



MEMORANDUM

DATE: September 26, 2017

TO: MAYOR AND CITY COUNCIL

FROM: CITY ATTORNEY

RE: **MEDICAL AND RECREATIONAL MARIJUANA ACTIVITIES UPDATE—INCLUDING
STATUS REPORT ON THE PROCESSING OF MEASURE “U” APPLICATIONS
AND CLOSURE OF ILLEGAL DISPENSARIES**

I. **INTRODUCTION AND BACKGROUND**

a. Federal Law

Under federal law, possessing or using marijuana remains illegal, including for medical purposes.¹ In 2005, the United States Supreme Court ruled that federal agencies could continue (under federal law) to prosecute individuals who possess or use marijuana for medical purposes even if legal under a state’s law.² Currently, however, the United States Department of Justice (DOJ) generally chooses not to prosecute most marijuana users and businesses that follow state marijuana laws if those laws are consistent with federal priorities. These priorities include preventing minors from using marijuana and preventing marijuana from being taken to other states.

It should be noted that the federal government, under the new administration, could revert back to prosecuting individuals who possess or use marijuana (medical or nonmedical). If so, this action could provide a setback for individuals and entities utilizing rights and entitlements conferred by state and local laws.

b. State Law

As you are aware, several laws recently became effective in California to regulate, permit and prohibit medical and recreational marijuana activities. The Medical Marijuana Regulation and Safety Act (comprised of AB 266, AB 243 and SB 643) (“MMRSA”), addressed medical marijuana; Proposition 64—the Control, Regulate, and Tax Adult use of Marijuana Act (an initiative measure enacted by approval of the voters at the November 2016, statewide general election) (“AUMA”), addresses recreational marijuana (and some aspects of medical); and the latest, effective as of September 2017, Senate Bill 94 (SB 94), referred to as the Medicinal and Adult-Use Cannabis Regulation and Safety Act (“MAUCRSA”). MAUCRSA effectively repeals MMRSA and incorporates certain provisions of MMRSA into the licensing provisions of AUMA, thereby setting up a new hybrid regulatory structure which should be easier to

¹ See [Controlled Substances Act, Title 21](#).

² See [Gonzales v. Raich \(2005\) 545 U.S.1](#).

navigate. It is important to note that SB 94 did not change the authority of cities to prohibit or regulate marijuana-related activities such as dispensaries, cultivation, and manufacturing. This authority does not affect citizen initiative measures such as Measure “U”.

c. Local Law (Measure “U”)

As you are also aware, the voters in La Mesa passed Measure “U” in November 2016. Measure “U” authorizes and regulates (via Conditional Use Permit (CUP)) medical marijuana dispensaries, and the cultivating and manufacturing of medical marijuana, subject to certain regulations and restrictions. Consequently, Measure “U” nullifies existing ordinances inconsistent with its regulatory framework. Due to the fact that Measure “U” is a citizen-sponsored initiative, it may only be amended by a vote of the people; and, should the Council decide to augment Measure “U,” it may do so only in a fashion that does not conflict with the purpose and intent of the measure.

To date, 29 Measure “U” applications have been filed with the City: 21 for Dispensaries, 3 for Cultivation and 5 for Manufacturing. 2 applications were rejected (upon initial consideration) due to the fact that the proposals did not meet the distance requirements from sensitive uses such as day care facilities and schools.

II. ILLEGAL MARIJUANA DISPENSARIES—ENFORCEMENT ACTIVITIES

a. Measure “U” Implementation

Despite the existence and implementation of Measure “U,” the City continues to experience illegal dispensaries in significant numbers. As part of the implementation strategy for Measure “U,” the Planning Department will not accept an application for a site (i.e., separate and independent address) for a medical marijuana dispensary if an illegal dispensary is operating on that site. This strategy has resulted in the closure of 5 illegal dispensaries.

b. Method—Inventory of Closures and Pending Closures (lawsuits)

As you may be aware, compliance efforts aimed at the closure of illegal marijuana dispensaries are initially handled by the Code Enforcement division of the City. Information regarding these dispensaries usually comes by way of the City’s website, citizen letters/emails, word-of-mouth, and simple detection. Once an illegal dispensary is identified, Code Enforcement immediately provides notice to the operator to shut down, and if no movement is made towards compliance usually within 48 hours, the matter is turned over to the City Attorney’s office. Generally, within 10 days of receiving the information from Code Enforcement, the City Attorney’s office, in conjunction with Planning, Building and Fire Departments, conducts any necessary inspections and commences the civil litigation process for purposes of obtaining compliance (i.e., with Planning, Building and Fire regulations, and closure).

Utilizing this method, to date, the City Attorney’s Office, working in conjunction with individuals associated with the departments referenced above, has closed 17 illegal dispensaries; 4 lawsuits are pending which we anticipate will result in closure. The following is a list of such closures and pending lawsuits, as well as the closures through Code Enforcement efforts outside of the civil litigation process:

CLOSURES

- 7339 El Cajon Blvd., Suite “J” Closed: November 2014
- 7180 University Ave.—(“La Mesa Wellness Center” dispensary) Closed: December 2015
- 7140 University Ave., Suite “B”—(Sadler/Martinez—tenants) Closed: April 2015
- 7243 University Ave.—(“Organic Roots” dispensary) Closed: October 2016
- 8740 La Mesa Blvd.—(“Medi Mart” dispensary) Closed: January 2017
- 5555 Jackson Drive—(“Diamond Collective” dispensary) Closed: January 2017
- 6957 University Ave.—(“Lime Light Collective” dispensary) Closed: February 2017
- 7339 El Cajon Blvd., Suite “N”—(Unnamed dispensary) Closed: March 2017
- 8303 Parkway Drive—(Unnamed dispensary) Closed: March 2017
- 7180 University Ave.—(Unnamed dispensary) Closed: April 2017
- 8332 Case Street—(Unnamed dispensary) Closed: May 2017
- 6903 University Ave.—(“Herbal Trust” dispensary) Closed: June 2017
- 7317 El Cajon Blvd.—(“Left Coast Collective” dispensary) Closed: August 2017
- 7640 University Ave., Suite “B” (“Greenerside Wellness”) Closed: August 2017
- 7140 University, Suite “A” (“The Vault”) Closed: September 2017
- 7140 University, Suite “B” (“La Mesa’s Finest”) Closed: September 2017
- 7468 University Ave.—(“Power Plant” dispensary) *Pending Closure: November 2017*

PENDING LITIGATION

- 7232 University Avenue
- 7615 El Cajon Boulevard
- 7640 El Cajon Boulevard
- 5531 Jackson Drive

CLOSURES THROUGH CODE ENFORCEMENT

- 7882 La Mesa Boulevard Closed: January 2017
- 8334 Center Street Closed: January 2017
- 8336 La Mesa Boulevard Closed: July 2017

III. CIVIL LITIGATION—RATIONALE, TIMEFRAME, CONTRAST/CRIMINAL PROSECUTION

a. Rationale

As noted above, the federal government is reluctant to enforce federal criminal law related to illegal marijuana activities. At the State and local level, the District Attorney, who prosecutes State criminal law violations (while the City Attorney prosecutes Municipal Code violations) is also reluctant to prosecute State criminal law violations involving illegal marijuana-related activities such as the illegal operation medical of marijuana dispensaries (for reasons not officially stated).

State law does authorize the District Attorney to confer authority on city attorneys to prosecute State criminal law. However, prosecuting State criminal law violations requires specific criminal and prosecutorial training, expertise, experience and funding, all of which are beyond the resources available in the La Mesa City's Attorney's office.

Examples of cities utilizing the City Attorney's office to prosecute State criminal law related to illegal marijuana dispensaries include the City of San Diego (which maintains a staff of 130 in the Criminal Litigation Division with an annual budget of \$12.5 million) and Vista (who hired a former criminal Prosecuting Attorney from the City of San Diego to prosecute exclusively criminal law violations related to illegal marijuana activities at an annual fully burdened cost of approximately \$250,000. In addition, the Prosecuting Attorney requires support staff. In Vista, the City Attorney's office consists of an Investigator, Paralegal, Staff Assistant and Senior Office Specialist. In total, the Vista City Attorney's Department has a budget of \$1.4 million). In contrast, La Mesa City Attorney's Office has a budget of \$350,000 for one part time City Attorney and a contract Assistant City Attorney, who share the City Council and City Manager's administrative staff of one.

Consequently, based on closure results noted above and the resources available, the La Mesa City Attorney's office presently utilizes civil litigation to compel compliance (closure) of illegal dispensaries in the City. During Fiscal Year 2016-2017, the La Mesa City Attorney's office spent \$103,628 in shutting down illegal dispensaries through the civil process. To date, for Fiscal Year 2017-2018, the City Attorney's office has spent \$35,169.

b. Timeframe

The civil process begins with the filing and service of a Complaint. The Complaint must be personally served on the Defendant, which can be time consuming if attempts are made to evade service. Thirty days after service, a response must be filed by the Defendant (but Defendant may cause an additional 15 days to be added). If no response is forthcoming, the lawsuit enters the Court's default procedures.

Once the Defendant responds to the Complaint (or fails to respond) within 30-45 days, the City can then request a Court hearing to seek a Temporary Restraining Order, or "TRO", ordering the immediate shut down of the illegal dispensary. If a TRO is granted, the dispensary will be ordered to shut down and City staff will be permitted to perform an inspection of the property to confirm this. Thus, a TRO can shut down the dispensary as early as 4-6 weeks after the City becomes aware of its illegal operations, and may become permanent if a favorable civil Judgment is rendered.

However, because a TRO is only "temporary", the Court revisits the lawsuit about 14 days later at a preliminary injunction hearing which, if granted, shuts down the dispensary for the pendency of the

litigation. The City has recently been successful in compelling and obtaining the closure of illegal dispensaries more expeditiously using this method.

With the illegal dispensary shut down, the litigation moves forward. The Court will have already scheduled a Case Management Conference (or CMC), approximately 6 months after the Complaint was first filed. However, the CMC may be continued by the Court or the parties for a number of procedural reasons. Once the CMC is held, a trial date (and other trial-related dates) will be scheduled. Currently, the Superior Court trial dates are being scheduled to take place about 12-18 months after the CMC (due to budget cuts resulting in staff reductions).

Leading up to the trial date, the dispensary remains closed and the City negotiates with the property owner and/or tenant to resolve the litigation and avoid a trial, if possible. As a practical matter, however, with a preliminary injunction now in effect, the illegal dispensary simply shuts down.

However, in the event the case proceeds to trial, evidence presented, witnesses testify and the Court issues its Judgment which, assuming in the City's favor renders the preliminary injunction a "permanent injunction" one. Significantly, the Judgment entered "runs with the land" so that it prohibits the property owner and/or tenant from operating any future marijuana-related businesses on the property and to otherwise comply with local law.

Defendants then have 60 days after the Judgment is entered to file an appeal if they so choose. This is highly unlikely to occur, however, since the permanent injunction would remain in effect throughout the entire appellate process. If a case were ever appealed (unprecedented to date), it may take another 1 ½ -2 years to obtain a ruling.

c. Contrast/Criminal Prosecution

The criminal process moves more quickly toward trial once charges have been filed. Initially, the law enforcement agency (i.e. Police Department) working in conjunction with Code Enforcement and/or Building and Fire Departments, would be tasked with conducting a criminal investigation of an alleged illegal dispensary's activities. If necessary, they can ask a Judge to issue a search warrant if they can convince the Court that "probable cause" exists so that incriminating evidence in support of criminal charges to be filed can be seized.

However, contrary to popular belief, just because a search warrant is executed does not mean that a criminal prosecution is actually taking place, it is merely a collection of evidence. That is the decision of the prosecuting attorney, who must decide if the evidence obtained by the Police Department proves that a crime is being committed "beyond a reasonable doubt".

If the Prosecuting Attorney so chooses, he or she files criminal charges against the dispensary but its criminal activities may continue. Seizure of business assets through a search warrant may, as a practical matter shut down that business on a temporary or permanent basis, however, no legal closure of the business can occur without a criminal conviction. Contrary to the civil process, no actual shutdown can occur without a criminal conviction and sentencing by the Judge following a jury trial or through a negotiated plea bargain.

Once criminal charges are filed, an arraignment must be held within 30 days. The Court then sets the criminal trial shortly thereafter unless the parties agree to waive "speedy trial" requirements (which

almost always occurs). The City's misdemeanor Complaint alleges a violation of Health and Safety Code §11359 which prohibits the "possession for sale" of marijuana. As a misdemeanor, the Defendant dispensary is entitled to a speedy jury trial, and a right to counsel paid by the State, if necessary and this jury trial may take several days.

Alternatively, the Court may push both parties to reach a plea bargain. Terms of any probation will include closing the dispensary down but enforcement may be an issue.