

REGULAR

NUMBER: 270.2

TITLE: AN ORDINANCE OF THE CITY OF MILPITAS PROHIBITING THE ESTABLISHMENT AND OPERATION OF MEDICAL MARIJUANA DISPENSARIES

HISTORY: This Ordinance was introduced (first reading) by the City Council at a Special meeting on _____, 2007, upon motion by Councilmember _____ and was adopted (Second reading) by the City Council at its regular meeting of _____, 2007 upon motion by Councilmember _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose Esteves, Mayor

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

ORDAINING CLAUSE:

THE CITY COUNCIL OF THE CITY OF MILPITAS DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals and Findings.

- A. In 1996, the voters of the State of California approved Proposition 215, which enacted the Compassionate Use Act of 1996, codified at California Health and Safety Code Section 11362.5. The Compassionate Use Act permits possession and cultivation of marijuana for medical purposes under limited and specified circumstances.
- B. In 2003, the State Legislature enacted Senate Bill 420, the Medical Marijuana Program, codified at California Health and Safety Code section 11362.7 *et seq*, in order to clarify the scope of the Compassionate Use Act and to allow California cities and counties to adopt and enforce laws consistent with state law; and
- C. California Health and Safety Code section 11362.83 vests California cities with express authority to adopt and enforce laws consistent with the Compassionate Use Act and the Medical Marijuana Program; and
- D. The federal Controlled Substances Act, 21 U.S.C. Section 841 *et seq*, makes it unlawful for any person to cultivate, manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense marijuana. The Controlled Substances Act contains no statutory exemption for the use of marijuana for medical purposes; and
- E. In 2001, the United States Supreme Court issued its decision in *United States v. Oakland Cannabis Buyer's Cooperative*, in which the Court held that there is no medical necessity defense or exemption for the possession of marijuana under the Federal Controlled Substances Act; and
- F. In 2005, the United States Supreme Court issued its decision in *Gonzalez v. Raich*, in which the Court held that Congress has authority under the Commerce Clause to prohibit the manufacture, cultivation, distribution and possession of marijuana pursuant to the Controlled Substances Act, even as such prohibitions apply to marijuana manufactured, cultivated, distributed or possessed within the State of California under the auspices of the Compassionate Use Act and the Medical Marijuana Program; and
- G. In light of these decisions and other unresolved tensions between state and federal law in the area, the City Council finds that it would be premature to permit the establishment and operation of medical marijuana dispensaries, as defined herein, within the City of Milpitas because to permit such activities could potentially subject the City and/or its officials to prosecution under federal law for aiding and abetting a violation of federal law; and
- H. On August 2, 2005, the City Council, under the authority of California Government Code section 65858, adopted an urgency ordinance establishing a 45-day moratorium on the establishment and operation of medical marijuana dispensaries, which moratorium was extended, as permitted under State law, by 22 months and 15 days on September 6, 2005. The current moratorium shall expire on July 23, 2007; and
- I. State law permits such moratoriums as a vehicle for cities to study potential zoning measures to protect public health, safety and welfare; and

- J. During the moratorium, City Planning staff, working in conjunction with the City Attorney's office, reviewed the ordinances and reported the regulatory experiences of several California cities with a long and documented history of public health and safety problems and adverse secondary effects associated with the operation of medical marijuana dispensaries; and
- K. Based on said documentation, investigation and reports compiled by City staff, the City Council hereby finds that the cultivation and distribution of medical marijuana through medical marijuana dispensaries contributes directly to undesirable secondary impacts on neighboring land uses, including but not limited to: excessive traffic and noise, attraction of criminality and criminal elements, trespass, disturbance calls, diversion of marijuana for illegitimate non-medical or recreational purposes, dependency, addiction and substance abuse, vehicular violations, burglary, theft, display and discharge of firearms, loitering, vagrancy, and on-site consumption of marijuana and marijuana-enhanced products; and
- L. The California Police Chiefs Association has compiled an extensive report detailing a number of the negative secondary effects associated with medical marijuana dispensaries. The City Council hereby finds that the report, contained online at http://www.californiapolicechiefs.org/nav_files/research/pdfs_orcs/el_cerrito_ord.pdf, contains further persuasive anecdotal and documented evidence that medical marijuana dispensaries pose a threat to public health, safety and welfare; and
- M. California Health and Safety Code section 11362.5(c)(2) expressly provides that nothing in the Compassionate Use Act shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for non-medical purposes; and
- N. The City Council hereby finds that, because of the inconsistency between state and federal law relating to the possession and distribution, and because of the documented threat to public health, safety and welfare, it is in the best interest of the citizens of the City of Milpitas that the City prohibit the establishment and operation of medical marijuana dispensaries within the City of Milpitas; and
- O. Nothing in either the Compassionate Use Act or the Medical Marijuana Program contains an affirmative mandate that cities allow or permit medical marijuana dispensaries within their corporate limits; and
- P. This ordinance is enacted pursuant to California Health and Safety Code sections 11362.5(c)(2) and 11362.83 and the City's police power as granted broadly under Article XI, Section 7 of the California Constitution in order to promote the health, safety and welfare of Milpitas residents.

SECTION 2.

A new Chapter V is hereby added to Title XI of the Milpitas Municipal Code to read as follows:

**CHAPTER 5
MEDICAL MARIJUANA DISPENSARIES PROHIBITED**

XI-5-1.00 Definitions

For the purposes of this Chapter, unless otherwise apparent from the context, the following definitions shall apply:

- A. “Medical Marijuana” is marijuana authorized in strict compliance with Health & Safety Code Section 11362.5 *et seq.*

- B. “Medical Marijuana Dispensary” means any facility or location, whether fixed or mobile, where a primary caregiver makes available, sells, transmits, gives or otherwise provides medical marijuana to two or more persons with identification cards or qualified patients, or any facility where qualified patients, persons with identification cards and primary caregivers meet or congregate collectively and cooperatively to cultivate or distribute marijuana for medical purposes under the purported authority of California Health and Safety Code section 11362.775.

A Medical Marijuana Dispensary shall not include the following uses, so long as such uses comply with this Code, Health & Safety Code Section 11362.5 *et seq.*, and other applicable law:

- 1. A clinic licensed pursuant to Chapter 1 of Division 2 of the Health & Safety Code.
 - 2. A health care facility licensed pursuant to Chapter 2 of Division 2 of the Health & Safety Code.
 - 3. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health & Safety Code.
 - 4. A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health & Safety Code.
 - 5. A hospice or a home health agency, licensed pursuant to Chapter 8 of Division 2 of the Health & Safety Code.
- C. “Person with an Identification Card” shall have the meaning given that term by Health & Safety Code Section 11362.7.

 - D. “Primary Caregiver” shall have the meaning given that term by Health & Safety Code Section 11362.7.

 - E. “Qualified Patient” shall have the meaning given that term by Health & Safety Code Section

11362.7.

XI-5-2.00 Operation of Medical Marijuana Dispensaries Prohibited

Medical marijuana dispensaries, as defined in this chapter, are prohibited in all zones throughout the City of Milpitas.

XI-5-3.00 Criminal Penalties

Any violation of any provision of this chapter shall be deemed a misdemeanor.

XI-5-4.00 Separate Offense for Each Day

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

XI-5-5.00 Public Nuisance

Any use or condition caused or permitted to exist in violation of any of the provisions of this chapter shall be and is hereby declared a public nuisance and may be abated by the City pursuant to the procedures set forth in Chapter 500 of Title V of the Milpitas Municipal Code.

XI-5-6.00 Civil Injunction

The violation of any provision of this chapter shall be and is hereby declared to be a public nuisance contrary to the public interest and shall, and at the discretion of the City, create a cause of action for injunctive relief.

SECTION 3. SEVERABILITY

In the event any section or portion of this ordinance shall be determined invalid or unconstitutional, such section or portion shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

SECTION 4. PUBLICATION AND EFFECTIVE DATE

This Ordinance shall take effect thirty (30) days after adoption, and prior to the expiration of 15 days from the passage thereof shall be published at least once in the Milpitas Post, a newspaper of general circulation, published and circulated in the City of Milpitas, County of Santa Clara, thenceforth and thereafter the same shall be in full force and effect.