of legalized marijuana took many of us in law enforcement by surprise – we simply did not think that it would ever happen here. Our understanding of the complex issues around marijuana legalization changes almost weekly as we continue to advance solutions for public safety under the Colorado constitution. It does not matter if we are for or against marijuana legalization. As law enforcement professionals, we must be prepared to tackle the implementation of public policies as we are faced with marijuana legalization nationally.

Legalized marijuana brings new challenges. Increased use of marijuana by both adults and youth will occur in communities where marijuana is legalized. With increased use, we can expect to see more driving under the influence of marijuana cases and an increased number of accidental overdoses from highly potent THC concentrates. We anticipate increased diversion of marijuana to juveniles and states that currently prohibit marijuana.

One of our greatest challenges is educating our communities, policy-makers and elected officials as to the risks of adding marijuana to already legal substances, such as alcohol and tobacco. Our ability to collect and analyze data regarding the impact of marijuana legalization remains a challenge. Another challenge is the conflict between state and federal law. As peace officers, we have pledged to uphold both the Colorado and United State's constitutions, which conflict regarding marijuana laws.

Like you, I am a strong community-policing advocate. Using the community policing model, I believe that we need to partner and problem-solve with our communities around the issues of marijuana legalization. Working with stakeholders who have an interest in marijuana legalization, either pro or con, provides the best opportunity to develop public policies that will be fair and effective for our communities. What works in Colorado may not work in your community so solutions to this complex issue must be crafted for your community.

This technical assistance guide will be updated as our understanding of the complex issues around marijuana legalization continues to evolve. For any police chief or sheriff who may be facing marijuana legalization in your state, I hope this guide provides at least a starting point for you. Feel free to contact the Colorado Association of Chiefs of Police (http://www.colochiefs.org) or the Police Foundation in Washington D.C. (http://www.policefoundation.org) if we can be of any assistance. It is an honor to be involved in the development of this technical assistance guide on marijuana legalization published by the Police Foundation.

Sincerely,

Marc Vasquez, Chief
Erie Police Department
Erie, Colorado

ACKNOWLEDGEMENTS

This report was made possible by the support and assistance of the Colorado Association of Chiefs of Police and the president, Chief John Jackson of the Greenwood Village Police Department. We are indebted to Chief Marc Vasquez of the Erie Police Department, who is the Marijuana Issues Committee Chair for the Colorado Association of Chiefs of Police and formerly the Chief of Investigations for the Medical Marijuana Enforcement Division for the Colorado Department of Revenue. Chief Vasquez's contributions and leadership were invaluable.

The Police Foundation would like to express gratitude for the willingness of those who participated in the Colorado law enforcement focus groups and provided incredible insight into the on-the-ground challenges and trends for police and sheriffs managing the legalization issues.

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ABOUT THE POLICE FOUNDATION

The mission of the Police Foundation is "Advancing Policing Through Innovation & Science." The Foundation is a national non-profit bipartisan organization that, consistent with its commitment to improve policing, has been on the cutting edge of police innovation for over 40 years. The professional staff at the Police Foundation works closely with law enforcement, judges, prosecutors, defense attorneys, and community-based organizations to develop research, comprehensive reports, policy briefs, model policies, and innovative programs that will support strong community-police partnerships. The Police Foundation conducts innovative research and provides on-the-ground technical assistance to police and sheriffs, as well as engaging practitioners from multiple systems (corrections, mental health, housing, etc.), and local, state, and federal jurisdictions on topics related to police research, policy, and practice. The Police Foundation also manages the National Law Enforcement Officer Near Miss Reporting System found at www.LEOnearmiss.org, and a site dedicated to learning from critical incidents found at www.incidentreviews.org

ABOUT THE COLORADO ASSOCIATION OF CHIEFS OF POLICE

The Colorado Association of Chiefs of Police (CACP) is a professional organization committed to excellence in delivering quality service to our membership, the law enforcement community, and the citizens of Colorado. Through our leadership, we will provide education and training and promote the highest ethical standards. We are personally and professionally dedicated to preserving basic family values, which are essential for achieving a high quality of life.

INTRODUCTION

When voters made Colorado the first state in the nation to legalize recreational marijuana in 2012, law enforcement was presented with a new challenge: understanding and enforcing new laws that aim to regulate marijuana use, rather than enforcing laws that deem marijuana use to be illegal. Supporters of the new law claimed this would make things easier for police and save at least $12 million[1] in taxpayer dollars on reduced law enforcement costs. Agencies across the state argue that has not been the case[2]. The legislation to enact the new laws has been vague, and consequently difficult to enforce. Unforeseen problems have arisen, ranging from how to determine when a driver is legally under the influence of marijuana to how to deal with legal drug refining operations in residential neighborhoods. Some Colorado law enforcement agencies have at least one full-time officer dedicated to marijuana regulation and enforcement, but most agencies do not have this option and are struggling to deal with the additional workload brought by legalized marijuana. Many law enforcement leaders are frustrated by the conflict between enforcing the new law and upholding federal statutes that continue to view marijuana use as illegal. The neighboring states of Nebraska and Oklahoma have filed suit in the U.S. Supreme Court[3] to overturn Colorado's Constitutional amendment legalizing recreational marijuana, claiming that they have been flooded with illegal marijuana from Colorado. Additionally, school resource officers and other law enforcement leaders interviewed by the Police Foundation said they worry that illicit drug use by young people is on the rise because of easy access to marijuana through a continuing black market and a "gray market" of semi-legal marijuana sold through unauthorized channels.

The Police Foundation and Colorado Association of Chiefs of Police have developed this guide to illustrate the challenges for law enforcement in Colorado. This guide will introduce some of the solutions that have been put into effect and outline problems that still need to be addressed.

The Colorado Association of Chiefs of Police and almost every law enforcement leader in the state opposed the passage of Amendment 64, which legalized the recreational use of marijuana. Many chiefs still express strong opposition and some want to work to repeal the law because they believe it will lead to more crime and possible increased drug addiction, especially for the youth population. However, this guide is not intended to address the complex political elements of marijuana legalization. It is designed to summarize the numerous challenges faced by law enforcement when enforcing the laws surrounding legalization, to document solutions that have been proposed and put into effect, and outline problems that still need to be addressed.

Colorado is only a year into the legalization of recreational marijuana and Colorado law enforcement agencies have already faced many challenges in enforcement and management of the legalization process, which lawmakers did not anticipate. Law enforcement will continue to address circumstances as they arise, and the Police Foundation and the Colorado Association of Chiefs of Police will continue to partner in relaying information on policies, procedures, and best practices in addressing crime and disorder related to legalized marijuana to law enforcement agencies nationwide.

METHODOLOGY

The purpose of this review was to identify Colorado's public safety challenges, solutions, and unresolved issues with legalized medical marijuana and recreational marijuana. Very little hard data has been gathered on the effects of recreational marijuana sales in Colorado. There has been little rigorous, evidence-based research to draw any conclusions regarding the impact of legalized marijuana on law enforcement. Information gathered from interviews and focus groups with law enforcement officers and subject matter experts as well as official documents and news stories are presented in this guide to help all law enforcement who are facing the challenges of legalized marijuana.

PARTICIPANTS

The Police Foundation convened two focus groups to obtain the thoughts and opinions of Colorado law enforcement executives, detectives, and officers on enforcing the marijuana laws. Participants were selected based on their experience and knowledge of marijuana legalization, as well as agency location and size, to get a broad representation.

One focus group had nine participants, with six police chiefs, one sheriff, and three officers representing large, mid-size, and small agencies, along the Front Range and in the Rocky Mountains. The chiefs of police and sheriff have been in policing from 23-40 years and the officers have been in policing 15 years or more.

The second focus group session included six officers, detectives, and marijuana regulatory officers. These officers and detectives serve in the capacity of monitoring marijuana regulations in their community and investigating violations of the marijuana laws. Their tour of duty was anywhere from approximately five to 25 years. These officers represented Front Range agencies from large, mid-size, and small agencies, as well as the mountain towns and ski resorts.

In addition to the focus groups, the Police Foundation conducted 23 individual interviews with Colorado law enforcement leaders and officers. A snowball sample was used to obtain names of subject matter experts.

Whenever possible, the focus groups and interviews have been supplemented by official documents illustrating legislation, court decisions, and law enforcement studies. Hundreds of media articles were surveyed to gain background on the issue, and some are used to illustrate points or historical background.

PROCEDURES

Focus group participants were asked a series of questions on Amendment 20 (legalizing medical marijuana) and Amendment 64 (legalizing recreational marijuana) to determine how they worked with the community and municipal/county government to identify and address public safety concerns regarding: (1) crime and disorder, (2) youth related issues, (3) successful approaches to addressing crime or community issues, and (4) unanticipated consequences challenging public safety resources, strategies, policies, or procedures. Interviews were recorded whenever possible with the permission of the interviewee and then transcribed.

I. OVERVIEW OF COLORADO'S MARIJUANA LEGISLATION

The passage of Amendment 20 in November 2000 made Colorado the fifth state to legalize the medical use of marijuana. Twelve years later the state became one of the first two (along with Washington) to legalize recreational marijuana when Amendment 64 passed in November 2012. Because Colorado's law took effect immediately and Washington's was delayed until supporting legislation was passed, Colorado is considered the first state to have legal recreational marijuana.

From 2001 to 2008, there were a total of 4,819 approved patient licenses. In 2009, there were 41,039 approved medical marijuana registrations from CDPHE.

Source: CDPHE

The number of marijuana dispensaries went from zero in 2008 to 900 by mid-2010.

Source: Department of Revenue, Marijuana Enforcement Division

The amendments conflict with the federal Controlled Substance Act of 1970, which classifies marijuana as a Schedule I controlled substance and states that it is illegal to sell, use or transport marijuana across state lines. Federal officials eventually granted some leeway to the states that have legalized marijuana, but the conflicts between state and federal law remain a significant challenge for law enforcement.

Amendment 20, *The Medical Use of Marijuana Act*, passed in 2000 with 53.3 percent of the voters approving the use of marijuana for debilitating medical conditions.

Under the act, individuals requesting medical marijuana for conditions such as cancer, glaucoma, cachexia, severe nausea, seizures, multiple sclerosis and chronic pain associated with a debilitating or medical condition, may register with the Colorado Department of Public Health and Environment (CDPHE) and obtain a registered medical marijuana patient card. Patients may also obtain a physician's evaluation and official recommendation for the number of medical marijuana plants they are allowed to grow. The law allows individual patients the right to possess two ounces of marijuana and six marijuana plants – and they can have more upon a physician's recommendation. Physicians can recommend any amount they deem necessary for the patient's anticipated treatment. Patients can grow the marijuana themselves or designate a caregiver to cultivate the plants and distribute the yield. A caregiver could have up to five patients and theoretically cultivate plants for each of them; the law also requires the caregiver to register with the CDPHE.

The implementation of Amendment 20 was uneventful for the first five years; however, three significant events occurred between 2005 and 2010, which changed the medical marijuana industry. (See Appendix 1 for a detailed history of Colorado's marijuana laws).

- 2005: Denver voters approved the decriminalization of possession of small amounts of marijuana for recreational use. Voters in the town of Breckenridge approved a similar measure in 2009.

- 2009: Denver District Court Judge Naves threw out CDPHE's definition for caregivers and instructed CDPHE to hold an open meeting and revise the caregiver language.[4] The department was unable to set a new definition, and so there was no regulatory language on how many medical marijuana patients a caregiver could supply until the General Assembly created new laws the following year.

- 2009: The U.S. Department of Justice released the "Ogden Memo," providing guidance and clarification to the U.S. Attorneys in states with enacted medical marijuana laws. Deputy Attorney General David W. Ogden stated, among other things, the federal government would not prosecute anyone operating in clear and unambiguous compliance with the states' marijuana laws.[5]

The Growth of Medical Marijuana Centers

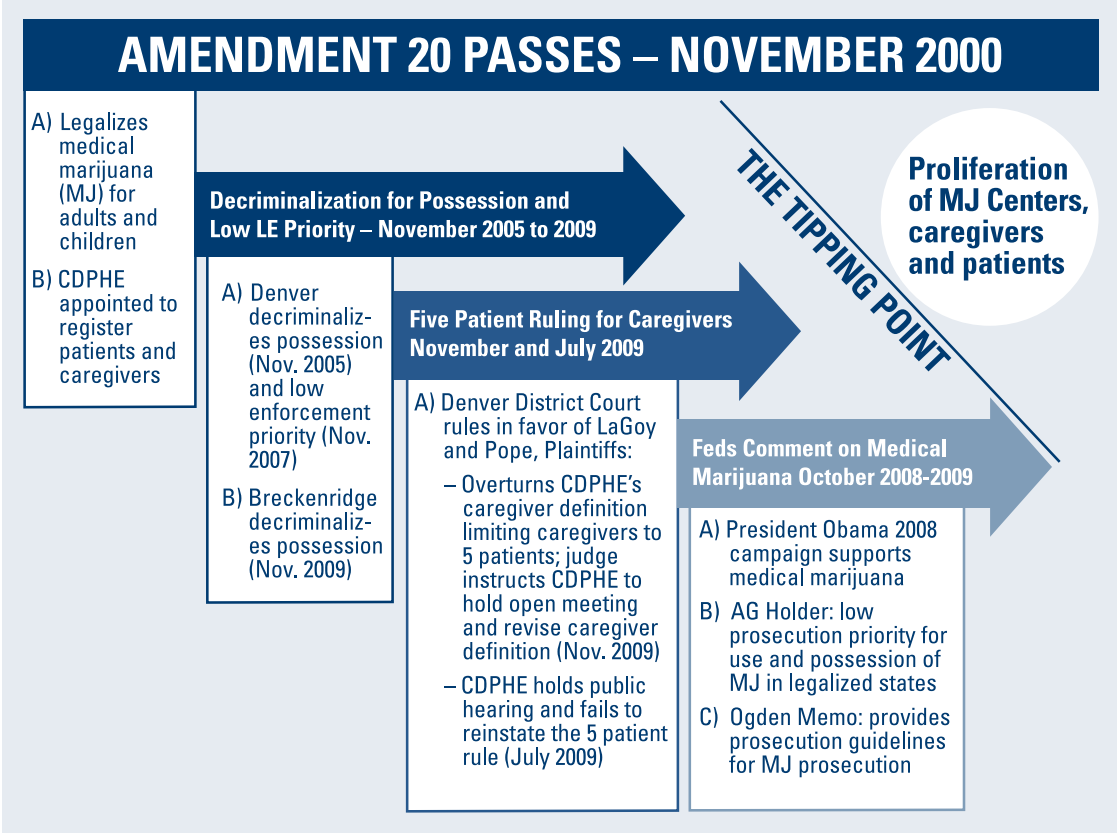
When CDPHE's caregiver definition was overturned in court in 2009, there was no limit on the number of patients caregivers could serve. At the same time, there was a boom in the number of medical marijuana patients registering with CDPHE.

Some medical marijuana proponents decided to test the boundaries of the caregiver model after the definition was thrown out. This resulted in a proliferation of medical marijuana centers throughout the state. These centers grew large quantities of marijuana plants because they could claim to be the "caregivers" for any registered medical marijuana patient.

This was one of the first major unanticipated problems for law enforcement, according to members of the Police Foundation focus groups. Since there were no statutes or regulations, the medical marijuana centers had no restrictions on the number of patients to whom they could provide marijuana. This also led to patients "shopping" their doctor's recommendation to as many medical marijuana centers as they wanted and as often as they wanted, focus group members said. As long as the patient had a "red card" and an authorized doctor's recommendation, then that patient could go to countless medical marijuana centers as long as the patient only carried two ounces or less out of each one.

Because so many medical marijuana centers opened so quickly, state and local officials found it difficult to regulate them. The General Assembly did not craft regulations until 2010 to govern licensing fees, inventory tracking requirements, production of marijuana infused products, packaging and labeling requirements, and disposal of waste water from the processing of medical marijuana.

Figure 1: Tipping Point for Opening Medical Marijuana Centers



Source: Adapted from Chief Marc Vasquez

From June 1, 2001, to December 31, 2008, a total of 5,993 patients applied for a medical marijuana registration card (also known as a red card due to its color). Of those applicants, 4,819 were approved. After the opening of the medical marijuana centers, by December 31, 2009, there were 43,769 applications of which 41,039 were approved. This is an increase of 751.61% in approved registrations in just one year's time. As of December 1, 2014, there were 116,287 medical marijuana patients registered with the state.

The Colorado legislature responded to these developments by passing legislation in the 2010 and 2011 sessions that created the Colorado Medical Marijuana Code. The primary bills creating the Code were HB 10-1284, SB 10-109 and HB 11-1043. They legalized medical marijuana centers and created a range of marijuana business-related regulations. Other parts of the code limited caregivers to provide for just five patients (although more could be approved under a waiver), and created a new regulatory body: the Medical Marijuana Enforcement Division under the state Department of Revenue. In addition to marijuana plants, the code allowed for "infused products" to be made and sold to patients.

The code requires centers to cultivate at least 70 percent of the marijuana they sell. The law created a "seed-to-sale" inventory tracking system which tracks all marijuana plants from cultivation to sale to the customer. The legislation allows local jurisdictions to set their own rules on whether to allow marijuana businesses to operate in their municipality or county, hours of operation and other rules – as long as the rules were stricter than state law. Of the state's 64 counties, 22 agreed to allow new marijuana businesses in their jurisdictions, while 37 banned them outright. Others grandfathered in existing operators, and still others set further limits on the businesses.

The update to the code that passed in 2011 - HB 11-1043 - set stricter requirements on doctors providing recommendations for medical marijuana and provided for licensing of businesses manufacturing infused products.

In 2012 with the passage of Amendment 64, Colorado voters approved the recreational use of marijuana. The new law allows anyone 21 years of age or older to possess one ounce of marijuana or to grow six plants for personal use. It is illegal to provide recreational marijuana to anyone under the age of 21. Amendment 64 prohibits the consumption of marijuana in public or open places and defines driving under the influence. Regulations were also established on infused products – edibles that include marijuana oil – that could now be sold for recreational use. The amendment provided provisions for local governing bodies (i.e., City Council or County Commission) to determine whether to permit recreational marijuana stores, marijuana infused product businesses, or cultivations in their area, similar to provisions for medical marijuana providers. If approved locally, medical marijuana centers were allowed to sell recreational quantities. The amendment requires, among other things, operators of marijuana cultivation and sales facilities to undergo a criminal background check. Anyone with a felony conviction is barred from operating a cultivation and sales facility or working in the industry.

Both medical marijuana and recreational marijuana is subject to the state's 2.9 percent sales tax, and recreational sales are also subject to a 10 percent excise tax. Local taxes may be added as well – in Denver, recreational marijuana is subject to a total 21.12 percent tax.

The Colorado legislature passed a series of bills (SB 13-283 and HB 13-1317) to implement the recreational marijuana provisions of Amendment 64. They limited non-Colorado residents to purchasing only one quarter of an ounce of marijuana after neighboring states expressed fears that marijuana "tourists" would transport large quantities home to sell illegally.

This history of overlapping medical and recreational marijuana laws has left law enforcement in Colorado with the challenge of both interpreting and enforcing the laws.

The Four Models for Regulating Medical and Recreational Marijuana

As a result of the passage of Amendments 20 and 64, four types of marijuana regulation and oversight models emerged – caregiver/patient, medical commercial, recreational home-grown and recreational commercial (see Figure 2). Having different models and regulatory agencies providing oversight has created challenges. The first model began with the passage of Amendment 20: the caregiver/patient model for medical marijuana.

With the proliferation of medical marijuana centers the second model, medical commercial, was established for licensing and regulating the medical marijuana industry. When Amendment 64 was passed, the recreational models were established. The Marijuana Enforcement Division regulates the Medical and Recreational Commercial models, and systems are in place for monitoring the commercial industry.

The regulation by local law enforcement of the caregiver/patient and the recreational home-grown models is more challenging.

Local law enforcement agencies are not authorized to perform home checks. They are bound by the law and cannot investigate a home grow unless a complaint has been filed. Even then, the officer must have probable cause to believe a crime is being committed by residents of the home or the resident would have to consent to allow the officers into the home. Thus, officers could conduct "knock & talks" at a caregiver location, but they would need to establish probable cause to execute a criminal search if they believe crimes are being committed. Some municipalities are enacting ordinances that prohibit noxious odors and the number of plants allowed to grow, and local law enforcement can use those ordinances to address neighborhood complaints.[6]

Figure 2 : Four Models Created through Amendments 20 and 64

Medical Commercial	Recreational Commercial
– Licensing for Businesses, Owners and Employees – Licensed by Department of Revenue, Marijuana Enforcement Division – Regulatory authority: Marijuana Enforcement Division	– Licensing for Businesses, Owners and Employees – Licensed by Department of Revenue, Marijuana Enforcement Division – Regulatory authority: Marijuana Enforcement Division
Caregiver/Patient	**Recreational Home Grows**
– Caregivers who can grow for up to 5 patients and themselves – Routinely see large grows – Patients are licensed by Colorado Department of Public Health and Environment – Caregiver Regulatory authority: Colorado Department of Public Health and Environment and local law enforcement	– Anyone 21 years of age or older can grow up to 6 plants. Law enforcement is seeing "Co-op" cultivations where a number of adults over 21 grow their marijuana at one location. This scenario is challenging for law enforcement because officers are uncertain which area of Amendment 20 or 64 may apply to the cultivation. – No licensing required – Regulatory authority: local law enforcement

Source: Adapted from Chief Marc Vasquez[7]

II. MEASURING LEGALIZED MARIJUANA'S IMPACT ON INVESTIGATIONS, CRIME, AND DISORDER

The legalization of marijuana in Colorado has created numerous challenges for law enforcement in conducting investigations, establishing probable cause, determining search and seizure procedures, and addressing public safety concerns with home growing operations.

In order to best assess the impact that the legalization of marijuana has had on crime, data must be gathered. Colorado authorities did not establish a data collection system when they began addressing the enforcement of the new laws; thus, law enforcement leaders who participated in the Police Foundation focus groups have urged that departments in other states facing laws on legalization move quickly to establish data collection systems and processes in preparation for the new challenges they will face.

Law enforcement leaders in focus groups convened by the Police Foundation warned that until there is a statewide data collection system, it will not be possible to fully understand the impact of legalized marijuana and related crime in the state of Colorado; however, they believe crime is increasing. Efforts are currently underway at the Colorado Department of Criminal Justice to develop statewide data collection systems. Given the time needed to create a statewide data system, it may be years before Colorado law enforcement can fully analyze the impacts of legalized marijuana.

"The absence and lack of data is absolutely a killer to demonstrate whether there is going to be adverse consequences of marijuana on your community or not. So what every law enforcement agency in the country should do right now, today, is start collecting data, not just on marijuana but on all controlled substances to establish a baseline. Colorado has missed their opportunity to collect baseline data, but other states could be establishing their baselines now."

– Sgt. Jim Gerhardt

In the meantime, local law enforcement and other related regulatory agencies and service providers are collecting data at the local level to understand the impact of marijuana-related crime. Collecting and analyzing this data is a challenge for smaller agencies including the majority of mountain towns, which are impacted by high volumes of out-of-state visitors.

Colorado law enforcement leaders in the Police Foundation focus groups have urged that departments in other states facing laws on legalization move quickly to establish data collection regarding the new challenges they face.

The Denver Police Department (DPD) has been one of the most active agencies in collecting data since legalization. Examining Denver's data provides some insight into the complexity of marijuana data collection at the local level.

Figure 3: Denver and State Comparisons for Marijuana Medical and Retail stores, Marijuana Cultivations, Marijuana Infused Product Producers and THC Inspection Laboratories

Denver Licensed Medical	Statewide Licensed Medical	Denver Licensed Retail	Statewide Licensed Retail
Centers = 198	Centers = 501	Stores = 126	Stores = 306
Marijuana Infused Product-Making Facilities = 78	Marijuana Infused Product-Making Facilities = 158	Marijuana Infused Product-Making Facilities = 44	Marijuana Infused Product-Making Facilities = 92
Cultivations = 376	Cultivations = 739	Cultivations = 190	Cultivations = 375
		Labs Checking for THC Levels = 9	Labs Checking for THC Levels = 15

Source: City of Denver data from Denver (CO) Police Department; state data from State of Colorado, Department of Revenue.

The Denver Police Department collects marijuana crime data specifically for industry-related crimes (defined as offenses directly related to licensed marijuana facilities) and non-industry crimes (defined as marijuana taken during the commission of a crime that did not involve a licensed marijuana facility). Data from 2012 through September 2014 shows burglary as the most prevalent industry-related crime. Burglaries at licensed marijuana facilities are much higher than other retail outlets like liquor stores. Burglaries occurred at 13 percent of Denver's licensed marijuana facilities in 2012 and 2013, compared with just 2 percent of liquor stores, according to Denver Police Department crime analyst, D. Kayser.

KEY ISSUES

Marijuana-Industry Related Homelessness Brings Challenges for Law Enforcement, Social Agencies

Denver officials say they are facing one unexpected result of legalization – a significant influx of homeless adults and juveniles are coming to Denver due to the availability of marijuana.[8] Although homelessness has been a persistent problem in Denver, police have seen an increase in the number of 18 to 26 year olds seeking homeless shelters because

they are hoping to find work in the cannabis industry. However, many have felony backgrounds and are ineligible to obtain work in the limited jobs in the industry. The St. Francis Center, a daytime homeless shelter, reported that "marijuana is the second most frequent volunteered reason for being in Colorado, after looking for work."[9]

http://www.click2houston.com/news/pot-draws-homeless-texans-to-colorado/28186888

The issue of homelessness has spread to suburban neighborhoods because of the location of growing operations, police said. The Golden City Council voted in June 2014[10] to ban recreational marijuana sales and restricted medical marijuana operations to manufacturing areas.[11] The council voted to only allow indoor marijuana cultivation. Any cultivation operation that attracts a high volume of foot or vehicular traffic can be shut down.

Marijuana businesses are keeping too much cash on hand because of federal banking restrictions, creating targets for burglaries and robberies

The U.S. Department of Justice and the U.S. Treasury Department's Financial Crimes Enforcement Network have issued guidelines[12] allowing banks to work with marijuana businesses that are in compliance with new state legalization laws. Even with the new Treasury guidelines, bank officials continue to be reluctant to do business with growers as they fear that they will still be subject to investigation[13] for accepting cash that drug-sniffing dogs can target as smelling of marijuana, according to news reports. Given that marijuana remains a Schedule I controlled substance under federal law, banks fear they could be prosecuted under money laundering laws for accepting funds from legalized businesses. To respond to the business need for financing, Colorado state regulators have approved the development of a credit union[14] to serve the industry, according to media reports. Nonetheless, most of the marijuana businesses remain cash-only, which will increase public safety risks and crime, Police Foundation focus group members said.

The dichotomy of federal and state law has led companies to turn to innovative strategies to resolve the cash problem. Entrepreneurs have developed armored car services for marijuana businesses[15] in which they collect the money, remove marijuana residue from the cash, and then transport the funds to the banks for deposit. Some law enforcement leaders believe this may be vulnerable to money laundering operations, while others say it is good policy.

This has resulted in many business owners choosing to operate solely using cash. Focus group members said that Colorado law enforcement officials have observed that criminals

are targeting centers, knowing they may have large sums of cash. According to focus group members, even couriers transporting marijuana from one location to another (e.g., transporting marijuana to an edible-infused business) are at risk and have been robbed.

The Armored Trucks Guarding Marijuana's Cash Flow in California
https://www.youtube.com/watch?v=2J41ZyYYFiI&feature=youtu.be>

A cash-only business also poses a challenge on the investigations side of enforcement. Criminal investigations can be hampered when there is no paper trail to determine cash flow. An all-cash business can potentially be used for money laundering activities, and it makes it more difficult to track the gray and black-market sales.

POINT FOR CONSIDERATION

- ***Law enforcement must develop policy, training and practices that take into account conflicting federal and state laws in relation to marijuana legalization in Colorado.***

  Marijuana remains a Schedule I controlled substance under federal law. Law enforcement officials at all levels should review and follow the rules laid out in the memorandum issued by Attorney General Holder in April 2013 entitled "Guidance Regarding Marijuana Enforcement"[16] to ensure that the federal guidelines are taken into account by local law enforcement.

III. IMPACT OF LEGALIZATION OF MARIJUANA ON LAW ENFORCEMENT PRACTICES

The laws surrounding commercial, recreational, and medical marijuana have established stringent reporting requirements, but medical marijuana caregivers were "grandfathered" under much less strict rules. The lack of clarity in the laws affecting medical and recreational marijuana has created significant challenges for Colorado law enforcement to investigate potential abuses and build a case for illegal marijuana growing operations.

According to HB 11-1043, a "primary caregiver" cultivating for medical marijuana patients must register the location of the cultivation operation with the Marijuana Enforcement Division and provide the registry ID for each patient. However, the law does not set a punishment for the caregiver who does not register. In addition, police cannot access patient information because of privacy laws, and so they cannot ascertain whether the "caregivers" are growing the amount specified in a doctor's recommendation or whether the caregiver is indeed still the caregiver for a given patient. Amendment 20 – which made medical marijuana legal in the state - mandates that patients must carry a medical marijuana registry card, whereas caregivers have no cards and no punitive sanctions from law enforcement if they have not registered.

"From the probable cause point of view, every situation has to be looked at from the totality of the circumstances that are present. Specifically, intelligence information, calls for service, neighborhood complaints, what you see, smell and hear, and any other information that would lead you to establish reasonable suspicion and/or probable cause."

– Lieutenant Ernie Martinez,
Director-at-large, National Narcotics Officers Association Coalition

Investigations and Probable Cause – How to Track Inventory

Colorado's laws established a "seed-to-sale" registry that has been praised for keeping track of every plant cultivated in the state. However, an audit by the Colorado State Auditor in 2013 found that the registry was failing in its mandate to monitor[17] medical marijuana dispensaries. Investigators for the Colorado Department of Revenue, Marijuana Enforcement Division, found in 2014 that some retail outlets they visited had discrepancies between the registry and the inventory on site. When queried, retailers could not articulate the reason for the discrepancies in inventory.

Members of the focus groups convened by the Police Foundation believe that the state registry officials are improving as funding increases to establish benchmarks for monitoring the supply. Law enforcement also noted that that the lack of coherent data and inventory information means that police must rely on standard investigative techniques to ascertain whether a grower or sales outlet is engaging in illegal underground activity on the side.

Searches and Seizures and Prosecution Under Legalization

Colorado police officials interviewed by the Police Foundation said one of the biggest concerns for law enforcement is attempting to establish probable cause for a search warrant under the conflicting laws regulating medical and recreational marijuana. "It is often difficult for law enforcement to develop probable cause because of vague language in the constitutional amendments and (that inhibits) the issuance of search warrants," said Chief Marc Vasquez of the Erie Police Department.

District attorneys have become cautious about warrants because juries have often found in favor of defendants who are medical marijuana users, said Matthew Durkin, Deputy Attorney General: "The same confusion and ambiguity in the legal landscape that hinders law enforcement, presents significant obstacles to a successful prosecution. The overly complex legal framework for marijuana not only makes developing evidence very challenging, but it also allows defendants to retroactively manipulate evidence."

Law enforcement is also caught in the middle when it comes to seizing and returning marijuana evidence because of conflicting state and federal laws. "We have changed our seizure policies several times over the past few years due to court findings," said Deputy Chief Vince Ninski of the Colorado Springs Police Department. "We received a legal opinion from our city attorney's office that since marijuana is still federally illegal, we would seize marijuana plants and harvested products when we believed the grower was violating state law. When a defendant was acquitted of his or her charges, the Colorado Springs P.D. was ordered to return the marijuana back to the defendant. The U.S. Attorney advises police that to return it would be in violation of federal law. Our hands are tied."

Even dealing with seized evidence has presented new challenges. Police departments confiscate marijuana plants but are challenged in securing the evidence and caring for the plants properly. Some departments have taken pictures of the plants but left the actual evidence with the person charged for operating illegally. Other agencies have confiscated the plants and let them die. In a case brought by a grower whose confiscated plants had died, the Colorado Court of Appeals upheld a ruling by District Court Judge Dave Williams that the Larimer County Sheriff's Office did not have to pay damages to the plaintiff in part because federal law did not recognize marijuana as property subject to search and seizure rules (see case at http://www.cobar.org/opinions/opinion.cfm?opinionid=9505&courtid=1).

KEY ISSUE

Drug-Sniffing Canines May Have To Be Retrained or Replaced

Canines trained to detect marijuana introduce a conundrum for officers in conducting drug searches. Drug dogs are usually trained to alert on all drug scents; therefore, it is not clear to an officer which drug a canine has detected. If a police dog detects drugs in a car, for example, it is not clear under the new laws if the officer has probable cause for a search since the officer does not know which drug the canine is detecting. If the driver has legal amounts of marijuana in the car, the search might be deemed inadmissible even if other drugs were found. Officers have been advised to ask whether there is marijuana in the car and can continue with the search if the suspect says there is none. The practices surrounding the use of drug-detecting canines will continue to evolve, with new training necessary both for officers and possibly for the dogs themselves.

http://www.thedenverchannel.com/news/local-news/marijuana/legalization-of-marijuana-presents-a-potential-problem-for-police-departments-using-drug-dogs

POINTS FOR CONSIDERATION

- ***New standards need to be established by law enforcement to be able to determine the difference between a legal and an illegal marijuana growing operation.***

  Law enforcement leaders, district and city attorneys and policymakers should form working groups to clarify the criteria for determining an illegal marijuana growing operation.

- ***Law enforcement, working with state level leadership, needs to revise and update search warrant procedures for conducting searches as they relate to the newly passed legalized marijuana statutes.***

  Officers and deputies need uniform guidance on how to establish probable cause to gain a warrant to search and seize illegal marijuana operations. A "Law Officer's Marijuana Handbook" – similar to the Colorado handbook created for liquor enforcement - should be available to inform patrol officers on policies, procedures, protection gear, and other important information regarding marijuana searches and seizures.

POINT FOR CONSIDERATION

- ***Law enforcement leaders, criminal justice officials, and policymakers should determine if there are any ramifications for using the current cadre of drug dogs for general drug searches.***

  Drug-sniffing dogs in Colorado (and in other states) are currently trained to target all drugs, including marijuana. Law enforcement leaders should assess the current practice of using drug dogs in the field and determine if new training and protocols need to be adopted as a result of legalized marijuana. Newly trained drug-sniffing dogs may be required in states where marijuana has been legalized.

IV. ILLEGAL MARIJUANA: BLACK AND GRAY MARKETS

When Colorado state regulators commissioned a look at the new legalized industry in mid-2014, the study[19] conducted by the Marijuana Policy Group for the Colorado Department of Revenue's Marijuana Enforcement Division, entitled "Market Size and Demand for Marijuana in Colorado," turned up some unexpected numbers: Demand for marijuana through 2014 was estimated at 130 metric tons but legal supplies could only account for 77 metric tons. The rest, according to a widely quoted Washington Post article,[20] was coming through continuing illegal sales – either by criminals in a black market, or by legal cultivators selling under the table in a growing "gray" market.

Colorado law enforcement officials interviewed by the Police Foundation are convinced that the black and the gray markets are thriving in Colorado primarily through unregulated grows, large quantities of marijuana stashed in homes, and by undercutting the price of legitimate marijuana sales. In fact, police have stated that legalized marijuana may have increased the illegal drug trade. Low-level drug dealers, looking to profit from access to an abundance of marijuana, have an open market to grow illegal amounts of marijuana and sell through the black market. Or they can purchase excess marijuana from caregivers growing marijuana for patients but divert their excess crop illegally – the gray market.

It is difficult for Colorado law enforcement to prove when a marijuana cultivation site is producing for the gray market. Medical marijuana growers may have a license, but ensuring that all of their plants are registered can be time-consuming and difficult to accomplish without a warrant and can be costly in staff time to check hundreds of plants. Focus group members said that recreational growers may also have an easy means of growing off-market plants. A resident might grow their limit of six marijuana plants, but could conceivably grow additional plants for family members, friends, and neighbors who are all over twenty-one. With the passage of Amendment 64, there is an increasing trend toward co-op growing, which state officials have suggested has created a shortage of warehouse space[21] in Denver. This practice has become popular as growers have found they can save on operating costs such as rent and utilities when they section off the warehouse for their cultivation space. The presence of multiple growers sharing one facility has created a time-consuming challenge to law enforcement agencies trying to track down illegal marijuana growers, focus group members said.

Colorado's commercial marijuana is grown indoors. The operation at LivWell in Denver, at 120,000 square feet, dwarfs the competition. Credit: Lawrence Downes

The challenge of locating and shutting down illegal growers has spread to residential neighborhoods as well, law enforcement officials said. Growers have rented homes solely

http://www.washingtonpost.com/news/storyline/wp/2014/07/30/inside-colorados-flourishing-segregated-black-market-for-pot/

to grow marijuana,[22] according to media reports, destroying the interior of the home as every room is converted to the growing operation.

Colorado law enforcement officials have also faced continuing challenges when trying to ensure that medical marijuana caregivers are not feeding the gray market, focus group members said. Caregivers are required by Amendment 20 to register their cultivation operations with the Marijuana Enforcement Division. Many do not register their operations; however, according to observations made by Colorado law enforcement officials. When police challenge the legality of the growing operation, it is difficult to file criminal charges. Media reports[23] have shown that caregivers can have numerous grow locations for the same five patients, leaving excess marijuana to be diverted through the gray market. A physician verifying a patient's medical needs for medical marijuana can recommend any number of plants for the patient. Regulators cracking down on shoddy prescribers discovered one doctor had given out thousands of medical marijuana recommendations[24] without even seeing the patients.

http://www.huffingtonpost.com/2013/11/07/how-many-joints_n_4236586.html

"A typical joint in the United States contains just under half a gram of marijuana, and a single intake of smoke, or "hit," is about 1/20th of a gram. A joint of commercial-grade cannabis might get a recreational user high for up to three hours; one-third as much premium-priced sinsemilla might produce the same effect. A heavy user might use upwards of three grams of marijuana a day. The development of tolerance means that frequent users need more of the drug to get to a given level of intoxication."

Source: Jonathan P. Caulkins, Marijuana Legalization: What Everyone Needs to Know.

Diverson of marijuana through the mail

According to Rocky Mountain High Intensity Drug Trafficking Area, the number of marijuana packages mailed out-of-state has increased from zero parcels in 2009 to 207 parcels in 2013. The poundage of marijuana seized increased annually beginning with zero pounds in 2009 and then increased to 57.20 pounds in 2010, 68.20 pounds in 2011, and 262 pounds in 2012, all during the time of legalized medical marijuana.

Then in 2013, when recreational marijuana became legal, the postal service seized 493.05 pounds and the top five states intercepting these marijuana parcels were Florida, Maryland, Illinois, Missouri, and Virginia. These numbers are most likely conservative since not all packages mailed are intercepted.

When officers try to verify a caregiver's quota of plants, they are often faced with growers who do not have documentation on hand, according to members of the Police Foundation focus groups. Due to privacy and confidentiality laws, officers cannot call CDPHE to verify the patient-caregiver information.

Taxation may be fueling gray and black markets

The state's tax structure mainly affects recreational marijuana. Medical marijuana buyers must only pay a 2.9 percent state sales tax. In addition to the sales tax, recreational marijuana faces a 15 percent excise tax plus a 10 percent special state sales tax. The proceeds of this are divided, with 85 percent going into the state marijuana tax cash fund and 15 percent to local governments that allow retail marijuana sales. Licensed cultivation centers pay the state excise sales tax of 15 percent on the average market wholesale price of recreational marijuana. Local taxes are also applied to the retail marijuana shops.

Denver's 2014 local retail marijuana tax is 7.12 percent, plus 1 percent for the Regional Transportation District (RTD) and .1 percent for the Cultural Facilities District. When this is added to the state retail marijuana tax of 12.9 percent, a marijuana consumer would be paying 21.2 percent in taxes.[25] Medical marijuana is taxed in Denver at a rate of 3.62 percent sales tax, 1 percent for RTD and .1 percent for Cultural Facilities District, which is added to the state tax of 2.9 percent.[26]

Police estimate that marijuana purchased on the street ranges from $160 to about $300 an ounce.[27] The average price per ounce for medical marijuana is $200 per ounce and average retail marijuana is $225/ounce and an average of $320/ounce in the mountain towns.[28] With taxes added in, a recreational consumer will pay a total of $242 for an ounce priced at $200 in Denver. Medical marijuana users will pay $215.24 for the same ounce. Regulators suggested this major tax burden might have caused an increase in the past year in patients seeking medical marijuana red cards, even as overall tax revenues fell short.[29]

KEY ISSUE

Bordering States Feel the Effects of Colorado's Legalization of Marijuana

Colorado's legalized marijuana laws are impacting[30] neighboring Nebraska, Arizona, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. States bordering Colorado are concerned with the amount of time, resources, and expenses required in arresting and prosecuting offenders for the diversion of marijuana. In its report on the effects of legalized marijuana, the Rocky Mountain HIDTA[31] noted that cartel operations and other criminals may be using the thriving black market to stage illegal shipments to other states.

The states of Nebraska and Oklahoma in December 2014 filed suit in the U.S. Supreme Court,[32] asking that the court find Colorado's recreational marijuana law in violation of the U.S. Constitution. The states claim that Colorado has violated federal laws that criminalize marijuana use and sales and that it has caused significant crime and hardship for law enforcement in the two states because of criminals illegally transporting Colorado marijuana across state lines.

The Federal El Paso Intelligence Center reported that law enforcement agencies across the country seized three and a half tons of Colorado marijuana destined for other states in 2012.[33] That's up more than 300 percent from 2009 when there was slightly over three-quarters of a ton of Colorado marijuana seized.[34] In Kansas, there was a 61 percent increase in marijuana seizures from Colorado.[35]

In response to the additional law enforcement costs in bordering states, Colorado legislators introduced a bill to share surplus revenue with bordering states' law enforcement agencies to further prevent out-of-state marijuana diversion; however, the bill died in the 2014 legislative session.[36]

http://www.cbsnews.com/videos/colorados-neighbors-deal-with-marijuana-trafficking/

POINTS FOR CONSIDERATION

- ***Law enforcement should work with policymakers to bring clarity and transparency to the medical marijuana patient and caregiver identification system.***

  Current law is vague about the identification required for a medical marijuana caregiver and about the penalties for not producing the ID when requested by law enforcement. Law enforcement officials have called for registration of caregivers with pictured licensed cards, along with the necessary enforcement resources and penalties. They have also urged creation of a patient registration system that would ensure that a caregiver is growing the correct number of plants, and would stop patients from buying from more than one caregiver. Local jurisdictions should consider ordinances that require a business license for anyone growing more than six marijuana plants, which would provide law enforcement with a tool for inspecting growing operations.

- ***Increase cooperation with bordering states regarding the illegal transportation of Colorado marijuana across state lines.***

  Law enforcement agencies in neighboring states have reported arrests involving possession of marijuana that was produced in Colorado. Officials in the other states have raised alarms over their concerns of the potential for problems, and are currently attempting to track the data to identify trends. A regional working group should be established to follow up on any diversions of marijuana to other states with the aim of detecting the source of the marijuana and disrupting any further illegal transportation across state lines.

V. INCREASED PUBLIC HEALTH AND SAFETY IMPACTS

Marijuana connoisseurs are using enhanced science and technology to breed plants for various characteristics, especially plants that produce stronger compounds. Chemical extractions pose serious public safety risks. The chemical solvents, most often butane gas, create fumes that are highly flammable and can lead to explosions and fire that are similar to the extremely dangerous methamphetamine labs that have long plagued police and firefighters.

There are 483 compounds in a marijuana plant; the most well-known are tetrahydrocannabinol (THC) and cannabidiol (CBD).[37] THC is known to be a mild analgesic and is therefore used for medicinal purposes. It is also known to stimulate a person's appetite.[38] THC produces psychoactive chemical compounds and when extracted it becomes a resin used in hashish, tinctures, edibles, and ointments.[39]

A liquid process is used to extract THC.[40] Cannabinoids are not water soluble, which means the extraction businesses use a solvent to remove the resin from the plant. Chemical solvents, such as butane, hexane, isopropyl alcohol, or methanol are the most popular because higher levels of THC can be extracted and the process is much faster. Chemical extractions can obtain THC levels as high as 90 percent.

KEY ISSUES

Threat of Explosion and Fire

A hash oil explosion not only puts the lives of people inside the home at risk, it can quickly spread to nearby homes. While meth labs tend to be located in remote areas because of their illegal nature, hash oil operations are often conducted in residential neighborhoods by homeowners using legally grown marijuana. While consumers can purchase hash oil or by-products of hash oil from a marijuana retail store, many residents attempt to make their own hash oil because it is cheaper. Commercial extractions have the necessary equipment to safely extract hash oil. Denver experienced nine hash oil explosions from January 1 to September 15, 2014.

The City and County of Denver recently passed an ordinance that will restrict unlicensed hash oil extractions. One of the exceptions is that the extraction use alcohol, and not a fuel-fired or electrified source. The accepted process can use no more than 16 ounces of alcohol or ethanol for each extraction.[41]

Impact on Medical Facilities

The Burn-Trauma Intensive Care Unit at the University of Colorado Hospital is the primary burn center for Colorado. They report caring for only one patient from 2010 through 2012 from hash oil extraction burns. Since then it has significantly increased to 11 patients in 2013 and to 10 patients from January through May 2014.[42] Camy Boyle, associate nurse manager for CU's burn ICU, collected data on hash oil burn patients and found that the hash oil burn patients were almost always men in their 30s, on average had severe burns over 10 percent of their bodies (primarily hands and face), and stayed in the hospital an average of nine days.[43]

Lack of Regulations for Edibles Related to Increased Overdoses

The growing industry of injecting hash oil into candy, cookies and other "edibles" has raised concerns among health officials and police because it is unclear to most who ingest them what the potency levels are. Although there are legal limits to the total amount of THC allowed in individual edibles, the portions are not well regulated. Purchasers may not understand that eating several cookies or pieces of candy could result in toxic levels of THC. Due to the increased toxicity, medical and police professionals have seen an increase in adult psychotic episodes resulting in hospitalizations and deaths by suicide or homicide. For example, a student from Northwest College, in Wyoming, visiting Denver for vacation jumped over the railing of a hotel, falling to his death, after consuming an entire marijuana cookie. An autopsy revealed that there was no other drug, nor alcohol, in his body except marijuana.

http://denver.cbslocal.com/2014/09/15/ordinance-would-ban-denverites-from-making-hash-oil-at-home/

https://www.youtube.com/watch?v=3P_CEXRt010

http://kdvr.com/2014/04/02/student-fell-to-death-after-eating-marijuana-cookie-denver-coroner-says/

Often the marijuana edibles are packaged and look just like over-the-counter candy and food purchases. This is of particular concern when it comes to youth. According to the Children's Hospital Colorado,[44] children are at a significant risk when they ingest marijuana edibles, innocently believing it is candy.

http://www.mrctv.org/videos/cbs-wakes-dangers-edible-pot

The concerns over packaging and labeling have led the Department of Revenue, Marijuana Enforcement Division (MED), to call for a new panel [45] to determine how edibles can be made safer. Colorado law gives the MED powers to enforce packaging and sales practices by recreational marijuana operations similar to those granted over liquor products and stores.

Informational labeling requirements have been established by the MED.[46] The labels are required to list the batch number or marijuana plant or plants contained in the container that were harvested and a list of solvents and chemicals used in the creation of the medical marijuana concentrate. In addition, medical marijuana-infused products must be designed and constructed to be difficult for children under five years of age to open, as well as have print on the label saying, "Medicinal product – keep out of reach of children."

A marijuana-infused gummy bear next to a regular one. source: International Business Times - http://www.ibtimes.com/marijuana-edibles-colorado-officials-want-ban-some-strict-regulations-others-1707957

Marijuana Tourism: Impacts on Public Safety

Marijuana tourism began almost immediately after the passage of Amendment 64, and it has grown to become a significant factor in the administration of the law. Visitors from out of state can only buy ¼ of an ounce at a time (compared to an ounce at a time for residents). Nearly 90 percent of the recreational marijuana sold at ski resorts was to tourists.[47] The annualized marijuana demand for tourists visiting mountain communities is between 2.15 and 2.54 tons of marijuana, and it is expected to grow in 2014 to be between 4.3 and 5.1 metric tons of marijuana.[48]

Law enforcement agencies have found novice users, such as tourists, pose a particular problem because they often do not understand the potency of the marijuana and marijuana infused products, often resulting in overdoses. Hospitalizations related to marijuana have steadily increased[49] from 2000 to 2013 resulting in a 218% increase (see graph below taken from Rocky Mountain HIDTA report).[50] Many patients go to the emergency room reporting that they feel like they are dying because they feel their heart pounding in their chest.[51]

To deal with the problem of educating tourists, police departments have asked hotels and visitors' bureaus to include literature on marijuana safety. The Breckenridge Police Department has prepared literature for tourists and asked it to be distributed by recreational marijuana shops. The department has prepared a separate brochure warning hotel workers to be cautious of edibles left in the rooms by departing tourists.

SOURCE: Colorado Hospital Association, Emergency Department Visit Dataset. Statistics Prepared by the Health Statistics and Evaluation Branch, Colorado Department of Public Health and Environment (CDPHE). Reprinted from the Rocky Mountain High Intensity Drug Trafficking Area report on the "Legalization of Marijuana in Colorado, The Impact." August 2014.

Tourists are occasionally stopped at airports with marijuana "leftovers" in their bags. Others have left marijuana inside hotel rooms and rental cars. One hotel worker found marijuana edibles left in a room and thought it was candy. Upon returning home the worker innocently gave it to children.

Residential grows pose safety risks for first responders

There are many public safety hazards with homegrown marijuana. First responders entering a home growing operation need to be aware of the types of dangers and the importance of using personal protective equipment before entering. Just like methamphetamine houses, marijuana houses contain numerous health and safety hazards that require special practices.

Growing marijuana requires high-intensity lighting for the growing and flowering season, increased carbon dioxide levels, high humidity levels, and heat. Law enforcement officials working with National Jewish Health in Denver issued a checklist of potential hazards for officers entering a growing operation[52]:

- Toxic mold, which grows in constant wet conditions, can be dangerous even in small quantities for some people.
- When removing illegal growing operations, officers should be wary of THC levels in the air, on the surfaces of the home, and on the hands of the investigating officers. Therefore, officers should use gloves and possibly surgical masks when handling plants.
- Growers have been known to disconnect the vent system for the furnace and hot water heater, to enhance plant growth. This creates high carbon dioxide levels and a potential for carbon monoxide poisoning.

Denver Rental Grow
source: Chief Marc Vasquez

- Fertilizers and pesticides can pose a hazard if improperly handled.

Law enforcement officials said that one of the most dangerous factors for residents extracting their own THC is the potential for a hash oil explosion. Because growing operations can include a rudimentary THC hash oil refinery, officers are urged to take precautions similar to those used in a methamphetamine laboratory operation. When dealing with hash oil refineries, officers are recommended to follow PPE guidelines as provided by the American Industrial Hygiene Association in 2010:

- Chemical resident boots with slip and puncture protection;
- Eye and face protection;
- Tactical ballistic helmet;
- Tear and fire resistant outer garment;
- Chemical resistant gloves;
- Tyvek and/or chemical resistant coveralls;
- For unknown atmospheres – a self-contained breathing apparatus (SCBA);
- For known atmospheres – a Powered air purifying respirator (PAPR) or air purifying respirator with a P-100 cartridges.[53]

Residential growing operations can contain fire risks including overloaded electrical circuits and bypassed electrical meters. An additional hazard is the presence of carbon dioxide cylinders, which can explode due to electrical arcing.[54]

Beyond the risk to investigating officers, law enforcement officials in the Police Foundation focus groups said they are concerned about the potential danger for children living in homes with marijuana growing operations. The Colorado legislature had considered legislation to define drug endangerment, but no laws have passed. Officers asked to investigate child endangerment in growing operations must rely on current safety laws during the investigation.

Residential Electrical Rewiring
source: Chief Marc Vasquez.

KEY ISSUE

Legalization of Marijuana Will Bring Changes to Hiring Practices

The conflicts between drug-free workplace laws and patients' rights are currently being debated in Colorado's courts. The language of Amendment 64 stated that it did not require any employer to accommodate the use of medical marijuana in the workplace. But the Colorado Supreme Court is weighing an appeal by a worker[55] – left a quadriplegic in an auto crash - who was fired for having THC in his system, although he did not use marijuana at work.

Even without a legal requirement to allow officers to use medical marijuana when recommended, departments in states with legalized marijuana laws may soon be faced with the need to rethink hiring practices that ban any admitted use of marijuana. Public safety agencies are seeing more job applicants admitting to using marijuana just prior to applying. The pool of applicants is shrinking because of this, which has made it more difficult to fill openings in a timely manner.[56]

The Attorney General's Office has supported a zero tolerance stance for all employees, including peace officers and firefighters, for use of marijuana even when off duty.

POINTS FOR CONSIDERATION

- ***Co-ordinated planning and outreach are needed to ensure the safe operation of marijuana businesses.***

  Officers and deputies are called when citizens are concerned about potential nuisance and safety violations caused by marijuana operations in their neighborhoods. Law enforcement is often faced with the necessity of both interpreting and enforcing vague laws and regulations regarding marijuana cultivation and extraction operations. Law enforcement leaders should develop partnerships with city or county code inspectors, planners, city or county attorneys, district attorney's offices, and any other city or county agency that can play a role in establishing ordinances or inspecting, regulating, and prosecuting public safety violations.

- ***Law enforcement leaders should form a statewide working group to assess current challenges and practice on marijuana enforcement in order to inform state and local practices and policies.***

  Under Colorado law, every local jurisdiction can establish its own regulations on marijuana businesses, but many of the challenges facing law enforcement are similar throughout the state. Police Foundation focus group members called for statewide information sharing sessions to share best practices and emerging issues, as well as ensuring the dissemination of criminal intelligence and information on illegal marijuana trafficking.

- ***The state medical association should develop standardized physician criteria for writing medical marijuana recommendations and share the criteria with law enforcement and the public.***

  Law enforcement faces a challenge in determining whether medical marijuana growers are producing excess product that could be sold on the black market. Additionally, a physician has been sanctioned[57] for writing thousands of recommendations without even meeting patients. A standardized state system could provide guidance in planning enforcement efforts.

- ***Law enforcement leaders and state tourism officials should develop and distribute educational materials about Colorado's marijuana laws and safety information.***

  Tourists coming from out-of-state often do not know the basics of Colorado's marijuana laws, such as no public consumption or no consumption while driving. Medical center emergency rooms have also reported seeing an increasing number of out-of-state patients who overdosed because they were not aware of the potency of the product they ingested. Educational materials should be available in hotels, tourism outlets, and marijuana retail businesses to provide legal and safety information.

- ***Require hospitals and emergency care centers to collect data on the number and nature of emergency room visits involving marijuana.***

  The health care industry and law enforcement agencies should create a statewide database to inform practices and policies regarding marijuana overdose and what on-the-scene measures might help lessen the trauma.

VI. MARIJUANA'S EFFECT ON YOUTH – ISSUES FOR PUBLIC EDUCATION AND FUTURE LAW ENFORCEMENT CHALLENGES

A widely-cited article in the Lancet Psychiatry Journal[58] stated that studies have shown that those who use marijuana daily before age 17 are 60 percent less likely to finish high school or college, seven times more likely to commit suicide and eight times more likely to use addictive drugs later in life.

Amendment 64 clearly states that no one under the age of 21 can possess recreational marijuana. Legal marijuana retail stores face the same enforcement and oversight as liquor stores when it comes to selling to minors.

"We won't know the extent of the damage legalized marijuana has caused for our youth until 5 to 10 years down the road. Unfortunately, we've used our kids to understand the impacts in this great social experiment."

– Ben Cort,
Business Development Manager, University of Colorado

Ben Cort, Business Development Manager, University of Colorado Center for Dependency, Addiction and Rehabilitation, said that studies have shown that many young people with substance abuse problems have easy access to marijuana through patients with a medical marijuana card. In addition, many teenagers have followed the debate regarding legalized marijuana and have been swayed by the proponents' arguments that marijuana is much safer than alcohol, he said.

"I am very concerned about the effect of marijuana on the developing brains of our youth. I believe we can and must do a better job addressing this issue in Colorado… Our success with the student-led/adult-facilitated 'Drive Smart Campaign' has been highly successful in terms of reducing teen driving accidents and fatalities. I would like to see a similar approach to addressing the issue of teen drug use."

– Officer David Pratt,
School Resource Officer, Colorado Springs (CO) Police Department

Cort told the Colorado Juvenile Council meeting in November 2014 that the dangers to youth from marijuana have increased under legalization.

Colorado has seen the greatest percentage of youth marijuana use in 10 years, based on the latest National Survey on Drug Use and Health (2011-2012). Youth, ages 12-17, reported using marijuana in the past month at a rate almost 40 percent higher than the national average.

Marijuana use by homeless juveniles is a growing concern, according to Police Foundation focus group members.

As with the general homeless population, many turn to panhandling and theft to support themselves, focus group members said.

No studies are available to measure the effects of juvenile marijuana use on future criminal

https://www.youtube.com/watch?v=jtVJMJpavyw

behavior. Police Foundation focus group members expressed concern that the high dropout rate and emotional setbacks faced by such teens are common indicators of the potential for future criminal activity. They worry that the increased availability of high-potency marijuana and an increasingly positive public reaction to marijuana use will mean difficult challenges ahead for youth education on these dangers.

POINTS FOR CONSIDERATION

- ***Public education campaigns to prevent juvenile marijuana use should be revised to emphasize the health dangers of regular marijuana use by youth.***

  Colorado law restricts recreational marijuana possession to people over the age of 21, but law enforcement officials said they have observed an increase in marijuana use among teenagers since legalization. Public education campaigns must emphasize scientific studies that have raised health alarms over juvenile marijuana use to counter the public perception that marijuana is safer to use than alcohol.

- ***Increased training and tools should be provided to school resource officers to ensure that youth receive factual information on the dangers of marijuana use.***

  State health and research officials should intensify studies on the effects of marijuana on education, employment, health, and mental illness.

VII. FIELD TESTS ARE A CHALLENGE TO MEASURE DRIVING UNDER THE INFLUENCE OF MARIJUANA

As stated in Amendment 64, recreational marijuana use is subject to the same standards of public behavior as alcohol. Consumption of marijuana is prohibited in all public places, and standards of public intoxication can be similarly applied. Consumption of marijuana while driving is prohibited, and driving under the influence of marijuana is treated similarly to driving under the influence of alcohol.[59]

However, police have found that putting these new enforcement measures into effect is a major challenge.

Colorado has established a blood level of five or more nanograms per milliliter of THC as the limit for driving while impaired. One of the biggest challenges is determining the legal limit of driving while impaired when marijuana is combined with alcohol or other drugs. Using marijuana with alcohol will produce more impairment than if either drug was used alone.[60]

Detection of this level of impairment has required an entirely new testing system and complete retraining for law enforcement officers in Colorado.

The initial procedures for driving under the influence of alcohol or marijuana are the same, law enforcement officials said. The officer will look for inidicia of impairment like bloodshot eyes, slurred speech, and abnormal responses to questions. If the officer suspects that a driver is impaired, a field sobriety test can be performed to measure balance and other factors.

If the driver fails that test, or refuses it, the officer must decide whether to require a blood test to determine the level of THC. These tests require medical personnel, either a paramedic at the scene or a hospital emergency room to draw the blood sample. The test results can take from one day to six weeks.

Police Foundation focus group members said law enforcement is facing a tremendous cost increase for testing for driving under the influence of marijuana. A blood test for alcohol costs approximately $25 to $35, while the drug panel that includes marijuana can cost $250-$300.

There is emerging technology that allows for the testing of oral fluids for drugs, such as THC. The State of Colorado is currently examining this technology to see if it is effective. This alternative technology tests for the presence of drugs based on saliva, known as the Oral Fluid Test. Although the method is quicker and easier than taking blood samples, the evaluation period to show whether drugs are in the system is about the same.

There is currently no technology available to do a marijuana "breathalyzer" test, which has significantly shortened the time involved for DUI testing for alcohol. Researchers at Washington State University have reported progress in developing a portable breathalyzer that could provide an initial reading to aid in decision-making on driving under the influence. Testing on the device is expected to begin in spring 2015.

The additional law enforcement training for sobriety testing and drug detection will cost about $1.24 million in the coming year, according to the Colorado Association of Chiefs of Police (CACP). Those funds will include officer training on Advanced Roadside Impaired Driving Enforcement (ARIDE), legal updates, train-the-trainers, Drug Recognition Expert (DRE) trainings, and DUID classes.

There are a series of trainings offered which will assist law enforcement officers to better detect drivers who are impaired by substances, such as marijuana. As an example, officers can receive training on the basic Standardized Field Sobriety Test (SFTS). A more intense training course is called ARIDE, which is a sixteen-hour class to train law enforcement officers on how to detect drug-impaired drivers and is given after the SFST training. The National Highway Safety Administration (NHTSA) developed training materials for these courses. Finally, if an officer wishes to become an expert in roadside detection, then the officer would become a drug recognition expert (DRE). The DRE training, which has been in existence since the 1970s, trains law enforcement officers to detect and identify drivers who may be impaired on a variety of substances. This detection is very important because research has shown that drivers are often impaired by more than one substance.

Observing drug-impaired driving is not a new situation for most officers, but legal experts have warned that more training and better equipment is essential in order to provide adequate resources for prosecution under the new laws of marijuana legalization. While in the past simply having evidence of marijuana in the system could lead to conviction of drivers, many judges and juries will be more demanding of proof that the case meets the legal criteria of impairment.

POINT FOR CONSIDERATION

- ***Field Sobriety testing for marijuana users should be funded to ensure that all officers in Colorado are trained to recognize the difference between drivers who are under the influence of marijuana versus alcohol.***

  Marijuana is being ruled a factor in an increasing number of highway deaths[63] in Colorado according to data gathered by the Rocky Mountain High Intensity Drug Trafficking Area task force, and patrol officers must be given the tools to discern whether drivers are impaired by marijuana ingestion. Currently the state has not fully funded the training program for officers to determine if those stopped are driving under the influence of marijuana.

CONCLUSION

Legalization of marijuana is a complex issue and many unanticipated consequences have challenged Colorado law enforcement. Until there is more clarification and stiffer sanctions for law violations, law enforcement is working at a deficit in trying to reduce the black and gray markets. Law enforcement leaders are just beginning to understand the related crime and disorder issues associated with legalized marijuana, and how to reduce them through ordinances, codes, policies, and partnerships.

Establishing partnerships with city agencies, such as code enforcement, building inspectors, fire, and zoning is currently one of the best strategies in addressing the problems. Local ordinances addressing neighborhood complaints, such as noxious odors, building and code violations, and land use codes, have been found to be effective in regulating non-commercial marijuana cultivation. Marijuana odors emitted from households growing marijuana, child endangerment, THC distillation processes, dangerous electrical wiring, and furnace reconstruction to recover dangerous carbon monoxide fumes for plant growth are just a few examples of how law enforcement can work with city and county agencies to reduce these public risks.

Officer safety is paramount when going into marijuana cultivations, especially houses where toxic black mold is in the house growing marijuana. These homes may pose similar health dangers as methamphetamine homes. Policies should be established outlining procedures for officers using personal protective equipment when entering these homes or at any grow location where there is risk of toxic black mold.

The conflict between federal and state laws regarding the legalization of marijuana has put law enforcement in a difficult situation. This has impacted public safety regarding unavailability of banking services and the challenges to officer integrity for those who have taken an oath to uphold both federal and state constitutions, but are now trying to uphold conflicting laws.

The Police Foundation and the Colorado Association of Chiefs of Police believe sharing challenges, lessons learned, and points for consideration will provide a launching point for increased national discussions and will help identify strategies to resolve the conflicts and challenges for states passing legalized marijuana laws. As the states neighboring Colorado have discovered, marijuana has become a complicated and pressing issue, even where it has not been legalized.

The Colorado Association of Chiefs of Police and individual departments around the state worked tirelessly to ensure that legislation enacting the rules and regulations in Amendment 64 provided adequate enforcement measures. Those efforts were rushed, however, by the short period between the passage of the amendment and enactment of the legislation.[64] They remain concerned that state officials have not allocated adequate resources to meet the new challenges brought by the law. Their message to law enforcement officials in states where voters are considering legalization: Develop a legislative and statewide funding plan before the measure passes and be ready to make the case for proper enforcement in the name of public safety.

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APPENDIX 1: COLORADO'S LEGISLATIVE HISTORY REGARDING THE LEGALIZATION OF MARIJUANA

INTRODUCTION

Understanding Colorado's legislative and political history provides important perspective for appreciating Colorado law enforcement's experience with addressing the legalization of marijuana.

There were two notable elements of the legislation that legalized marijuana in the state of Colorado: first, marijuana became legal through an amendment to the Colorado's constitution; and second, the legislative language was ambiguous and broad. This has placed Colorado law enforcement in the position of both interpreting and enforcing the law. It is further complicated by the fact that, at the federal level, marijuana is still an illegal drug under the Controlled Substance Act of 1970[1], which classified marijuana as a Schedule I controlled substance.[2]

AMENDMENT 20: NOVEMBER 2000 MEDICAL MARIJUANA BALLOT MEASURE

Overview of Colorado Amendment 20

The shift toward legalized marijuana use began with the passage of Amendment 20, *The Medical Use of Marijuana Act*, which passed with the support of 53.3 percent of Colorado voters in November 2000.[3]

The amendment to the Colorado Constitution made the following legal under state law:

- Using marijuana with a physician's recommendation for debilitating medical conditions defined as chronic pain, severe nausea, persistent muscle spasms (i.e. multiple sclerosis), cancer, glaucoma, cachexia, seizures (e.g., epilepsy), and HIV;
- Possessing no more than two ounces and up to six marijuana plants, with no more than three being mature flowering plants that produce usable marijuana;
- An exemption from criminal prosecution and an eaffirmative defense for patients from some state criminal marijuana penalties;
- Tasking the Colorado Department of Public Health and Environment (CDPHE) with establishing a confidential registry for patients and primary caregivers;
- Allowing children access to medical marijuana with parents' permission; and,
- Making law enforcement economically liable for the value of marijuana should a criminal case not be filed, dismissed, or results in an acquittal.

2000 TO 2008: LEGISLATION AND NOTABLE EVENTS FOLLOWING THE PASSAGE OF AMENDMENT 20

Following the passage of Amendment 20, registrations for medical marijuana started on June 1, 2001. By December 31, 2008, there were 4,819 total medical marijuana patients registered with CDPHE and receiving marijuana drug treatment.[4] Registered caregivers with CDPHE cultivated marijuana plants and distributed the drug to their patients.

A series of events led to a massive number of people registering for medical marijuana cards and the proliferation of medical dispensaries opening in a very short period of time. By December 31, 2009, there were 41,039 patients who possessed a valid registration card from CDPHE.[5] The rapid increase created a concern among public safety and public health officials.

Decriminalization of Possession and Low Enforcement Priority for Marijuana

In November 2005, the City and County of Denver voters passed a ballot initiative decriminalizing possession of small amounts of marijuana. In 2007, Denver voters approved Ballot Question 100, which directed law enforcement to make arrest or citation of adult cannabis users the lowest priority.[6] The town of Breckenridge, a mountain town near ski resorts, also decriminalized marijuana possession and allowed citizens to carry small amounts in 2009.[7]

Lawsuit Against CDPHE's Five Patient Rule

The Colorado Court of Appeals ruled in October 2009 that caregivers must know the patients who use the marijuana they grow. The ruling upheld a verdict against Stacy Clendenin who had been found guilty of illegally growing marijuana in her home. Clendenin claimed that she was a caregiver who was growing marijuana for patients. However, the Court of Appeals ruled, "Simply knowing that the end user of marijuana is a patient is not enough." The court said, "A care-giver [sic] authorized to grow marijuana must actually know the patients who use it."[8]

Responding to the court's ruling, The Colorado Department of Public Health and Environment's Board of Health created a policy, during a closed meeting, called the "Five Patient Policy" limiting caregivers to providing medical marijuana to no more than five patients.[9]

The Board of Health's process for establishing the Five Patient Policy was challenged in a 2007 lawsuit filed on behalf of David "Damien" LaGoy, a registered marijuana patient with life-threatening symptoms resulting from HIV/AIDs and Hepatitis C. LaGoy's lawsuit claimed that CDPHE: (1) violated the Open Meetings Act,[10] (2) violated the Administrative Procedures Act[11] by deeming the meeting as an emergency, and (3) decreased LaGoy's access to medical marijuana, increased the confusion of his registered caregiver, Daniel, as to his responsibilities due to the policy defining the caregiver as one who is "significantly respon-

sible for the well-being of a patient," and therefore caused an "immediate and irreparable injury."[12] The plaintiffs requested that CDPHE hold a public meeting to define the term "caregiver" and to invalidate their current policy because it was adopted in an arbitrary manner. Additionally, they asked the courts for a temporary and permanent injunction ordering the defendants to cease and desist from the enforcement of the regulatory change.[13]

Denver District Court Judge Dave Naves granted a temporary injunction, and after further review, permanently overturned CDPHE's definition for caregivers. Naves required the CDPHE to hold an open meeting and revise the caregiver language.[14]

The CDPHE held public hearings according to Naves' ruling but did not reinstate the "Five Patient Policy."[15]

The Federal Government's Position on Marijuana Enforcement

The first national statement regarding legalizing medical marijuana came from President Barak Obama during his campaign in 2008.

Attorney General Eric Holder, in October 2009, laid out medical marijuana guidelines for federal prosecutors in accordance with the Controlled Substance Act (CSA).[16] A memorandum from Deputy Attorney General David W. Ogden provided guidance and clarification to U.S. Attorneys in those states that have enacted medical marijuana laws. This became known as "The Ogden Memo."[17]

https://www.youtube.com/watch?v=LvUziSfMwAw

The Ogden Memo provides uniform guidance but does not allow medical marijuana to be a legal defense to the violation of federal law, including the Controlled Substances Act. (http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf).[18]

Specifically, the Ogden Memo directs that prosecutors should place a low priority on cases involving individuals with medical conditions and who are in "clear and unambiguous compliance" with state laws. The federal government continues to pursue illegal drug trafficking activity as well as the unauthorized production or distribution of medical marijuana by the state when the following situations are present:

- Unlawful possession or unlawful use of firearms;
- Violence;

- Sales to minors;
- Financial and marketing activities inconsistent with state law, including money laundering, financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- Illegal possession or sale of other controlled substances; or
- Ties to other criminal enterprises.

2009: THE GROWTH OF MEDICAL MARIJUANA CENTERS

When CDPHE's caregiver definition was overturned in 2009, there was no limit on the number of patients caregivers could serve. At the same time, there was a boom in the number of medical marijuana patients registering with CDPHE.[a]

Some medical marijuana proponents decided to test the boundaries of the caregiver model as a result of the LaGoy-Pope Case. This resulted in a proliferation of medical marijuana dispensaries opening in a relatively short time period of time throughout the state. These centers grew large quantities of marijuana plants because they could now claim to be the "caregivers" for an unlimited number of registered medical marijuana patients.

From 2001 to 2008, there were a total of 4,819 approved patient licenses. In 2009, there were 41,039 approved medical marijuana registrations from CDPHE.
Source: CDPHE

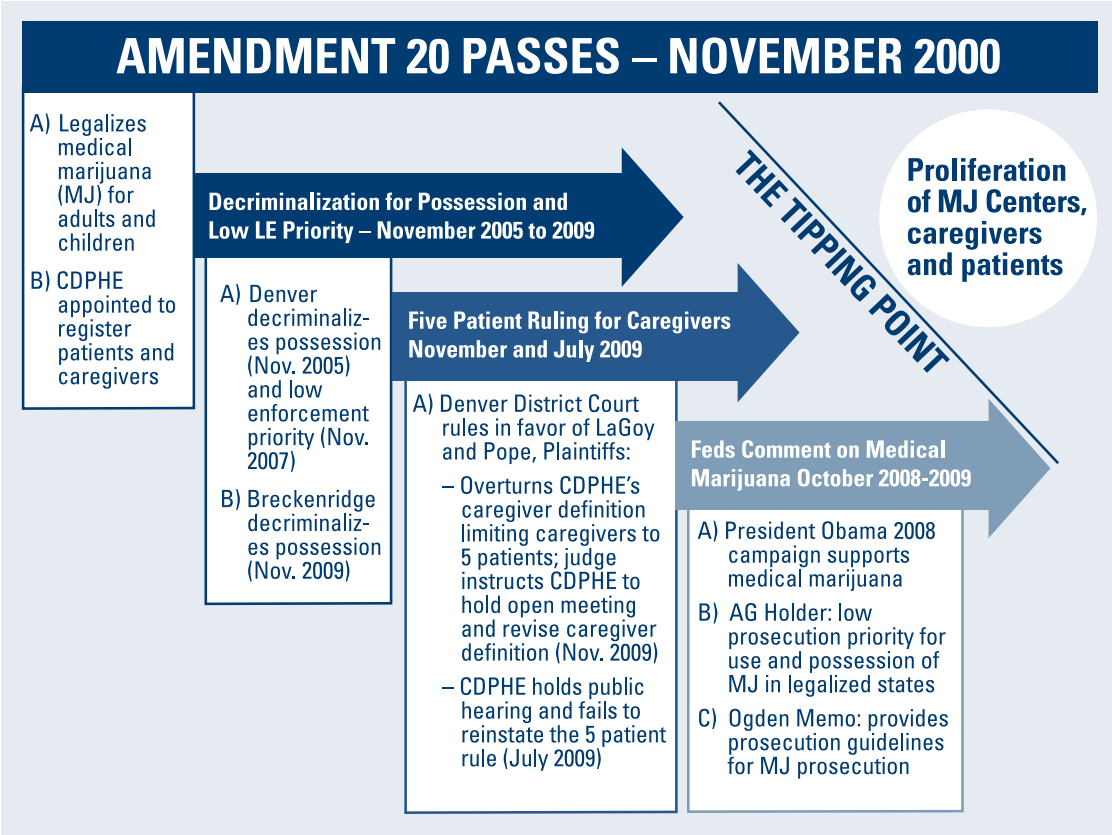
The number of marijuana dispensaries went from zero in 2008 to 900 by mid-2010.
Source: Department of Revenue, Marijuana Enforcement Division

This was one of the first major unanticipated problems for law enforcement, according to members of the Police Foundation focus groups. Since there were no statutes or regulations, the medical marijuana centers had no restrictions to the number of plants they could grow and the number of patients they served. This also led to patients "shopping" their doctor's recommendation to as many medical marijuana centers as they wanted and as often as they wanted, focus group members said. As long as the patient had a medical marijuana licence and an authorized doctor's certification, then that patient could go to many medical marijuana centers as long as they only carried two ounces out of each center.

a. This has led to another challenge in regulation. CDPHE registers medical marijuana patients and caregivers; however, they do not regulate or monitor the caregiver marijuana grows. Beginning in 2010 (?), the Colorado Department of Revenue, Medical Marijuana Enforcement Division (MMED), now entitled the Marijuana Enforcement Division (MED), is responsible for monitoring the caregiver grows. Caregivers are required to register their grow locations with the MED. However, there is no way to cross-verify if this is occurring since CDPHE cannot release the names of the patients and their caregivers due to the Health Insurance Portability and Accountability Act (HIPAA). As a result, enforcing caregiver cultivations is challenging on many different levels such as locations of cultivations, number of plants authorized to grow per patient, illegal cultivations in multiple locations for the same set of patients, and detecting gray market illegal sells to adults and minors.

Because so many medical marijuana centers opened so quickly, state and local officials found it difficult to regulate them. The Colorado General Assembly had not crafted regulations governing licensing fees, inventory tracking requirements, production of marijuana infused products, packaging and labeling requirements, and disposal of waste water produced during the processing of medical marijuana.

Figure 1: Tipping Point for Opening Medical Marijuana Centers



From June 1, 2001, to December 31, 2008, a total of 5,993 patients applied for a medical marijuana registration card (also known as a red card due to its color, shown in Figure 2). Of those applicants, 4,819 were approved. After the opening of the medical marijuana centers, by December 31, 2009, there were 43,769 applications, of which 41,039 were approved. This is an increase of 751.61% approved registrations in just one year's time. As of December 1, 2014, there were 116,287 medical marijuana patients registered with the state.[c]

c. Lower-than-projected revenues from recreational marijuana, combined with higher revenues from medical marijuana and a high proportion of out of state recreational marijuana customers provide a strong indication that many have elected to obtain red cards because it is less expensive to purchase medical marijuana because of the higher tax structure on recreational marijuana.

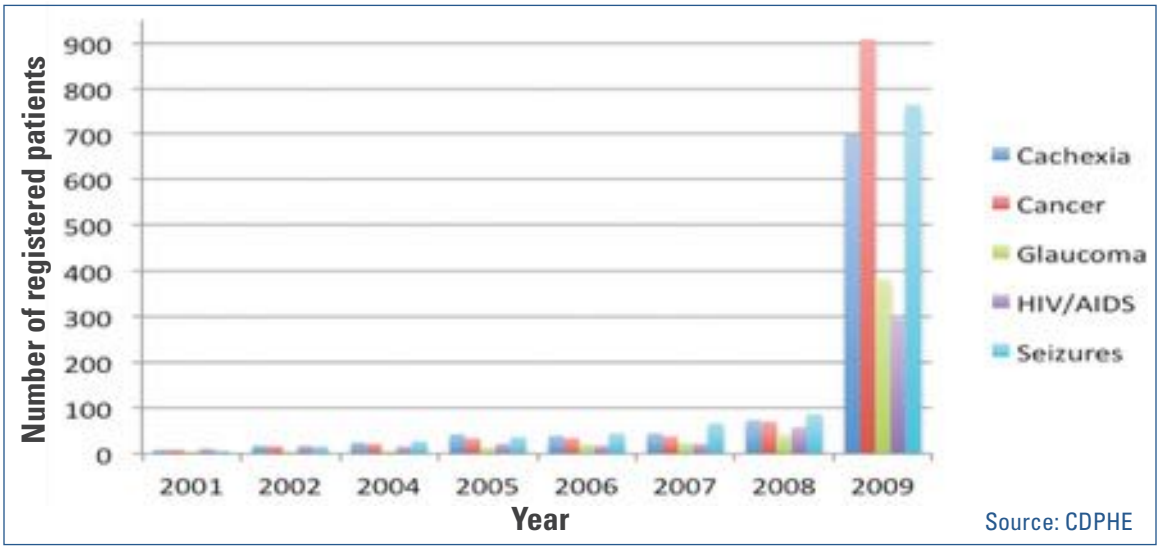
d. The number of medical conditions does not add to 100% because patients can have more than one debilitating condition.

e. The number of medical conditions does not add to 100% because patients can have more than one debilitating condition.

Figure 2: Example of Colorado Medical Marijuana Patient Registry Card

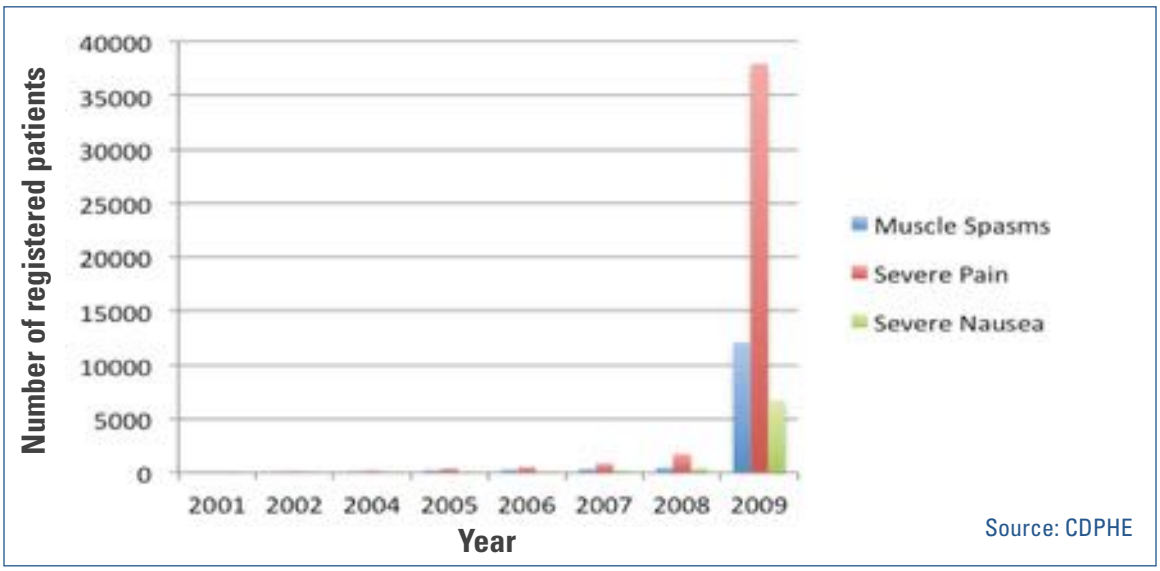
Source: Chief Marc Vasquez[19]

Figure 3: Number of Registered Patients and Five Illness Reasons from 2001-2009[d]



Source: CDPHE

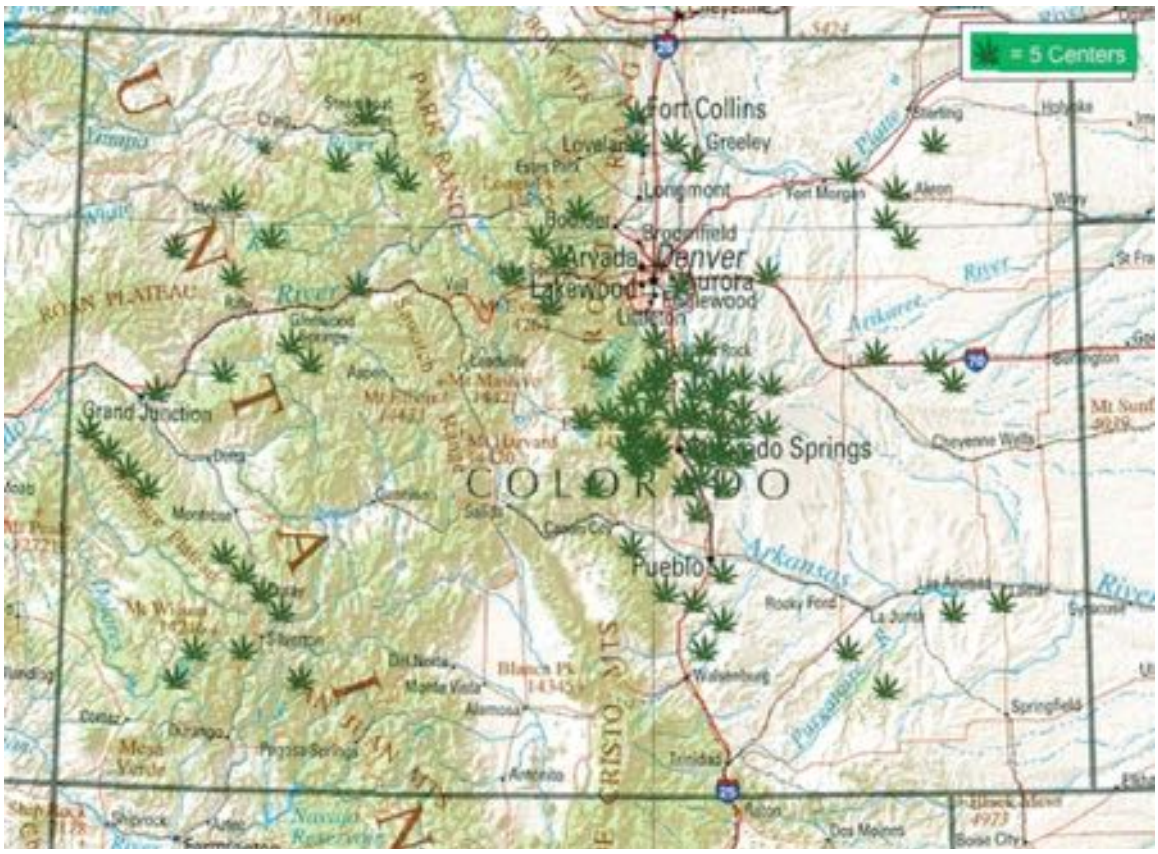
Figure 4: Number of Registered Patients and Three Illness Reasons from 2001-2009[e]



Source: CDPHE

There were no medical marijuana centers before 2009. In that year alone, 250 were opened. As of December 1, 2014, there were 501 state licensed medical marijuana centers with 23 pending applications (see Figure 5 for a map of dispensary locations).[22]

Figure 5: Colorado Map with Medical Marijuana Dispensary Locations



Source: Lt. Ernie Martinez, Director At-Large for the National Narcotics Officers Association Coalition[23], for illustration purposes

LEGISLATION SUPPORTING AMENDMENT 20 IN 2010 AND 2011

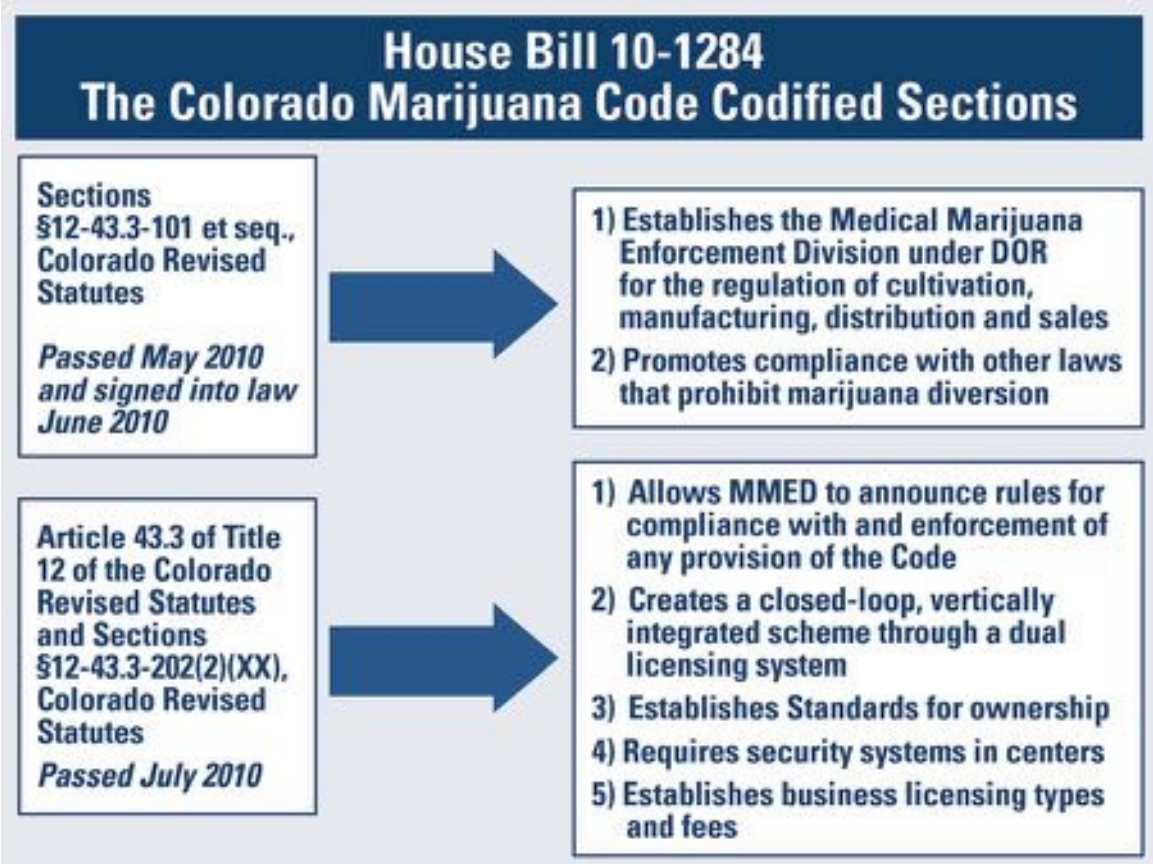
The Colorado Legislature in 2010 and 2011 passed a series of bills to address the unanticipated consequences of Amendment 20.

2010: Legislation Regulating Medical Marijuana Centers

During the 2010 legislative session, the issues of medical marijuana centers and the regulation of cultivation and sales of medical marijuana were addressed through two significant bills: House Bill (HB) 10-1284, establishing the medical marijuana code, and Senate Bill (SB) 10-109, establishing the physician-patient relationship.

HB 10-1284: Colorado Medical Marijuana Code

Figure 6: Overview of HB 10-1284



Source: Adapted from State of Colorado, Amendment 64 Legislation[27]

HB 10-1284, known as the Colorado Medical Marijuana Code, codifies sections §12-43.3-101 et seq., Colorado Revised Statutes (C.R.S.), and was passed in May 2010 and signed into law on June 2010. This bill established legalized medical marijuana centers and other business-related regulations. Additionally, it designated the Colorado Department of Revenue (DOR) as the state licensing authority as well as local licensing authorities throughout the state. This legislation also established the Medical Marijuana Enforcment Division (MMED) within the Department of Revenue to regulate the cultivation, manufacture, distribution and sale of medical marijuana and promote compliance with other laws that prohibit illegal trafficking. It also provided regulations for:

- Medical marijuana business owners;
- Local government;
- Physicians;
- Caregivers and patients; and
- The Colorado Department of Public Health and Environment (CDPHE).

According to HB 10-1284, an owner interested in opening a medical marijuana business was required to obtain approval first from their local licensing authorities. Once approved, the owner could apply to obtain a state license from the Department of Revenue. The law gave the MMED the authority to establish an application fee structure to cover the state and local licensing authorities' operating costs.

All existing center or manufacturer owners, or owners who had applied to a local government for operations by July 2010, were allowed to continue to operate as long as they registered with the Department Revenue and paid their license fee. They also had to certify that they were cultivating at least 70 percent of the marijuana necessary for their operations by September 2010.

Provisions were established for local licensing authorities which allowed local government to adopt a resolution or ordinance to license, regulate, or prohibit the cultivation and sale of medical marijuana. This needed to be completed by July 1, 2011. HB 10-1284 also allowed local licensing authorities to establish limitations on marijuana centers such as restricting the number and location of centers. If they did not establish local limitations, the ordinances defaulted to the requirements established in HB 10-1284 which are as follows:

- The center cannot be located within 1,000 feet of a school.
- Hours of operation must fall between 8:00 a.m. to 7:00 p.m. no matter which day(s) of the week.
- The cultivator may sell no more than six immature plants to a patient and cannot exceed more than half of the recommended plant count to a patient, primary caregiver, another medical marijuana cultivator, or to a marijuana infused products manufacturer. In other words, if patients grow their own medical marijuana, they can purchase up to six immature plants from a medical marijuana center. If a physician has recommended more than six plants, the patient can only receive half of the additional amount of immature plants at one time. So if a patient were allotted 20 plants, he or she could only purchase 10 of those immature plants at one time.
- The law prohibits physicians, minors, and law enforcement members from operating a dispensary. It prohibits certain individuals, including felons convicted of possession, distribution or use of a controlled substance, from obtaining medical marijuana center licenses.
- Licenses are valid for up to two years.
- Violations of the medical marijuana code are class 2 misdemeanors.[25]

The legislation required that physicians must have a "bona fide" relationship with a patient, keep records of all patients that are certified by the registry, cannot have an economic interest in marijuana centers, and are required to hold a doctor of medicine or doctor of osteopathic medicine degree from an accredited medical school, as well as meet certain educational and professional requirements.

It required caregivers to register with CDPHE for each patient they provide services up to five patients at any time. In addition, patients may only have one caregiver. Patients must

obtain registry cards and have them in their possession whenever they possess medical marijuana. CDPHE's responsibilities include keeping a confidential registry for caregivers and patients and issue medical marijuana registry cards.

HB 10-1284 created a vertically integrated, closed-loop commercial medical marijuana regulatory scheme. Cultivating, processing, and manufacturing marijuana as well as retail sales had to be a common enterprise under common ownership.[26]

The vertical integration model also requires that medical marijuana businesses must cultivate at least 70 percent of the medical marijuana needed for the operation of their business. The remaining 30 percent may be purchased from another licensed medical marijuana center. No more than 500 plants can be cultivated unless the Director of the Medical Marijuana Enforcement Division grants a waiver. If a facility cultivates more marijuana than it needs for its operation, it can sell the excess to other licensed facilities.

The vertical integration model also required that medical marijuana businesses must cultivate at least 70 percent of the medical marijuana needed for the operation of their business. The remaining 30 percent may be purchased from another licensed medical marijuana center. For Optional Premises Centers (OPC), no more than 500 plants may be cultivated unless the director of the Medical Marijuana Enforcement Division grants a waiver. If a facility cultivates more marijuana than it needs for its operation, it can sell the excess to other licensed facilities.

The legislation established rules for ownership including that the applicant must have been a Colorado resident for two years prior to filing the application. Applicants are fingerprinted, and the MMED investigates the qualifications of an applicant or licensee. The MMED checks character references, criminal histories, possible prior rehabilitation and educational achievements.[f]

Article 43.3 also establishes the types of licenses for the cultivation, manufacture, distribution and sale of medical marijuana. This article is the foundation for licensing requirements by the Marijuana Enforcement Division or Medical Marijuana Enforcement Division.

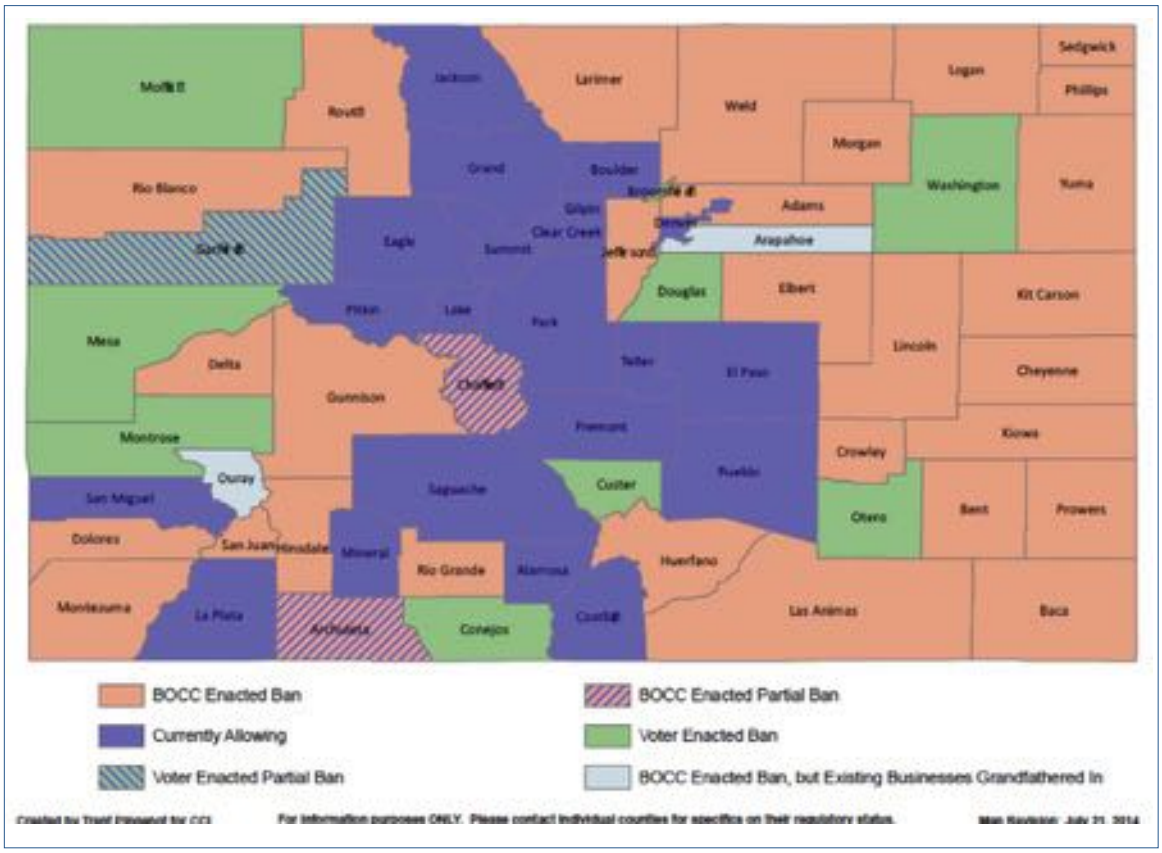
A significant provision in HB 10-1284 was the option for cities and counties to allow or prohibit any or all medical marijuana businesses such as medical marijuana centers and production of marijuana infused products. If a local municipality or county wished to exercise this option, it had to be done either by a special election or by a majority of the governing board (i.e., city council or county commissioners). A local governing board had until July 1, 2011, to vote to prohibit medical marijuana centers.

There are 64 counties in the state of Colorado. Denver and Broomfield have consolidated their city and county governments. In Figure 3, the counties' decisions for or against having medical marijuana centers is shown. Of those counties, 29 of the state's county board of commissioners voted to ban medical marijuana centers (peach shaded areas). Medical

f. If a person has a past felony drug conviction then that person cannot apply for medical marijuana center ownership. For all other felonies, a person can apply for an ownership license five years after the conviction. If someone with a past felony drug conviction applies for ownership of a retail marijuana store, then they must apply 10 years after all felonies. The Marijuana Enforcement Division also applies a moral character test when determining status of licensing.

marijuana centers are allowed by 22 counties (purple shaded areas). Voters enacted a ban in eight counties (green shaded areas). Two counties banned new centers but grandfathered in existing centers. In another two counties (pink and purple striped areas), the boards of county commissioners enacted a partial ban meaning they authorize only specific types of medical marijuana facilities within their jurisdiction, and in one county (grey and purple striped area), voters elected for a partial ban.

Figure 7: Medical Marijuana Centers – Regulatory Status



Source: Colorado Department of Revenue, Medical Marijuana Enforcement Division

The Colorado Medical Marijuana Code was amended in 2011 to provide for an "infused products manufacturing license."

As of December 1, 2014, statewide there were:

- 501 medical marijuana centers (dispensaries)
- 729 medical marijuana cultivation operations
- 149 medical marijuana infused product factories[28]

Patients must apply annually for a medical marijuana card. In January 2009, CDPHE registered 41,039 patients and in December 2014, there were 116,180 patients holding medical marijuana cards, resulting in a 183.1% increase in the number of registered marijuana patients.[29] As of January 31, 2014, the reported conditions for obtaining a medical marijuana card were:

- 94% for severe pain by 103,918 patients
- 13% for muscle spasms by 14,632 patients
- 10% for severe nausea by 10,904 patients
- 3% for cancer by 3,118 patients
- 2% for seizures by 2,111 patients
- 1% for glaucoma by 1,133 patients
- 1% for cachexia by 1,126 patients
- 1% for HIV/AIDS by 668 patients[30]

SB 10-209: Regulation of the Physician-Patient Relationships for Medical Marijuana Patients

SB 10-209 required CDPHE to establish new rules for issuing registry identification cards, documentation for physicians who prescribe medical marijuana, and sanctions for physicians who violate the law.[31] The law outlines the following requirements for a physician:

- Must have a bona fide physician-patient relationship;
- Must provide consultation with patient regarding patient's debilitating medical condition;
- Must provide follow-up care and treatment to the patient to establish efficacy of the use of medical marijuana;
- Must be licensed and in good standing with the Colorado Medical Board;
- Holds a doctor of medicine or doctor of osteopathic medicine degree from an accredited medical school; and
- Has not had his or her U.S. Department of Justice federal drug enforcement administration controlled substances registration suspended or revoked at any time.

A physician cannot:

- Offer a discount or any other thing of value to use as a particular primary caregiver, distributor, or other provider of medical marijuana to procure medical marijuana;
- Diagnose a debilitating condition at a location where medical marijuana is sold; or
- Hold an economic interest in an enterprise that provides or distributes medical marijuana.

The legislation established a marijuana review board and will review requests by patients under 21 years of age who are not veterans or military service and are seeking to be placed on the state's confidential registry for the use of medical marijuana.

2011: LEGISLATION REGULATING MEDICAL MARIJUANA CENTERS

HB11-1043 established rules for the purpose of cultivation, manufacture or sale of medical marijuana or medical marijuana-infused products. Within the law, it sets forth the powers and duties for MMED in reviewing marijuana industry applications and granting licenses.

This bill also requires primary caregivers who cultivate medical marijuana for their patients to register their cultivation location with the MMED.

2012: FEDERAL RESPONSE TO THE COLORADO MEDICAL MARIJUANA LAW

U.S. Attorney's Office Issues Warning Letters and Closes Businesses

John Walsh, the United States Attorney for the District of Colorado, issued three waves of letters to medical marijuana businesses who were deemed to be in violation of federal law. On January 12, 2012, 23 letters were issued to medical marijuana centers in Colorado advising them they were within 1,000 feet of schools and gave the businesses 45 days to close down before facing potential civil and criminal action.[33] By February 2012, all 23 businesses were shut down.

In March 23, 2012, the U.S. Attorney's Office issued a second wave of warning letters to another 25 medical marijuana centers and by May 8, 2012, they all were closed. The third and last wave of letters were sent on August 3, 2012, to another 10 businesses because they were operating within 1,000 feet of schools; these businesses subsequently closed.[34]

Medical Marijuana Enforcement Division Budget Shortfalls and Staff Reduction

The original Medical Marijuana Code licensing model was a "dual-licensing" model, which required that the local licensing authority issue the local license before the state licensing authority could issue the state license. There was a moratorium in place which would not allow any new applicants to apply for licenses until July 1st of 2011. It was decided by the state legislators (with the agreement of the DOR and other stakeholders such as the Colorado Municipal League) to extend the moratorium for another year to July 1, 2012. There were reasons why extending the moratorium made sense at that time such as the tremendous workload the MMED had with limited staff and infrastructure. The MMED was in the process of conducting background investigations (over 4,500 investigations) into the individuals and businesses seeking licenses from the state licensing authority with a limited staff. Also, many local licensing authorities had not adopted rules and had not issued local licenses by this time. It had been anticipated that once the moratorium had been lifted, a new round of applications and licenses would be issued. The MED was to obtain operating revenue from licensing and application fees as required through legislation. However, marijuana industries wanting to start up a business had to seek local

approval first. Local jurisdictions did not approve the applications as quickly as expected, and there was no "second wave" of renewal applications. Because of this delayed approval process, the revenue into MMED was significantly lower than anticipated.

The MMED created numerous positions in its first year. The MMED had been approved to hire approximately 55 full time employees (FTEs). During this time frame, the MMED had hired 38 FTEs only to discover they had to significantly reduce their staff due to the lack of income. As a result, many of the FTEs hired were either relocated to other agencies in the Department of Revenue or laid off. The impact of this staff reduction was not having the personnel needed to conduct the regulation oversight of a significant number of medical marijuana centers already in operation.

2012: RECREATIONAL MARIJUANA LEGISLATION PASSES

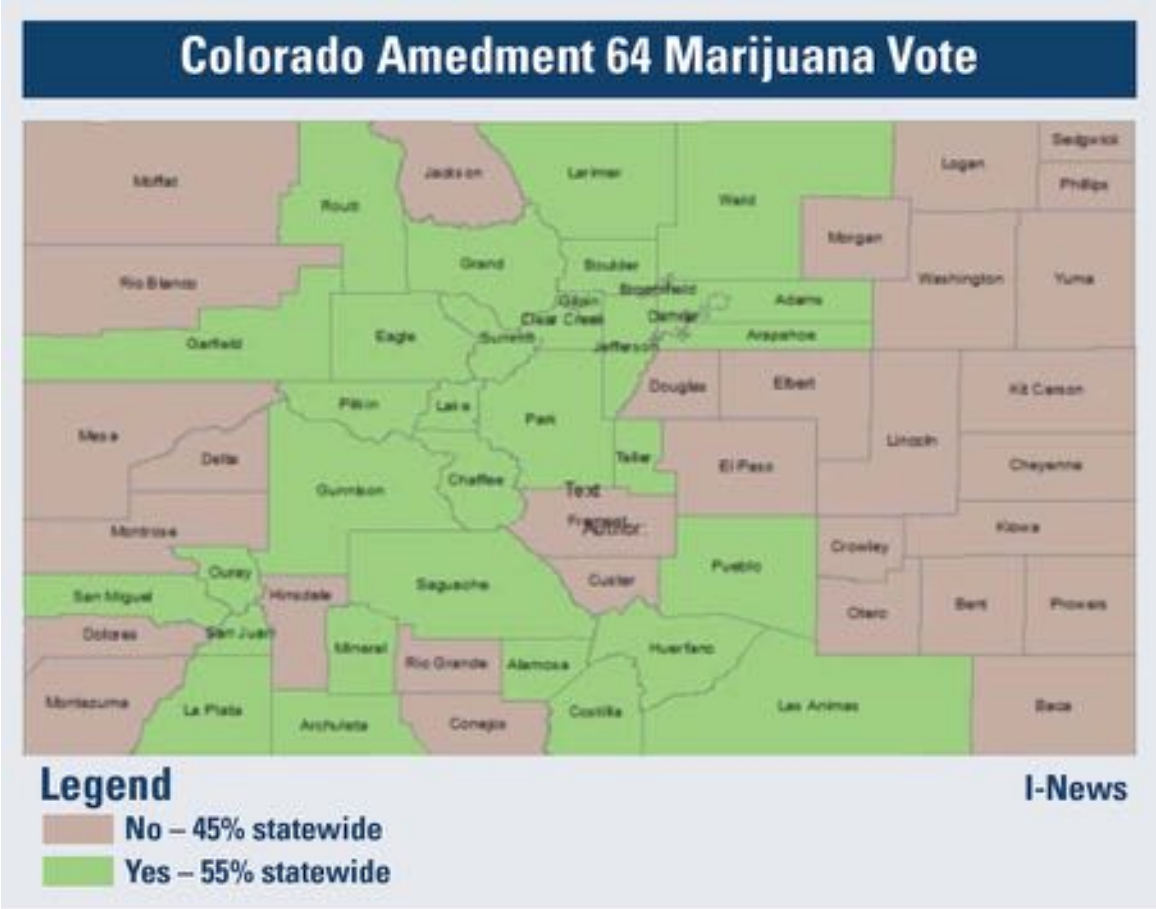
In February 2012, the initiative for the legalization of recreational marijuana was certified as having the more than 86,000 signatures required to be placed as an amendment on the November 2012 ballot, making Colorado the first in the nation to legalize recreational marijuana if passed.[35] The ballot measure read:

> "Shall there be an amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first $40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp?"[36]

Voter Turnout

The citizens of Colorado passed Amendment 64 on November 6, 2012, adding to the state constitution the legalization of marijuana for personal use.[37] With a voter turnout of 69%, the amendment passed with 55% of voters approving (see Figure 4).

Figure 8: Map of Counties Passing Amendment 64



Source: Rocky Mountain PBS News

Amendment 64: Use and Regulations of Marijuana

The law provides for regulation to be similar to that of alcohol regulation. Specifically, only individuals 21 years or older have the ability to:

- Possess, use, display, purchase, or transport marijuana accessories or one ounce or less of marijuana;
- Possess, grow, process, or transport no more than six marijuana plants, with three or fewer immature and three mature cannabis plants (i.e., flowering plants) on the premises where the plants are grown. These plants must be in an enclosed, locked space; and cultivation is not conducted openly or publicly, and is not made available for sale;
- Transfer one ounce or less of marijuana without payment to a person who is 21 years or older; and
- Assist another person, 21 years or older, in any of the above acts.
- Also, consumption of marijuana is prohibited in open and public areas or in a manner that endangers others.

It makes it lawful for people 21 years or older to:

- Manufacture, possess, or purchase marijuana accessories or sell marijuana accessories to a person 21 years or older;
- Possess, display, or transport marijuana or marijuana products;
- Purchase marijuana or marijuana products from a marijuana cultivation facility;
- Sell marijuana or marijuana products to consumers if the person has a current, valid license to operate a retail marijuana store or is acting in his or her capacity as an owner, employee or agent of a licensed marijuana store;
- Cultivate, harvest, process, package, transport, display, or possess marijuana;
- Deliver or transfer marijuana to a marijuana testing facility;
- Sell marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility or a retail marijuana store if the person conducting the activities has obtained a current, valid license to operate a marijuana cultivation facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana cultivation facility;
- Package, process, transport, manufacture, display or possess marijuana or marijuana products, delivery to marijuana testing facility, purchase from a marijuana cultivation facility or manufacturing facility if they are acting as an owner, employee, or agency of a licensed marijuana product manufacturing facility; and
- Lease or allow the use of property owned, occupied, or controlled by any person, corporation or other entity for any of the activities conducted lawfully in accordance with the above regulations.

Marijuana legalization will be regulated by MED, which had to adopt regulations necessary for implementation of recreational marijuana no later than July 1, 2013. Additional requirements include

- Application, licensing, and renewal fees shall not exceed $5,000, with the upper limits adjusted for inflation;
- Licensure is for the operation of marijuana establishments;
- Security requirements for marijuana establishments;
- Requirements to prevent the sale or diversion of marijuana and marijuana products to individuals under the age of 21;
- Label requirements for marijuana and marijuana infused products;
- Health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana;
- Restrictions on the advertising and display of marijuana and marijuana products;
- Civil penalties for failure to comply with regulations established by DOR;

- Tax levy not to exceed 15 percent prior to January 1, 2017, at which time the General Assembly will determine a rate to apply thereafter; the first $40 million in revenue raised annually from excise tax will be credited to the Public School Capital Construction Assistance Fund; and a competitive application process which will consider whether the applicant has:
  - Prior experience producing or distributing marijuana or marijuana products in the locality in which the applicant seeks to operate a marijuana establishment, and
  - Complied consistently with the Colorado Medical Marijuana Code.

Local ordinances or regulations specifying the entity within the locality that is responsible for processing applications submitted for licenses to operate a marijuana establishment within the boundaries of the locality had to be enacted no later than October 1, 2013. Local government could enact ordinances or regulations that are not in conflict with the existing law that determine:

- Time, place, manner and number of marijuana establishments;
- Procedures for the issuance, suspension, and revocation of a license issues by the locality;
- Schedule of annual operating, licensing, and application fees for marijuana establishments;
- Civil penalties for violation of an ordinance or regulation government the time, place, and manner of marijuana establishment operations; and
- Opting in or out of allowing marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through ordinance by the local governing authority (i.e., city council or board of commissioners) or if through public vote, on a general election ballot during an even numbered year. Local governing authorities can remove or approve marijuana establishments any time or as many times as they deem is in the best interest of their community.

An employer is not required to permit or accommodate the use, consumption, possession, transfer, display, transportation sale or growing of marijuana in the workplace. Employers may have policies restricting the use of marijuana by employees. A person, employer, school, hospital, detention facility, corporation or any other entity who occupies, owns, or controls a property may prohibit or regulate the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

In addition, the law addresses hemp[40] as follows:

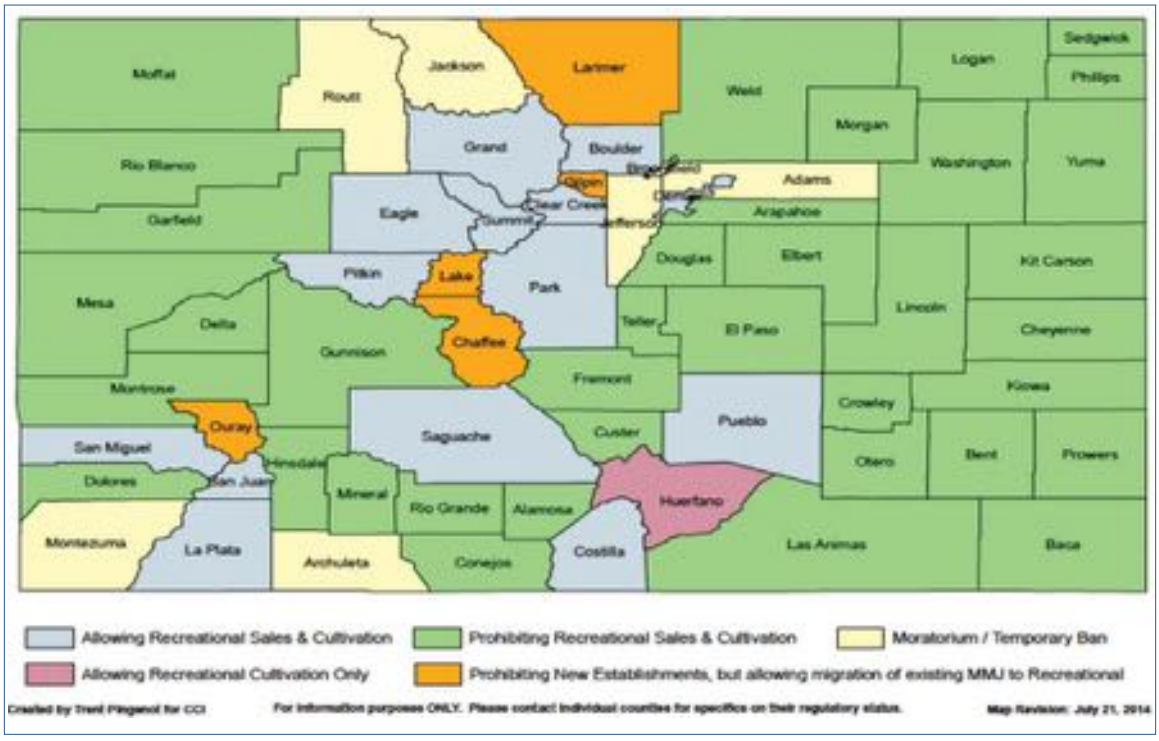
- Industrial hemp should be regulated separately from strains of cannabis with higher delta-9-tetrahydrocannabinol (THC) concentrations that do not exceed three-tenths percent on a dry weight basis; and
- Not later than July 1, 2014, the General Assembly will enact legislation governing the cultivation, processing and sale of industrial hemp.[g]

g. The Industrial Hemp Regulatory Program Act was passed through the Hemp Act of 2014, Title 35 Agriculture, Article 61, Industrial Hemp Regulatory Program, C.R.S. 35-61-109. The Colorado Department of Agriculture is responsible for oversight; rules pertaining to the administration and enforcement of this act is established through 8 CCR 1203-23.

2014: RECREATIONAL MARIJUANA STORES OPEN FOR BUSINESS

Recreational marijuana stores opened for business on January 1, 2014. Thirty-seven cities and towns have opted out of allowing recreational marijuana stores (see Figure 5), including Colorado Springs, the state's second largest city, and Greeley, the third largest city. Fifteen cities and towns have allowed the recreational sales and cultivation, including Denver, the largest city in Colorado. Six counties have a moratorium on allowing stores, five counties have allowed the existing medical marijuana centers to also sell for recreational purposes, and one county allows recreational cultivation only.

Figure 9: Locations for Towns and Cities Opting out of Recreational Retail Stores



Source: Colorado Department of Revenue, Marijuana Enforcement Division[41]

As of December 2014, there are:

- 300 Medical Marijuana Centers in Denver
- 496 Medical Marijuana Centers statewide
- 212 retail stores
- 279 cultivation operations
- 63 infused product factories
- 8 laboratory testing facilities[42]

BANKING CHALLENGES FOR COLORADO MARIJUANA INDUSTRY

The Cole Memorandum on Marijuana Related Financial Crimes

As medical marijuana centers began making money, opening a bank account was not possible since banks, which are federally regulated, cannot receive funds obtained illegally under federal law. According to law enforcement officials in the Police Foundation focus groups, these business owners pay for everything in cash and have to store their revenue in their own safes. This has posed a safety risk for the owner, employees, and patrons who are at risk of being robbed either at the business, in the parking lot, or while being followed to another location.

In response to the banking problem, Deputy U.S. Attorney General James M. Cole released a memorandum on February 14, 2014, titled "Guidance Regarding Marijuana Related Financial Crimes." Besides reiterating the enforcement of the Controlled Substance Act, Cole outlined the expectations of the Department of Treasury's Financial Crimes Enforcement Network (FinCEN) for financial institutions providing services to marijuana-related businesses.[43] Cole's memo reiterated the eight federal priorities in enforcing the Controlled Substance Act Enforcement:

- Distribution of marijuana to minors;
- Revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Diversion of marijuana from states where it is legal under state law in some form to other states;
- State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Violence and the use of firearms in the cultivation and distribution of marijuana;
- Drugged driving and the exacerbation of other adverse public health consequences associates with marijuana use;
- Growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Marijuana possession or use on federal property.

Cole further summarized statutes for prosecuting financial institutions that accept money from the marijuana industry, specifically related to:

- Money laundering statutes (18 U.S.C. §§ 1956 and 1957), making it unlawful to engage in financial and monetary transactions with the proceeds from, among other things, marijuana-related violations of the Controlled Substance Act.
- Unlicensed money transmitter statute (18 U.S.C. § 1960), which makes it illegal to engage in any transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct

- Record keeping in accordance to the Business Secrecy Act of 1970 so the U.S. government can detect and prevent money laundering, tax evasion, or other criminal activities.[44]

The U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN) released, on the same day as the Cole memo, their expectations regarding marijuana-related business.[45]

The Four Models for Regulating Medical and Recreational Marijuana

As a result of the passages of Amendments 20 and 64, four types of marijuana regulation and oversight models emerged (see Figure 6). Having different models and regulatory agencies providing oversight has created challenges. The first model began with the passage of Amendment 20: the caregiver/patient model for medical marijuana.

The first model began with the passage of Amendment 20: the caregiver/patient model for medical marijuana. W. Lewis Koski, Director of the Marijuana Enforcement Division, wrote that "the affirmative defense (in Amendment 20) was narrowly tailored to patients who were suffering from debilitating medical conditions provided they could prove that a doctor was recommending the use of cannabis to help treat the condition (Colorado Constitution, Art. XVII, § 14)….This model was not intended to take on the tone of a commercial market and it was my understanding that the fear of federal intervention kept most of the caregivers operating underground. Since this was relatively unique public policy at the time, it stands to reason that cultivators/caregivers were unwilling to come from out of the shadows and make themselves known to law enforcement since after all, the cultivating, manufacturing, distribution and possession of any marijuana was still criminal under federal law (Controlled Substances Act). It remains so today."[46]

With the proliferation of medical marijuana centers, the second model, Medical Commercial, was established for licensing and regulating the medical marijuana industry. When Amendment 64 was passed, the recreational models were established. The Medical and Recreational Commercial models are regulated by the MED and systems are in place for monitoring the commercial industry.

The regulation by local law enforcement of the Caregiver/Patient and the Recreational Home Grows models is more challenging. Local law enforcement agencies are not authorized to randomly perform home checks. They are bound by the law and cannot investigate a home grow unless a complaint has been filed or if the officer has some probable cause and the resident willingly allows the officer to enter the home. There is nothing that would allow or prohibit local law enforcement to conduct "knock & talks" at a caregiver location, but they would need to establish probable cause to execute a criminal search if they believe crimes are being committed. Some municipalities are enacting ordinances which prohibit noxious odors and the number of plants allowed to be grown residentially, and local law enforcement can use those ordinances to address neighborhood complaints.[47]

Figure 10: Four Models Created through Amendments 20 and 64

Medical Commercial	Recreational Commercial
– Licensing for businesses, owners and employees – Licensed by Department of Revenue, Marijuana Enforcement Division – Regulatory authority: Marijuana Enforcement Division	– Licensing for businesses, owners and employees – Licensed by Department of Revenue, Marijuana Enforcement Division – Regulatory authority: Marijuana Enforcement Division
Caregiver/Patient	**Recreational Home Grows**
– Caregivers who can grow for up to 5 patients and themselves – Routinely see large grows – Patients are licensed by Colorado Department of Public Health and Environment – Caregiver regulatory authority: Colorado Department of Health and Environment and local law enforcement	– Anyone 21 years of age or older can grow up to 6 plants – No licensing required – Regulatory authority: local law enforcement

Source: Adapted from Chief Marc Vasquez[48]

ENDNOTES FOR APPENDIX 1

[1] Comprehensive Drug Abuse Prevention and Control Act § Statute 84 (1970)

[2] Note: According to the Controlled Substances Act of 1970, a Schedule I controlled substance is defined as, (A) The drug or other substance has a high potential for abuse; (B) The drug or other substances has no currently accepted medical use in treatment in the United States; and (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

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[19] Chief Marc Vasquez, Chief of Police, Erie, CO.

[20] Colorado Department of Health and Environment, Medical Marijuana Registry Program Update reports for 2001, 2003, 2004, 2005, 2006, 2007, 2008 and 2009, https://www.colorado.gov/.

[21] Ibid., https://www.colorado.gov/.

[22] Department of Revenue, Marijuana Enforcement Division.

[23] Map created by Lt. Ernie Martinez, Director-At-Large for the National Narcotic Officers' Associations' Coalition.

[24] Regulation of Medical Marijuana Act § 10-0773.02.

[25] Kelty, K. (2010, August 11). Colorado's Medical Marijuana Law. Colorado Legislative Council Staff, Issue Brief retrieved from http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251649691480&ssbinary=true

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APPENDIX 2: GLOSSARY OF TERMS

This glossary contains terms frequently used in the discussion of the new medical marijuana and recreational marijuana laws approved by Colorado voters in Amendment 20 and Amendment 64. It also includes a number of terms frequently used by and about Colorado law enforcement and their involvement in the new legal marijuana laws. The intent of this glossary is to assist the reader with terms used in this report that may not be familiar to those outside of the field. These terms are frequently used in the marijuana industry and law enforcement when discussing marijuana.

Amendment 20 – Colorado voters passed "Medical Use of Marijuana 2000," allowing persons suffering from debilitating medical conditions to legally grow and use marijuana under strict registry guidelines. This amended Article XVIII of the Colorado Constitution.

Amendment 64 – Citizens of Colorado passed the "Use and Regulation of Marijuana" amendment in 2013, allowing the recreational use of marijuana and licensing for cultivation facilities, product manufacturing facilities, testing facilities, and retail stores. This amended Article XVIII of the Colorado Constitution.

Black Market – The sale or illegal trade of consumer goods that are scarce or heavily taxed. Black market marijuana is considered controlled by criminals and drug cartels. http://www.businessdictionary.com/definition/black-market.html

Caregiver – A person managing the well being of a patient with a debilitating health condition. This person cannot only deliver medical marijuana or marijuana paraphernalia, but must also provide other patient care (i.e., transportation, housekeeping, meal preparation, shopping, and arranging access to medical care). The person providing care must be 18 years of age or older; cannot be the patient or the patient's physician; and cannot have a primary caregiver of their own. https://www.colorado.gov/pacific/cdphe/medical-marijuana-caregiver-eligibility-and-responsibilities

Colorado Department of Public Health and Environment (CDPHE) – Legislative appointed agency that registers medical marijuana patients and caregivers.

Concentrates – Extracted from marijuana, it usually has higher levels of THC through a chemical solvent process (most widely using butane). Depending upon what is done during the extraction process, it can produce different forms of the THC product, such as oil, wax, and shatter. These concentrates are used in marijuana-infused products, such as food and drink products. These concentrates can also be smoked, dabbed, or used in oils or tinctures.

Diversion – Is delivering, distributing, or dispensing of a drug illegally. http://www.deadiversion.usdoj.gov

Drug Cartel – A criminal organization involved in drug trafficking operations.

Edibles – Marijuana infused products in the forms of food or drinks, such as butter, pizza, snacks, candies, soda pop, and cakes.

Extraction Processes – The distillation process to extract THC resin from the marijuana plant using a liquid-to-liquid process through water or chemical solvents. Chemical solvents are more popular for extractions (i.e., butane, hexane, isopropyl alcohol, or methanol) because a higher chemical extraction of THC can be obtained. Chemical extraction processes are more dangerous if not done in a professional and controlled environment because gas fumes from the process can ignite on fire and explode.

Gray Market – A market of semi-legal marijuana produced by caregivers and anybody over 21 who grows their own marijuana. The marijuana in the gray may be legal or grown in legal operations, but its sale circumvents authorized channels of distribution.

Hashish and Hash Oil – To obtain higher levels of THC, the flower from the Cannabis sativa is concentrated through distraction processes, which results in a resin called hashish or a sticky, black liquid called hash oil. Bubble hash is produced through a water process.

Industry-related Crime – Offenses directly related to licensed marijuana facilities.

Marijuana – This is the dried leaves, flowers, stems, and seeds from the cannabis plant. It is usually smoked in hand-rolled cigarettes (also called joints) or in pipes or water pipes (also known a bongs). It can also be mixed in food. When smoked or ingested, it alters perceptions and mood; impairs coordination; and creates difficulty with thinking and problem solving and disrupts learning and memory. http://www.drugabuse.gov/publications/drugfacts/marijuana). Long-term use can contribute to respiratory infection, impaired memory, and exposure to cancer-causing compounds (http://www.samhsa.gov/disorders/substance-use).

Marijuana Cultivations – This is the propagation of cannabis plants beginning with cuttings from other cannabis plants or from seed. In Colorado, all plants must be started from cuttings.

Marijuana Infused Products – Foods, oils, and tinctures containing THC available for consumer purchase.

Marijuana Product Manufacturers – A licensed business through the Department of Revenue, Medical Marijuana Division, that produces and sells concentrates, topicals (e.g., massage oils and lip balms), and edibles (e.g., cakes, cookies, candies, butters, meals, and beverages).

Medical Marijuana – The use of cannabis for the purposes of helping to alleviate symptoms of those persons suffering from chronic and debilitating medical conditions.

Medical Marijuana Center (Centers) and Medical Marijuana Dispensaries (Dispensaries) – The reference to medical marijuana businesses that sell to registered patients has interchangeably been called 'medical marijuana *dispensaries*' and 'medical marijuana *centers*.' Dispensaries connote a doctor's prescription to receive medication.

Colorado doctors do not prescribe medical marijuana, they simply make a certification that recommends the number of plants a patient needs. Since a prescription is associated with dispensaries, the reference to medical marijuana businesses as centers has become the preferable terminology. The medical marijuana businesses are the "center" of a financial transaction between patient and the grow facility.

Medical Marijuana Conditions – A person wanting to register for a medical marijuana card must have one of the following debilitating or chronic conditions: cancer, glaucoma, HIV or AIDS Positive, Cachexia (also known as wasting syndrome in which weight loss, muscle atrophy, fatigue, weakness and significant loss of appetite), persistent muscle spasms, seizures, severe nausea, and severe pain. https://www.colorado.gov/pacific/sites/default/files/CHEIS_MMJ_Debilitating-Medical-Conditions.pdf

Medical Marijuana Division (MED) – Located in the Colorado Department of Revenue, the MED licenses and regulates medical and retail marijuana industries. The MED implements legislation, develops rules, conducts background investigations, issues business licenses and enforces compliance mandates. https://www.colorado.gov/enforcement/marijuanaenforcement

Non-industry Crime – Marijuana taken during the commission of a crime that did not involve a licensed marijuana facility

Patient Medical Marijuana Registration Card – After a patient's application is submitted, reviewed, and approved by the Colorado Department of Public Health and Environment, the patient receives a red license card to be presented to registered Medical Marijuana Centers for purchasing marijuana. The patient must renew annually to remain with the registry. https://www.colorado.gov/pacific/cdphe/renew-your-medical-marijuana-registration-card

Physician's Recommendation – Physicians must qualify to write patient recommendations for medical marijuana. These qualifications include having a bona fide physician-patient relationship and a good standing with the medical licensing board. Physicians must certify annually with the Colorado Department of Public and Health Environment in order to assist people wanting to receive medical marijuana. Physicians do not *prescribe* marijuana, but rather provide a marijuana *plant count recommendation* for the patient based on the severity of the patient's condition. A physician is not limited in the number of plants recommended in a year for a patient. If a physician does not select a marijuana plant count option, then the patient will receive the standard 6-plants/2 ounces of useable marijuana as defined through legislation. https://www.colorado.gov/pacific/sites/default/files/Medical-Marijuana-Registry_Physician-Newsletter_Mar2012.pdf

Probable Cause – A reasonable and factual basis for believing a crime has been committed in order to make an arrest, conduct a search, or obtain a warrant.

Recreational marijuana – The use of cannabis as a pastime to alter a person's state of consciousness.

Red Card – This is slang for a patient medical marijuana registration card because the license color is red.

Registered Medical Marijuana Patient – Someone who has gone through the approval process and obtains a licensed medical marijuana patient card from the Colorado Department of Public Health and Environment.

Retail marijuana stores – Licensed stores that can sell marijuana, paraphernalia, and marijuana infused-products.

Seed-to-sale – The tracking process for medical marijuana from either the seed or immature plant stage until the medical marijuana or medical infused-product is sold to a customer at a medical marijuana center or is destroyed. This tracking system is used by the Department of Revenue, Marijuana Enforcement Division, to monitor licensed marijuana businesses inventory. https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf

Schedule I Controlled Substances – These drugs, substances or chemicals are not currently accepted for medical use and have a high potential for drug abuse as defined in the Substance Control Act of 1970. These are the most dangerous drugs that can potentially cause severe psychological or physical dependency. Drugs in this category include: heroin, LSD, marijuana, ecstasy, methaqualone, and peyote. http://www.dea.gov/druginfo/ds.shtml

Substance Control Act of 1970 – This law regulates the manufacturing and distribution of narcotics, stimulants, depressants, hallucinogens, anabolic steroids, and illicit production of controlled substances. These drugs are placed within one of the five schedules based on medicinal value, harmfulness, and potential for abuse or addiction.

THC (Tetrahydrocannabinol) – THC is the mind-altering chemical found in the Cannabis sativa plant (which is one species of the hemp), specifically in the leaves, flowers, stems, and seeds.

Vape Pens – A battery operated heating element that vaporizes liquid marijuana oils.

APPENDIX 3: COLORADO ASSOCIATION OF CHIEFS OF POLICE MARIJUANA POSITION PAPER

Colorado Association of Chiefs of Police, Inc.

Marijuana Position Paper
March 13, 2014

Philosophy and Position:

The Colorado Association of Chiefs of Police (CACP) recognizes that Amendment 20 and Amendment 64 of the Colorado Constitution were passed by voters in 2000 and 2012 respectively. The Colorado General Assembly has enacted legislation which legalized the cultivation, distribution, possession and non-public consumption of small amounts of medical and recreational marijuana. In 2013, the Colorado General Assembly enacted legislation which legalized and regulated the commercial, retail cultivation and sale of small amounts of marijuana. The statutes which address medical and recreational marijuana cultivation, sale and possession have been passed by the Colorado General Assembly and signed into law by the Governor. The CACP recognizes that society's views and norms are evolving on the use of marijuana yet we also believe that public safety is also of paramount concern to our residents, businesses and visitors.

- It is the position of the Colorado Association Chiefs of Police that a primary mission and focus of Colorado law enforcement officers represented by the CACP is the prevention and reduction of crime and disorder. Marijuana legalization will negatively impact traffic safety and safety in Colorado communities. The CACP is committed to research and the implementation of practices and strategies which will maintain safety in our communities.

- It is recognized that Colorado peace officers have a duty and responsibility to uphold the Colorado Constitution and amendments to that constitution as well as local, state and federal laws.

- The conflict between Federal law and State law with regard to marijuana remains a major obstacle and needs to be resolved as soon as possible.

- The Colorado Association of Chiefs of Police is concerned that widespread marijuana use has the potential to adversely affect the safety, health and welfare of Colorado residents, businesses and visitors. There are concerns that marijuana use will adversely affect traffic safety on our highways and roadways and that marijuana legalization will result in an increase in marijuana and overall drug use in our schools.

- The Colorado Association of Chiefs of Police supports community education to reduce the use of marijuana by our youth and to highlight the risks of marijuana use to our communities and individuals. The CACP requests that adequate funding be provided for the development and delivery of community and youth education.

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Colorado Association of Chiefs of Police, Inc.

- The Colorado Association of Chiefs of Police is concerned for the safety of the motoring public and passengers as it pertains to driving under the influence of drugs. Since the scientific evidence constituting impairment has not yet been clearly defined, the presumptive inference standard of impairment at 5 nanograms should be considered a starting point with additional concerns expressed for the combination of alcohol and marijuana in a person's system while operating a motor vehicle.
    - The CACP strongly supports Colorado peace officers being trained in Advanced Roadside Impaired Driving Enforcement (ARIDE) and as Drug Recognition Experts (DRE) and requests that adequate funding be provided to increase training for peace officers statewide.
    - The CACP requests that funding be provided for the purchase of oral fluid testing equipment for local agencies to explore the effectiveness of this technology in determining if drivers are under the influence of marijuana or other legal and illegal drugs. Training on use of such equipment should also be funded.
    - It has been recognized by experts in the field that being under the influence of both alcohol and marijuana is more dangerous than being under the influence of just alcohol or just marijuana. The CACP supports additional legislation or changes in current law to enhance the seriousness of offenses when drivers are found to be impaired by both alcohol and marijuana and/or other drugs.
- The Colorado Governor impaneled an Amendment 64 implementation task force. The Colorado Association Chiefs of Police were represented on this task force and numerous recommendations were ultimately made by the task force. The Amendment 64 Implementation Task Force had several Guiding Principles. Two of those Guiding Principles which focus on law enforcement include:
    - Establish tools that are clear and practical, so that the interactions between law enforcement, consumers, and licensees are predictable and understandable.
    - Ensure that our streets, schools, and communities remain safe.
- There were numerous recommendations, which received consensus approval by the Amendment 64 task force, which focus on the two outlined principles and it is the position of the CACP that those recommendations should be implemented without delay.

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- The CACP conducted a survey regarding funding priorities for law enforcement. This survey was sent to members of the CACP Legislative Subcommittee and the survey results identified seven priorities:
  - Priority One:
    - Funding for ARIDE (Advanced Roadside Impaired Driving Enforcement) and Drug Recognition Expert (DRE) training.
  - Priority Two:
    - Provide immediate funding for the purchase of oral fluid testing equipment for local agencies. Also provide funding for training on use of equipment, etc.
  - Priority Three:
    - Funding for patrol officer and investigator training development and implementation in Colorado Marijuana Code. Overtime funding for trainers and students (similar to POST regional training scholarships).
  - Priority Four (Four Programs/Initiatives Tied):
    - Funding to support the creation of a state-wide database on marijuana crimes
    - Funding to support Drug Task Force Operations if investigation is focused on criminal organizations involved in marijuana trafficking.
    - Provide funding for local agencies to fund marijuana compliance officers. Those officers would focus on the Colorado Marijuana Code and local ordinances, both commercial/retail and home cultivation. Would be somewhat like a municipal inspector who is well-versed in fire codes, health codes, etc.; may be sworn or non-sworn.
    - Funding to implement DUI/DUID check points and conduct presumptive testing on marijuana and other drugs.
- CACP is concerned with the conflicts which exist between Amendment 20 and Amendment 64. The CACP supports legislation which will clearly define and outline legal vs. illegal marijuana cultivation and distribution under both Colorado constitutional amendment 20 and 64.
- The CACP has concerns regarding the lack of oversight of plant count recommendations made by doctors for medical marijuana patients. As an example, the Colorado Department of Public Health and Environment (CDPHE) routinely receives recommendations for allowable plant counts far in excess of the six plant limit without any justification as to why additional plants are necessary.

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- The CACP supports an effective and robust regulatory system, which can regulate the retail-commercial distribution of medical and recreational marijuana.

- The CACP is concerned with the lack of regulatory oversight of non-commercial caregiver and recreational cultivations, which are commonly referred to as "Home Grows". The CACP believes there is great potential for an increase in violent crime and the potential for diversion of marijuana produced in non-commercial, licensed cultivations.

- The CACP is concerned there is a lack of prosecution of marijuana-related cases which are outside the parameters of legal marijuana cultivation and distribution in Colorado. The CACP supports prosecution of behavior which is illegal under Colorado constitution, statutes and municipal & county ordinances. It is of paramount importance that what is legal vs. what is illegal be clearly defined and a bright line between legal and illegal behavior be established.

- Diversion of marijuana from non-commercial marijuana cultivations remains a major source of marijuana to youth and to buyers who live outside the State of Colorado.

- The CACP acknowledges great concern for the diversion of marijuana outside the state of Colorado and for the availability of marijuana to minors.

- It is the position of the Colorado Association Chiefs of Police that clear direction and guidance is essential for our officers, prosecutors and community. The Colorado Association of Chiefs of Police supports legislation, training and education which provide clear direction and guidance to our officers and the communities we serve.

- The Colorado Association of Chiefs of Police support development and analysis of accurate data to determine the impact to the communities we serve. The Colorado Association of Chiefs of Police will partner with all stakeholders, including all local, state and federal law enforcement partners to ensure safety in the communities we serve and will assist in the collection of data to determine the impact of marijuana legalization in Colorado.

The Colorado Association of Chiefs of Police is committed to working with all stakeholders to ensure that all Colorado communities remain safe and the legalization of marijuana does not adversely impact the communities in which we live and work.

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APPENDIX 4: FEDERAL GUIDANCE MEMOS ON STATE MARIJUANA LEGALIZATION LAWS

Marijuana remains a Schedule I controlled substance and is an illegal drug under the Federal Controlled Substance Act. Federal officials have made it clear on numerous occasions that federal law enforcement will continue to enforce the law when activities involving marijuana amount to a violation of federal statutes.

However, the U.S. Department of Justice has since 2009 set out parameters under which the federal law may be enforced within states, and has otherwise allowed states to enforce their own laws regarding medical marijuana, and now in Colorado, recreational use of marijuana.

The guidance regarding federal enforcement was first laid out in a 2009 memo from Deputy Attorney General David W. Ogden to federal prosecutors, attached below. Following this guidance, federal law enforcement in 2012 informed a total of 58 marijuana businesses in Colorado that they were in violation of the conditions the federal government has laid out under which it would consider a marijuana operation illegal. All of these businesses agreed to close without prosecution.

This guidance policy was reinforced by a second memo issued in 2014 by Deputy Attorney General James M. Cole, also attached below. This memo expanded the guidelines to inform financial institutions of how federal money laundering laws will be enforced with regards to accounts for marijuana businesses that are deemed legal at the state level.

This latter guidance was supported by a memo (also attached) from the Financial Crimes Enforcement Network of the U.S. Department of Treasury, also clarifying the laws on money laundering with regard to marijuana businesses deemed legal under state laws.

Federal policy continues to evolve as more states allow some form of legal marijuana. The U.S. Congress, in the 2015 Appropriations omnibus funding bill, approved language barring any federal agency from using funds to enforce laws against medical marijuana operations deemed legal under state laws; however, this provision will expire at the end of the fiscal year on September 30, 2015.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
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United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

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Department of the Treasury
Financial Crimes Enforcement Network

Guidance

FIN-2014-G001
Issued: February 14, 2014
Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network ("FinCEN") is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana.[1] Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.[2] The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress's determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

[1] Controlled Substances Act, 21 U.S.C. § 801, *et seq.*
[2] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the "Cole Memo priorities"):[3]

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.[4]

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of

[3] The Cole Memo notes that these enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA.
[4] James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014).

products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[5] Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this

[5] *See, e.g.*, 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a SAR with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations.

SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term "MARIJUANA LIMITED" in the narrative section.

A financial institution should follow FinCEN's existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a "Marijuana Limited" SAR.[6] The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a "Marijuana Priority" SAR.

"Marijuana Priority" SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a "Marijuana Priority" SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term "MARIJUANA PRIORITY" in the narrative section to help law enforcement distinguish these SARs.[7]

"Marijuana Termination" SAR Filings

If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should

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[6] Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (Question #16), *available at:* http://fincen.gov/whatsnew/html/sar_faqs.html (providing guidance on the filing timeframe for submitting a continuing activity report).

[7] FinCEN recognizes that a financial institution filing a SAR on a marijuana-related business may not always be well-positioned to determine whether the business implicates one of the Cole Memo priorities or violates state law, and thus which terms would be most appropriate to include (i.e., "Marijuana Limited" or "Marijuana Priority"). For example, a financial institution could be providing services to another domestic financial institution that, in turn, provides financial services to a marijuana-related business. Similarly, a financial institution could be providing services to a non-financial customer that provides goods or services to a marijuana-related business (e.g., a commercial landlord that leases property to a marijuana-related business). In such circumstances where services are being provided indirectly, the financial institution may file SARs based on existing regulations and guidance without distinguishing between "Marijuana Limited" and "Marijuana Priority." Whether the financial institution decides to provide indirect services to a marijuana-related business is a risk-based decision that depends on a number of factors specific to that institution and the relevant circumstances. In making this decision, the institution should consider the Cole Memo priorities, to the extent applicable.

file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term "MARIJUANA TERMINATION" in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. See *Section 314(b) Fact Sheet* for more information.[8]

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution's knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners, and may be updated in future guidance.

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
    - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
    - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
    - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
    - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
    - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

[8] Information Sharing Between Financial Institutions: Section 314(b) Fact Sheet, *available at: http://fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.*

- Deposits apparently structured to avoid Currency Transaction Report ("CTR") requirements.
- Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
- Deposits by third parties with no apparent connection to the accountholder.
- Excessive commingling of funds with the personal account of the business's owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
- Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
- Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
- A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.

- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
- The business is unable to demonstrate the legitimate source of significant outside investments.
- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a "consulting," "holding," or "management" company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.

- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.

- A marijuana-related business's proximity to a school is not compliant with state law.

- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than $10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than $10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

* * * * *

FinCEN's enforcement priorities in connection with this guidance will focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. Financial institutions with questions about this guidance are encouraged to contact FinCEN's Resource Center at (800) 767-2825, where industry questions can be addressed and monitored for the purpose of providing any necessary additional guidance.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

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Attachment "C"

STAFF REPORT TO THE CITY COUNCIL

DATE: Regular Meeting of December 13, 2016

TO: Honorable Mayor and Members of the City Council

SUBMITTED BY: Michael G. Vigilia, City Attorney
Forrest Ebbs, Community Development Director

SUBJECT: Extension of an Interim Urgency Ordinance Establishing a Temporary Moratorium on Non-Medical Marijuana Uses within the City of Antioch

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RECOMMENDED ACTION

It is recommended that the City Council take the following actions:

1) Accept and approve the report from the City Attorney and Community Development Director and provide direction regarding a permanent ordinance regulating non-medical marijuana uses; and

2) Adopt the extension of the interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses. ***(A 4/5 vote is required for adoption.***

STRATEGIC PURPOSE

This item will support the City's Crime Reduction Strategy. It also supports Strategy C-2 Blight Reduction by creating resources to address areas that experience nuisance conditions.

FISCAL IMPACT

No fiscal impact related to this item.

DISCUSSION

Pursuant to Government Code section 65858(a) the City Council adopted an interim urgency ordinance establishing a temporary moratorium on non-medical marijuana uses during the regular City Council meeting of November 8, 2016. The moratorium took effect immediately and will expire on December 23, 2016. Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of an interim ordinance, the City Council must issue a written report describing the measures taken to alleviate the conditions which led to the adoption of the interim ordinance. This report by staff, if approved by the City Council, shall serve as the report issued pursuant to the Government Code.

Proposition 64

Proposition 64, known as the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act"), was approved by the voters on November 8, 2016 and took effect on November 9. The AUMA has legalized non-medical marijuana use, possession and cultivation by persons 21 years of age or older. The AUMA has also established a regulatory framework for commercial non-medical marijuana activities. However the state will not begin issuing licenses to businesses until January 1, 2018.

In order to preserve local control to the greatest extent possible and allow staff sufficient time to act upon direction from the City Council in drafting a permanent ordinance, staff recommends extension of the interim urgency ordinance that establishes a moratorium on non-medical marijuana uses. The moratorium specifically prohibits the following non-medical marijuana activities for personal use: outdoor cultivation for personal use, indoor cultivation for personal use that does not comply with state law. The following commercial non-medical marijuana uses are prohibited by the moratorium: cultivation; manufacture; testing; retail; distribution/delivery; microbusiness; and any commercial marijuana activity that may be licensed by the state.

Measures Taken to Alleviate the Condition Requiring Adoption of the Interim Ordinance

The enactment of the temporary moratorium was necessitated by the absence of explicit regulations within the Antioch Municipal Code addressing non-medical marijuana uses. Since the enactment of the moratorium on November 8, staff has begun the process of evaluating regulatory options with respect to non-medical marijuana uses with the assistance of outside legal counsel. In order to draft permanent regulations, Council direction is sought on the following issues:

- Personal Cultivation
    - To what extent shall the City ban or allow private outdoor cultivation for personal use? If outdoor cultivation is allowed, what regulations should be imposed?
    - What regulations should be imposed on private indoor cultivation for personal use since the AUMA does not allow a total ban?

- Commercial Marijuana Activities
    - Shall the City prohibit all commercial marijuana activities, as allowed by the AUMA?
    - If the City chooses to allow commercial marijuana activities, which activities will be allowed? What types of regulations should be placed on allowed marijuana land uses? What type of local permit or permits will be required? How will the City process land use applications? What type of local taxes and/or fees should be imposed?

- Marijuana Deliveries
    - Shall the City prohibit marijuana deliveries that begin or end within the City's boundaries? The AUMA and the Medical Cannabis Regulation and Safety Act (MCRSA) allow cities to enact such prohibitions. However, a city may not prevent a delivery service from using public roads to simply pass through its jurisdiction.
    - If deliveries are allowed, should they be limited to medical marijuana deliveries?

Status of Non-Medical Marijuana Uses in Neighboring Cities

Staff has reached out to counterparts in Pittsburg, Oakley and Brentwood regarding those cities' respective positions regarding non-medical marijuana uses. Their current positions are as follows:

- Brentwood –Ban on cultivation, dispensaries and delivery.
- Oakley – Ban on cultivation, dispensaries and delivery.
- Pittsburg – Ban on non-medical marijuana to the fullest extent allowed by Prop. 64 and adopted regulations on indoor cultivation as allowed by Prop. 64.

Extension of Urgency Ordinance

Government Code sections 36937(b) and 65858 authorize the enactment of an interim urgency ordinance for the immediate protection public health, safety and welfare to prohibit any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. The legalization of recreational marijuana in California by Proposition 64 poses a significant and imminent public health and safety threat that must be addressed, see Attachment B.

The temporary moratorium enacted on November 8, 2016 will expire on December 23, 2016. Pursuant to Government Code section 65858(a) the moratorium may be extended for an additional 10 months and 15 days upon a 4/5 vote of the Council. Staff will return with a proposed permanent ordinance prior to the expiration of this extension based on direction given by the Council during this meeting. The permanent ordinance will initially be presented to the Planning Commission since the proposed regulations will involve land use and zoning regulations which are required by state law to be reviewed by the Planning Commission.

Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of this moratorium, staff will provide the City Council with a written report describing the measures taken to alleviate the conditions which led to the adoption of the urgency ordinance.

ATTACHMENTS

A. Interim Urgency Ordinance
B. Staff report and supporting materials from November 8, 2016 City Council meeting establishing temporary moratorium on non-medical marijuana uses.

ATTACHMENT "A"

ORDINANCE NO. _____

ADOPTION OF AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ANTIOCH EXTENDING A TEMPORARY MORATORIUM ON NON-MEDICAL MARIJUANA USES WITHIN THE CITY OF ANTIOCH PENDING COMPLETION OF AN UPDATE TO THE CITY'S ZONING ORDINANCE

The City Council of the City of Antioch does ordain as follows:

SECTION 1. Authority. This ordinance is adopted pursuant to the authority of Section 36937(b) and 65858(a) of the Government Code of the State of California, the Antioch Municipal Code, and the laws of the state of California.

SECTION 2. Findings. The City Council of the City of Antioch hereby finds, determines and declares as follows:

A. The City of Antioch may make and enforce all laws and regulations not in conflict with the general laws, and the City holds all rights and powers established by state law.

B. Proposition 64, known as the Control, Regulate, and Tax Adult Use of Marijuana Act ("AUMA" or "Act"), was adopted by the voters on November 8, 2016 and took effect on November 9. The AUMA has decriminalized under state law recreational marijuana use, cultivation, and distribution and further established a licensing program for non-medical commercial cultivation, testing, and distribution of non-medical marijuana and the manufacturing of non-medical marijuana products. However, such licenses will not be issued at least until 2018.

C. The City of Antioch currently bans medical marijuana dispensaries and prohibits cultivation of marijuana for medical, non-recreational use pursuant to Title 5, Chapter 21 of the Antioch Municipal Code.

D. The Antioch Municipal Code does not have express provisions regarding non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales. As a result, the City Council adopted an Interim Urgency Ordinance on November 8, 2016 establishing a temporary moratorium on non-medical marijuana uses in the City of Antioch.

E. During the past several years, the City faced similar land use impacts and criminal activity related to medical marijuana uses, leading the City to adopt a temporary moratorium and eventually regular ordinances to address those issues.

F. It is reasonable to conclude that non-medical marijuana uses would cause similar adverse impacts on the public health, safety, and welfare in Antioch.

G. Despite the City's ban on non-medical marijuana uses and state criminal statutes related to marijuana cultivation and possession, the Antioch Police Department has encountered eight (8) illegal marijuana grows, seized 2,478 marijuana plants and 12,153.1 grams of processed marijuana since the beginning of 2016. An excerpt of the report is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

H. The cultivation of marijuana for personal use has the potential to lead to nuisances and criminal activity. Growing marijuana plants emit an odor that can be noxious and can interfere with the quiet enjoyment of neighboring properties. Also, marijuana cultivation can be attractive to burglars seeking to steal the plants, which can lead to violent confrontations with property owners.

I. It is imperative that the City retain local land use control over non-medical marijuana cultivation. Several California cities and counties have experienced serious adverse impacts associated with and resulting from medical marijuana dispensaries and cultivation sites. According to these communities and according to news stories widely reported, medical marijuana activities have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, and illegal sales of marijuana to, and use of marijuana by, minors and other persons without medical need in the areas immediately surrounding such medical marijuana activities. There have also been large numbers of complaints of odors related to the cultivation and storage of marijuana.

J. A California Police Chiefs Association compilation of police reports, news stories, and statistical research regarding crimes involving medical marijuana businesses and their secondary impacts on the community is contained in a 2009 white paper report which is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

K. The Police Foundation and the Colorado Association of Chiefs of Police issued a 2015 report entitled "Colorado's Legalization of Marijuana and the Impact on Public Safety: A Practical Guide for Law Enforcement," which outlined many of the summarize the numerous challenges faced by law enforcement when enforcing the laws surrounding legalization, to document solutions that have been proposed and put into effect, and outline problems that still need to be addressed; a copy of this memorandum is attached to the staff report presented to the City Council with this ordinance and is on file with the City Clerk.

L. In order to protect the public health, safety, and welfare, the City Council desires to amend the Municipal Code to address, in express terms, non-medical marijuana uses. In the wake of the adoption of Proposition 64, the City Council hereby determines that the Municipal Code is in need of further review and revision to protect the public against potential negative health, safety, and welfare impacts and preserve local control over non-medical marijuana establishments. Marijuana currently is prohibited under federal law as a controlled substance.

M. Proposition 64 expressly preserves local jurisdictions' ability to adopt and enforce local ordinances to regulate non-medical marijuana establishments including local zoning and land use requirements, business license requirements, and the ability to completely prohibit the establishment or operation of one or more types of non-medical marijuana businesses.

N. Proposition 64 further recognizes the City's ability to completely prohibit outdoor planting, harvesting, cultivation or processing of non-medical marijuana for personal use, and the City's ability to regulate indoor cultivation for personal use.

O. The City did not take a formal position on Proposition 64 but in order to preserve local control, the City confirms that such non-medical marijuana is prohibited within the City to the fullest extent permitted by law.

P. A permanent ordinance is necessary to address the public health and safety issues related to non-medical marijuana uses. Subsequent to the City Council's adoption of the interim urgency ordinance establishing a temporary moratorium on non-recreational marijuana uses on November 8, 2016, staff has begun to develop options for a permanent ordinance. However, the compacted time frame between now and the expiration of the initial 45-day moratorium on December 23, 2016 does not provide sufficient time to consider and adopt a regular zoning code amendment, which includes public notice, consideration by the Planning Commission, and first and second reading before the City Council. Consequently, an extension to the interim prohibition on cultivation of non-medical marijuana for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales and the issuance of any permits and/or entitlements relating to such uses is necessary for an additional period of 10 months and 15 days. The loss of local land use control over marijuana cultivation would result in a current and immediate threat to the public health, safety, and welfare.

Q. Government Code sections 36937 and 65858 authorize the adoption of an interim urgency ordinance to protect the public health, safety, and welfare, and to prohibit land uses that may conflict with land use regulations that a city's legislative bodies are considering, studying, or intending to study within a reasonable time.

R. Failure to extend this moratorium could impair the orderly and effective implementation of contemplated amendments to the Municipal Code.

S. The City Council further finds that this moratorium is a matter of local and City-wide importance and is not directed towards any particular person or entity that seeks to cultivate marijuana in Antioch.

T. The proposed Ordinance conforms with the latest adopted general plan for the City in that a prohibition against non-medical marijuana uses such as cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales does not conflict with any allowable uses in the land use element and does not conflict with any policies or programs in any other element of the general plan.

U. The proposed Ordinance will protect the public health, safety, and welfare and promote the orderly development of the City in that prohibiting marijuana cultivation for personal use, commercial cultivation, manufacturing, testing, distribution, delivery and retail sales will protect the City from the adverse impacts and negative secondary effects connected with these activities.

V. The proposed Ordinance is consistent with the Antioch Zoning Code which does not currently specify non-medical marijuana uses as permitted by right or with a conditional use permit in any zoning district.

W. Based on the foregoing, the City finds that there is a current and immediate threat to the public health, safety, or welfare and that this Ordinance is necessary in order to protect the City from the potential effects and impacts of non-medical marijuana uses in the City, potential increases in crime, impacts on public health and safety, the aesthetic impacts to the City, and other similar or related effects on property values and the quality of life in the City's neighborhoods.

X. The City Council finds that this Ordinance is authorized by the City's police powers. The City Council further finds that the length of the interim zoning regulations imposed by this Ordinance will not in any way deprive any person of rights granted by state or federal laws, because the interim zoning regulation is short in duration and essential to protect the public health, safety and welfare.

SECTION 3. Imposition of Temporary Moratorium. In accordance with the authority granted the City under Government Code sections 36937(b) and 65858 (a), (b), and pursuant to the findings stated herein, the City Council hereby finds that: (1) the foregoing findings are true and correct; and (2) there exists a current and immediate threat to the public health, safety, and welfare from unregulated marijuana cultivation for personal use and commercial marijuana businesses, operating in Antioch; and (3) this Ordinance is necessary for the immediate preservation of the public peace, health, and safety as set forth herein; and (4) hereby declares and imposes a temporary moratorium for the immediate preservation of the public health, safety and welfare as set forth below:

A. Definitions

COMMERCIAL MARIJUANA ACTIVITY includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, delivery or sale of marijuana and marijuana products as regulated by state law.

CULTIVATION means planting, growing, harvesting, drying, curing, grading, trimming or processing of marijuana plants, or any part thereof for non-medical, personal use or commercial purposes.

DELIVERY means the commercial transfer of marijuana or marijuana products to a customer. “Delivery” also includes the use by a retailer of any technology platform owned and controlled by the retailer, or independently licensed under California law, that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of marijuana or marijuana products.

DISTRIBUTION means the procurement, sale, and transport of marijuana or marijuana products between entities for commercial use purposes.

LICENSEE means the holder of any state-issued license related to marijuana activities.

MANUFACTURE means to compound, blend, extract, infuse, or otherwise make or prepare a marijuana product.

MANUFACTURER means a person that conducts the production, preparation, propagation, or compounding of marijuana or marijuana products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages marijuana or marijuana products or labels or re-labels its container, that holds a state license pursuant to this division.

MARIJUANA means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part thereof; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Marijuana” does not include:
(1) Industrial hemp, as defined in Section 11018.5 of the California Health & Safety Code; or (2) The weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.

MARIJUANA PRODUCT means marijuana that has undergone a process whereby the plant material has been transformed into a concentrate, including but not limited to concentrated cannabis, or an edible or topical product containing marijuana or concentrated cannabis and other ingredients.

MARIJUANA TESTING SERVICE means a laboratory, facility or entity in the state that offers or performs tests of marijuana or marijuana products, including the equipment provided by such laboratory, facility, or entity, and that is both of the following: 1) accredited by an accrediting body that is independent from all other persons involved in commercial marijuana activity in the state; 2) registered with the California Department of Public Health.

MICROBUSINESS means a marijuana business that cultivates marijuana on an area less than 10,000 square feet acts as a licensed distributor, Level 1 manufacturer as defined by state law, and retailer pursuant to state law.

RETAILER means a person or entity that engages in retail sale and delivery of marijuana or marijuana products to customers.

SELL, SALE, and TO SELL means any transaction whereby, for any consideration, title to marijuana is transferred from one person to another, and includes the delivery of marijuana or marijuana products pursuant to an order placed for the purchase of the same and soliciting or receiving an order for the same, but does not include the return of marijuana or marijuana products by a licensee to the licensee from whom such marijuana or marijuana product was purchased.

B. Prohibitions. The restrictions on medical marijuana facilities in Title 5, Chapter 21 of the Antioch Municipal Code and other references to "marijuana" or "medical marijuana" throughout the Code shall apply equally to non-medical marijuana to the fullest extent permitted by law.

C. Cultivation of non-medical marijuana for personal use. Cultivation of marijuana for personal use is prohibited in all zones in the City to the fullest extent permitted by law. Cultivation of non-medical marijuana outdoors upon the grounds of a private residence is prohibited in all zones. Cultivation of non-medical marijuana within a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure is prohibited in all zones unless conducted in full compliance with state law.

D. Commercial cultivation. Commercial cultivation of marijuana is prohibited in all zones in the City to the fullest extent permitted by law.

E. Manufacture. Commercial manufacture of marijuana or marijuana products is prohibited in all zones in the City to the fullest extent permitted by law.

F. Testing Service. Marijuana testing service is a prohibited use in all zones in the City to the fullest extent permitted by law.

G. Retailer. Marijuana retailer is a prohibited use in all zones in the City to the fullest extent permitted by law.

H. Distributor. Marijuana distributor is a prohibited use in all zones in the City to the fullest extent permitted by law.

I. Microbusiness. Marijuana microbusiness is a prohibited use in all zones in the City to the fullest extent permitted by law.

J. Commercial marijuana activities. All commercial marijuana activities for which the state may issue a license are prohibited in all zones in the City to the fullest extent permitted by law.

K. Distribution or delivery of marijuana by state licensees. Distribution or delivery of marijuana, by a state licensee, to a recipient located within the city of Antioch is prohibited to the fullest extent permitted by law.

L. In addition to all other enforcement or legal remedies available to the City, any use or condition caused or permitted to exist in violation of any of the provisions of this Ordinance shall be and is hereby declared a public nuisance and may be abated by the City.

SECTION 4. CEQA. This Ordinance is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000, et seq.) (CEQA) because it can be seen with certainty that there is no possibility the adoption and implementation of this Ordinance may have a significant effect on the environment, and the Ordinance is exempt from CEQA pursuant to CEQA Guidelines Sections 15061(b)(1), 15061(b)(2), and 15061(b)(3). Moreover, the adoption of this Ordinance is further exempt from CEQA because the Ordinance does not change existing City law and practice. The City Council is the decision making body on this Ordinance, and before taking action on it, using its independent judgment, finds such CEQA exemptions to apply.

SECTION 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is, for any reason, held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 6. Effective Date. This ordinance shall take effect immediately upon its adoption by not less than a four-fifths vote of the Antioch City Council but shall be of no further force and effect 10 months and 15 days from its date of adoption unless the City Council, after notice and public hearing as provided under Government Code section 65858(a), (b) and adoption of the findings required by Government Code section 65858(c), subsequently extends this Ordinance.

SECTION 7. Report of Interim Moratorium. Pursuant to Government Code section 65858(d), 10 days prior to the expiration or any extension of this Interim Ordinance, the City Council will issue a written report describing the measures taken to alleviate the conditions which led to the adoption of this Interim Ordinance.

SECTION 8. Declaration of Urgency. This ordinance is hereby declared to be an urgency measure necessary for the immediate protection of the public health, safety and welfare. This Council hereby finds that there is a current and immediate threat to the public health, safety and welfare. The reasons for this urgency are declared and set forth in Section 2 of this Ordinance and are incorporated herein by reference.

SECTION 9. Publication; Certification. The City Clerk shall certify to the adoption of this Ordinance and cause same to be published in accordance with State law.

* * * * * *

I HEREBY CERTIFY that the foregoing Interim Urgency Ordinance was introduced and adopted as an urgency measure pursuant to the terms of California Government Code Sections 36937(b) and 65858(a) at a regular meeting of the City Council of the City of Antioch on the 13th day of December, 2016, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Sean Wright, Mayor of the City of Antioch

ATTEST:

Arne Simonsen, City Clerk of the City of Antioch