



STAFF REPORT

TO: PLANNING COMMISSION

FROM: Gary D. Peterson, Chief of Police

DATE: January 21, 2014

SUBJECT: Public Hearing, Consideration and Possible Adoption of a Resolution Recommending an Exemption From the Provisions of the California Environmental Quality Act (CEQA) Pursuant to CEQA Guidelines Sections 15304 and 15061(b)(3) and Making Findings Relating Thereto and Recommending the City Council Adopt Proposed Amendments to Martinez Municipal Code (MMC) Title 22, Chapter 22.41 Relating to the Outdoor Growing of Medical Marijuana

RECOMMENDATION:

Adopt PC Resolution No. 14-02 recommending to the City Council an Exemption From the Provisions of the California Environmental Quality Act (CEQA) Pursuant to CEQA Guidelines Sections 15304 and 15061(b)(3) and Making Finding Relating Thereto and Adoption of proposed Amendments to Martinez Municipal Code (MMC) Title 22, Chapter 22.41 Relating to the Outdoor Growing of Medical Marijuana.

BACKGROUND

Recently, complaints have been received by the City Council, City Manager and the Chief of Police concerning the nuisance impacts associated with the outdoor cultivation of medical marijuana in residentially zoned areas. The primary nuisance impact of outdoor cultivation is the strong odor associated with a large quantity of mature marijuana plants. Residents have also raised concerns about the proximity of children to areas under cultivation, visibility of grows from the public right-of-way, and the potential for increased neighborhood crime.

At the November 6, 2013, City Council Meeting, a marijuana grower who was apparently unaware of the November 4th public safety subcommittee meeting, chastised the local press for putting him at risk for theft or violence by publishing photos and the location of the grow. The grower's unwitting admission supported the argument that his

outdoor residential marijuana grow not only impacted his safety, but the safety of neighboring residents. At the December 2, 2013 Public Safety Subcommittee meeting, the same resident related that, in fact, his residence suffered a theft after the article was published.

In the past five years more than 40 cities and 25 counties in California have adopted ordinances regulating the cultivation of medical marijuana within their jurisdictions. Staff has reviewed numerous ordinances that offer varying approaches at regulating the outdoor cultivation of medical marijuana. Attachment 1 summarizes the different approaches other California cities have used to regulate the cultivation of medical marijuana.

DISCUSSION

Under both state and federal law, it is illegal to possess, distribute, or cultivate marijuana. The Controlled Substance Act (CSA) was enacted in 1970 as part of the federal government's "war on drugs." Congress placed marijuana in Schedule I of the CSA. Under the CSA, it is illegal to manufacture, distribute or possess marijuana (21 U.S.C. §841 and §844). It is also illegal under the CSA to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance, including marijuana (21 U.S.C. §856(a)(1)).

In 1996 California voters approved Proposition 215, known as the Compassionate Use Act (CUA), which provides that certain state law criminal provisions relating to the possession and cultivation of marijuana "shall not apply to a patient, or a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Safety Code §11362.5(d).) With the exception of possession and cultivation, the CUA did not change state criminal prohibitions concerning the transportation, possession for sale, or sale of marijuana.

In 2003, the state legislature enacted the Medical Marijuana Program Act (MMPA) to: (1) clarify the scope of the CUA, facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid their unnecessary arrest and prosecution, and provide guidance to law enforcement; (2) to promote uniform and consistent application of the CUA; and (3) to enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. (Health & Safety Code §§11362.7–11362.83.)

The MMPA expressly immunizes from state criminal liability qualified patients, persons with identification cards, and primary caregivers who transport or process marijuana for the personal medical use of a qualified patient or person with an identification card (Health & Safety Code §11362.765(b) (1) and §11362.765(b) (2)). The MMPA also created an affirmative defense to state criminal liability for qualified patients, persons with identification cards, and primary caregivers who collectively or cooperatively cultivate marijuana (Health & Safety Code §11362.775).

A. Applicable Federal Law

Notwithstanding the CUA and the MMPA, marijuana possession, use and cultivation remains a criminal offense under federal law, which categorizes marijuana as a drug with “no currently accepted medical use.”

The U.S. Department of Justice has taken the position that it will not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law. Consequently, we cannot rely on federal authorities to enforce federal law to regulate outdoor cultivation that is authorized under both the CUA and MMPA.

B. Legality of Ban on Outdoor Cultivation of Medical Marijuana

i. Reasonable Exercise of Police Power

Under its police power, the City may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws. (Cal. Const. Art. XI, Section 7.) A land use regulation lies within the police power if it is reasonably related to the public welfare. (*Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal.3d 582, 600-01 (1976)). In *Candid Enterprises, Inc. v. Grossmont Union High School District*, (1985) 39 Cal.3d 878, 885, the California Supreme Court addressed the scope of police power held by cities and counties as follows:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the police power [of a city or county]... is as broad as the police power exercisable by the legislature itself.

To summarize, under its police power, the City of Martinez may regulate medical marijuana activities in any manner not preempted by state or federal law. As discussed in detail below, local restrictions on outdoor cultivation of medical marijuana are not preempted. While the MMPA immunizes medical marijuana patients and caregivers from state criminal prosecution relating to the cultivation of medical marijuana, it does not guarantee their right to grow marijuana.

The justifications for regulating or banning of outdoor medical marijuana cultivation under the City of Martinez’s police power include:

- 1) The increased risk to public safety, based on the value of marijuana plants and the accompanying threat of break-ins, robbery and theft, and attendant violence and injury;

2) The strong “skunk like” fumes emitted from mature plants which can interfere with the use and enjoyment of neighboring properties by their occupants; and

3) The potential for theft and use by school age children where medical marijuana is cultivated in a visible location, particularly where such location is close to schools.

ii. No State Law Preemption

In a decision issued on February 6, 2013, *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, the California Court of Appeal considered for the first time whether a city or a county in California may lawfully limit outdoor cultivation of medical marijuana. At issue was Tehama County’s ordinance limiting the number of medical marijuana plants that may be grown outside, precluding marijuana cultivation within 1000 feet of schools, parks, and churches, and requiring that an opaque fence of at least six feet to be installed around all marijuana grows.

Upholding the ordinance, the court held that Tehama’s ban was not preempted by state law. As stated by the court:

The fundamental flaw in Petitioners’ argument is their misplaced view that the [Compassionate Use Act] somehow creates or grants unrestricted rights. Petitioners suggest that the CUA grants every qualified patient the right to cultivate...medical marijuana...But the CUA does not create any such right...Since the CUA does not create a right to cultivate medical marijuana, restrictions on such enforcement do not conflict with the CUA.

On December 2, 2013 the Public Safety Subcommittee recommended that staff propose an amendment to the existing Martinez Municipal Code, Medical Marijuana ordinance that would prohibit any person from cultivating, cloning or growing Marijuana of any kind or type outdoors, or within public view, within any zoning district in the City with the exception of the Cultivation of Medical Marijuana of no more than six (6) plants per property. A proposed resolution for Planning Commission consideration is included as Attachment 2.

This approach balances the interests of medical marijuana patients against the interests of the public related to public nuisance and crime related concerns that are presented by the outdoor cultivation of medical marijuana.

ENVIRONMENTAL IMPACT

Staff recommends that the Planning Commission recommend that the City Council find that the adoption of this ordinance is exempt from the requirements of the California

Environmental Quality Act ("CEQA") pursuant to Title 14, Chapter 3, California Code of Regulations (CEQA Guidelines), Sections 15304 and 15061(b)(3). The proposed ordinance regulates new gardening in all zoning districts in the City by limiting the outdoor growing of Marijuana where there are currently in existence no restrictions. There are no unusual circumstances that would lead to a significant impact. It can be seen with certainty that there is no possibility that the adoption of this ordinance will have a significant effect on the environment. The ordinance bans the outdoor growing of Marijuana with the limited exception of six (6) plants per property. Placing such a restriction on the use of property will not result in a permanent alteration of property nor the construction of any new or expanded structures.

ATTACHMENTS:

Attachment 1: Summary of the different approaches other California cities have used to regulate the cultivation of medical marijuana.

Attachment 2: Draft Resolution, with

- Exhibit A, Findings of Consistency with the General Plan
- Exhibit B, Draft Ordinance

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