



## SECOND READING - CONTINUED FROM 01/12/2016

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COUNTY COUNSEL

Agenda Item No. \_\_\_\_ January 12, 2016

January 6, 2016

The Honorable Board of Supervisors  
County Administration Building  
1221 Oak Street  
Oakland, CA 94612

Dear Board Members:

**Subject: ADOPT AN ORDINANCE ADDING CHAPTER 6.106 TO THE GENERAL ORDINANCE CODE RELATED TO THE PROHIBITION OF MEDICAL MARIJUANA CULTIVATION AND DELIVERY.**

#### **RECOMMENDATION:**

It is recommended that your Board give first and second readings and adopt an ordinance adding Chapter 6.106 to the General Ordinance Code related to the prohibition of medical marijuana cultivation and delivery in unincorporated Alameda County.

#### **DISCUSSION/SUMMARY:**

During the Board Transportation and Planning Committee meeting on December 9, 2015, the Committee heard a presentation regarding recent developments in California medical marijuana law, focused on the newly enacted Medical Marijuana Regulation and Safety Act (MMRSA). At the conclusion of the presentation, the Committee directed staff to draft an ordinance prohibiting the cultivation and delivery of medical marijuana in the unincorporated area of the County for consideration by the full Board. The primary intent of the ordinance is to preserve the County's authority to regulate and license medical marijuana cultivation under the MMRSA by having a local ordinance regulating or prohibiting the cultivation of marijuana in place before March 1, 2016.

The MMRSA creates a comprehensive state scheme for the licensure and regulation of medical marijuana cultivation, manufacturing, transporting, testing, delivery, and dispensing. It establishes a dual licensing structure requiring a state license and a local license or permit for persons to conduct commercial cannabis activity in the local jurisdiction. Local authority over licensing, zoning, and public safety is expressly preserved.

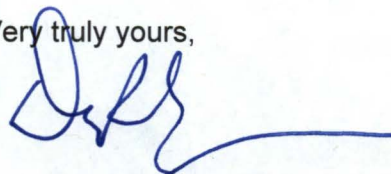
The MMRSA defines the "delivery" of medical cannabis as the commercial transfer from a dispensary to a primary caregiver, qualified patient, or testing laboratory. A dispensary, by definition, is a retail sales establishment, "including an establishment that delivers, pursuant to express authorization by local ordinance, medical cannabis and medical cannabis products as part of a retail sale." Only a dispensary may deliver medical cannabis to the end user of the product, and then only when expressly authorized by local ordinance. (The term "distribution" is used for the transfer between licensed entities, such as the transport from the manufacturer to the dispensary.)

Alameda County General Code section 6.108.180 requires dispensary permit holders to "at all times comply with Section 11326.5 et seq. of the California Health and Safety Code and [chapter 6.108] in the operations of the dispensary. This includes the prohibition of sales, transportation and delivery of medical marijuana off the site of the dispensary premises." Similarly, General Code section 6.110.020 does not allow the public to possess, use, or transport cannabis if such acts are not authorized by the Compassionate Use Act (Health and Safety Code section 11362.5). However, the General Code does not define the terms "dispensary", "delivery", and "medical cannabis" and it includes a definition of "cannabis" that is more narrow than the definition in the MMRSA. For clarity it is recommended that the General Code be amended to prohibit delivery, as more broadly defined in the MMRSA, of medical marijuana and that the prohibition on cultivation and delivery use the MMRSA's more expansive definitions of cannabis and medical cannabis.

The MMRSA prohibits cultivation of medical marijuana without both a state license and a "license, permit, or other entitlement" from the city or county where the cultivation will occur. An application for a state license may not be submitted (1) without having first received the local license, permit, or other entitlement for use; or (2) if the proposal for the state license will violate the provisions of a local ordinance or regulation; or (3) if medical marijuana is prohibited in the applicable local jurisdiction, "either expressly or otherwise under principles of permissive zoning." A permissive zoning code is one in which any use that is not enumerated or listed in the zoning code is presumed to be prohibited. The Alameda County Zoning Ordinance is a permissive zoning code. The cultivation of marijuana is not enumerated as an allowed use in our Zoning Ordinance, making it a prohibited activity in the unincorporated area.

There is conflicting language in the new cultivation code provisions (Health and Safety Code section 111362.777) of the MMRSA. Despite statements that local governments will be allowed to issue or deny cultivation permits in "current or future land use regulations or ordinances," other subdivisions of the statute provide that if a county does not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana before March 1, 2016, or chooses not to administer a conditional permit program, then the state will be the sole licensing authority for medical marijuana cultivation applicants in that city or county. While we consider our Zoning Ordinance to function as a prohibition on cultivation under the principles of permissive zoning, there is no statute or case law recognizing that it operates as such. Given the inconsistent language in the statute, we recommend amending the General Code to clarify that cultivating marijuana is prohibited in the unincorporated areas of the county until a local cultivation permit program and zoning regulations, should either be desired, are adopted. To adopt an ordinance addressing the delivery and cultivation issues, that will be effective before March 1, 2016 (following the 30-day publication period), second reading must occur no later than January 24, 2016.

Very truly yours,



Donna R. Ziegler  
County Counsel

ORDINANCE NO. 2016- 6**AN ORDINANCE OF THE BOARD OF SUPERVISORS OF ALAMEDA COUNTY ADDING CHAPTER 6.106 TO THE GENERAL ORDINANCE CODE RELATED TO THE PROHIBITION OF MEDICAL MARIJUANA CULTIVATION AND DELIVERY**

**WHEREAS**, in 1996, the voters of the State of California approved Proposition 215 (codified as California Health and Safety Code section 11362.5 and titled the "Compassionate Use Act of 1996"); and

**WHEREAS**, the intent of Proposition 215 was to enable persons who are in need of marijuana for medical purposes to be able to obtain and use it without fear of criminal prosecution under limited, specified circumstances; and

**WHEREAS**, in 2004, Senate Bill 420 was enacted (codified as California Health and Safety Code section 11362.7 *et seq.* and titled the "Medical Marijuana Program Act") to clarify the scope of the Compassionate Use Act of 1996. The Medical Marijuana Program Act allows counties to adopt and enforce rules and regulations consistent with its provisions; and

**WHEREAS**, in 2011, Assembly Bill 2650 was enacted (codified as California Health and Safety Code section 11362.768). This law affirms that counties can adopt ordinances that restrict the location and establishment of medical marijuana collectives and cooperatives; and

**WHEREAS**, in 2015, Assembly Bills 243 and 266 and Senate Bill 643 were enacted (codified as California Business and Professions Code section 19300 *et seq.* and titled the "Medical Marijuana Regulation and Safety Act"). These bills also amended provisions of the Medical Marijuana Program Act related to the cultivation of medical marijuana; and

**WHEREAS**, pursuant to California Business and Professions Code section 19315(a), nothing in the Medical Marijuana Regulation and Safety Act shall be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local permit or licensing requirements; and

**WHEREAS**, this Ordinance is enacted, consistent with the Compassionate Use Act of 1996, the Medical Marijuana Program Act, and the Medical Marijuana Regulation and Safety Act to protect the public health, safety, and welfare of Alameda County residents in relation to the cultivation and delivery of medical marijuana; and

**WHEREAS**, in *Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, the court held that neither the Compassionate Use Act nor the Medical Marijuana Program Act preempt a local jurisdiction's police power to prohibit the cultivation of marijuana within its jurisdiction; and

**WHEREAS**, in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, the California Supreme Court concluded that nothing in the Compassionate Use Act nor the Medical Marijuana Program Act preclude a local jurisdiction from regulating or prohibiting facilities that distribute medical marijuana; and

**WHEREAS**, although banned in Alameda County under the principles of permissive zoning, it is believed that the cultivation of medical marijuana has been occurring in the unincorporated area of Alameda County; and

**WHEREAS**, marijuana cultivation has been shown to involve avoidance of environmental laws and regulations and resulted in the pollution of waters and navigable waterways in the State of California. Unregulated marijuana cultivation can be harmful to the welfare of the surrounding community and its residents and constitute a public nuisance; and

**WHEREAS**, absent appropriate regulation, marijuana cultivation and delivery in the unincorporated area of Alameda County poses a potential threat to the public peace, health, and safety; and

**WHEREAS**, the County of Alameda intends to proceed with a study and public meetings to consider a revised ordinance that most effectively regulates and licenses all facets of medical marijuana activities; and

**WHEREAS**, the County of Alameda has a compelling interest in protecting the public health, safety, and welfare of its citizens, residents, visitors and businesses, in preserving the peace and quiet of the neighborhoods within the unincorporated areas of the County by prohibiting the cultivation and delivery of medical marijuana until a comprehensive study is conducted and regulations adopted; and

**WHEREAS**, this Ordinance is reflective of existing law and intended to clarify the County of Alameda's position with regard to the cultivation and delivery of medical marijuana; and

**WHEREAS**, nothing in this Ordinance shall be deemed to conflict with federal law as contained in the Controlled Substances Act, 21 U.S.C. § 841 or to license any activity that is prohibited under said Act except as mandated by State law; and

**WHEREAS**, nothing in this Ordinance shall be construed to: (1) allow persons to engage in conduct that endangers others or causes a public nuisance; (2) allow the use of marijuana for non-medical purposes; or (3) allow any activity relating to the cultivation, distribution, or consumption of marijuana that is illegal under state or federal law;

**NOW, THEREFORE, BE IT HEREBY ORDAINED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA THAT:**

SECTION 1. Chapter 6.106 of the Alameda County Ordinance Code is added to the General Ordinance Code to read as follows:

**6.106.010 Purpose and intent.**

It is the purpose and intent of this Chapter to reflect existing law in the County of Alameda, clarifying and expressly prohibiting the cultivation and delivery of medical marijuana in order to

protect the environment and preserve the public peace, health, safety, and general welfare of the citizens and residents of, and travelers through, the County of Alameda.

**6.106.020 Relationship to other laws.**

This Chapter is not intended to apply to, nor shall it be construed or given effect in a manner that causes it to apply to, any activity that is regulated by federal or state law to the extent that application of this Chapter would conflict with such law or would unduly interfere with the achievement of federal or state regulatory purposes. This Chapter shall be interpreted to be compatible and consistent with federal, state, and county enactments and in furtherance of the public purposes which those enactments express. The provisions of this Chapter will supersede any other provisions of this Code found to be in conflict.

**6.106.030 Definitions.**

For purposes of this Chapter, these words and phrases shall be defined as follows:

- A. "Caregiver" or "primary caregiver" shall have the same definition as set forth in California Health and Safety Code section 11362.7(d) as it now reads or as amended.
- B. "Cultivate" or "cultivation" shall have the same definition as set forth in California Business and Professions Code section 19300.5(l) as it now reads or as amended.
- C. "Delivery" shall have the same definition as set forth in California Business and Professions Code section 19300.5(m) as it now reads or as amended and shall include the commercial transfer of medical cannabis or medical cannabis products from a dispensary, up to an amount determined by the bureau to a primary caregiver or qualified patient as defined in Section 11362.7 of the Health and Safety Code, or a testing laboratory.
- D. "Dispensary" shall have the same definition as set forth in California Business and Professions Code section 19300.5(n) as it now reads or as amended, and shall include those facilities regulated by Chapter 6.108 of this Code.
- E. "Marijuana" shall have the same definition as "cannabis" as set forth in California Business and Professions Code section 19300.5(f) as it now reads or as amended.
- F. "Medical marijuana" shall have the same definition as "medical cannabis" and "medical cannabis product" as set forth in California Business and Professions Code section 19300.5(ag) as it now reads or as amended.
- G. "Qualified patient" shall have the same definition as set forth in California Health and Safety Code section 11362.7(f) as it now reads or as amended.

**6.106.040 Medical marijuana cultivation and delivery prohibited.**

- A. The cultivation and delivery of medical marijuana are prohibited in all areas of

unincorporated Alameda County. This prohibition includes, but is not limited to:

1. Cultivation of marijuana, either indoors or outdoors.
2. Operation of a marijuana nursery, as defined by California Business and Professions Code section 19300.5(ah) as it now reads or as amended.
3. Medical marijuana manufacturing sites, as defined by California Business and Professions Code section 19300.5(af) as it now reads or as amended.

B. Notwithstanding Subsection A, nothing in this Chapter shall prohibit:

1. The carriage of medical cannabis or medical cannabis products on public roads by licensees acting in compliance with California Business and Professions Code section 19340 and any adopted state and local regulations.
2. Licensed transporters operating in compliance with California Business and Professions Code sections 19337 and 19338 and any adopted state and local regulations.

#### **6.106.050 Enforcement.**

A. The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

B. Violations of this Chapter are subject to a civil action brought by the district attorney or the county counsel, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

C. Any violation of this Chapter is hereby declared to be a misdemeanor. Violations of this Chapter may, in the discretion of the district attorney, be prosecuted as infractions or misdemeanors. Notwithstanding this declaration, consistent with the holding in *Kirby v. County of Fresno* (2015) 242 Cal.App.4<sup>th</sup> 940, neither a qualified patient nor a primary caregiver who cultivates or delivers marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician shall be subject to arrest or criminal prosecution for a violation of this Chapter as a misdemeanor.

D. Violations of this Chapter are hereby declared to be public nuisances and may be enforced pursuant to the procedure in chapter 6.65 of this Code.

E. Any person that violates this chapter shall be guilty of a separate offense for each and every day during any portion of which such person commits, continues, permits, or causes a violation thereof, and shall be penalized accordingly.

F. In addition to other remedies provided by this chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the planning director or his designee, including, for example, administrative or judicial nuisance abatement proceedings, civil or

criminal code enforcement proceedings, and suits for injunctive relief.

**6.106.060 Severability.**

If any clause, sentence, paragraph, subdivision, section or part of this Chapter or the application thereof is for any reason held to be unconstitutional by any final court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Chapter.

SECTION 2. This Ordinance shall be repealed by its own terms upon the adoption of state legislation repealing or eliminating the March 1, 2016 deadline in Health and Safety Code section 11362.777(c)(4).

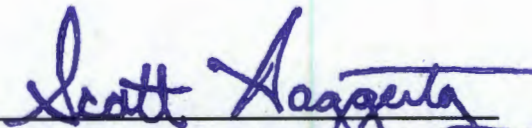
SECTION 3. This ordinance shall take effect and be in force thirty (30) days from and after the date of passage. Before the expiration of fifteen (15) days after its passage, it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda.

Adopted by the Board of Supervisors of the County of Alameda, State of California, on January 26, 2016, by the following called vote:

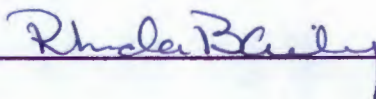
AYES: Supervisors Carson, Chan, Miley, Valle & President Haggerty

NOES: None


EXCUSED: None

  
\_\_\_\_\_  
President of the Board of Supervisors  
County of Alameda, State of California

ATTEST:  
CLERK OF THE BOARD

By: 

APPROVED AS TO FORM:  
DONNA R. ZIEGLER, COUNTY COUNSEL

By:   
Andrea L. Weddle, Assistant County Counsel