



THE CITY OF
NOVATO
CALIFORNIA

I-6

75 Rowland Way #200
Novato, CA 94945-3232
(415) 899-8900
FAX (415) 899-8213
www.ci.novato.ca.us

STAFF REPORT

MEETING

DATE: December 6, 2010

TO: City Council

FROM: David Wallace, Community Development Director

PRESENTER: Steve Marshall, Senior Planner

SUBJECT: **MORATORIUM ON MARIJUANA DISPENSARIES**

REQUEST

Consider adopting an urgency ordinance establishing an interim moratorium on the issuance of any permit, variance, building permit, approval or any other applicable license or entitlement for use for the establishment or operation of a marijuana dispensary in the city of Novato.

RECOMMENDATION

Adopt urgency ordinance.

DISCUSSION

In 1996 the voters of California approved Proposition 215, codified as the "The Compassionate Use Act of 1996," ("Act") which was intended to enable persons who are in need of medical marijuana for specified medical purposes to obtain medical marijuana under limited, specified circumstances without fear of criminal prosecution under State law. Since codification of the Compassionate Use Act the City of Novato, like numerous municipalities throughout California, has attracted inquiries from persons who desire to establish and operate medical marijuana dispensaries within the city. In response to these inquiries the City has opposed the establishment of any medical marijuana dispensary on the basis that such an activity is not permitted by the Novato Municipal Code (NMC). Despite this position, two medical marijuana dispensaries have recently established operations within the city.

In August of 2008, the state Attorney General adopted guidelines in an attempt to clarify provisions of the Act , see, "State Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use", August 2008. ("Guidelines")). Since that time, several jurisdictions in California have been embroiled in litigation surrounding interpretation of the Act and the Guidelines. In 2010, the State Legislature enacted AB 2650, codified as California Health and Safety Code Section 11362.768, to (i) require that as to local regulations adopted on or after Jan. 1, 2011, such regulations may not permit a medical marijuana

Novato City Council Agenda Staff Report Date: _____ File No. _____

cooperative, collective, dispensary, operator, establishment or provider to be located within six hundred feet (600 ft.) of any public or private school and (ii) provide that said restriction shall not prohibit a city from adopting ordinances or policies that further restrict the location or establishment of medical marijuana cooperatives, collectives, dispensaries, operators, establishments or providers. AB 2650 goes into effect on January 1, 2011.

The Novato Municipal Code, Chapter 19, Article 2 does not list medical marijuana dispensaries as a principally or conditionally permitted land use within any of the city's various zoning districts. According to NMC Section 19.02.030F., if a proposed land use is not specifically listed in Article 2 (Zoning Districts, Allowable Land Uses, and Zone-Specific Standards) the use shall not be allowed. NMC Section 19.02.030F.1., continues that the Zoning Administrator may determine that a proposed use not listed in Article 2 may be allowed as a permitted or conditional use where certain findings are made, including the characteristics of the proposed use are equivalent to those of one or more uses listed in Article 2. The Zoning Administrator has consistently held that a medical marijuana dispensary is not equivalent or comparable to any uses listed in Article 2 of the NMC and is therefore a prohibited use.

Staff has consistently advised prospective operators of medical marijuana dispensaries of the Zoning Administrator's determination. However, prospective operators of medical marijuana dispensaries within the city have taken the position that such dispensaries are not unlike pharmacies, medical offices, or other general retail uses and therefore are permitted in any zoning district that allows these types of land uses. Staff disagrees with these arguments and can document numerous differences between the establishment and operation of medical marijuana dispensaries and pharmacies, medical offices, and general retail stores.

In an effort to address the legal issues surrounding medical marijuana dispensaries and to provide time for staff to consider and evaluate the City's position relative to establishment and operation of medical marijuana dispensaries staff is recommending the City Council consider adopting an urgency ordinance enacting an interim moratorium on the issuance of any permit, variance, building permit, approval or any other applicable license or entitlement for use for the establishment or operation of a marijuana dispensary in the city of Novato.

An interim moratorium on medical marijuana dispensaries would provide staff with sufficient time to study the myriad of litigation surrounding the enforcement of the Compassionate Use Act and recent changes to state law concerning medical marijuana dispensaries so as to develop appropriate policy language and draft zoning ordinance amendments relating to said uses. Staff considers adopting the moratorium a matter of urgency due to the potential harmful effects of medical marijuana dispensaries, including increases in illegal drug activity, illegal drug sales, robbery, loitering, and other increased criminal activity as experienced in other jurisdictions in California. These adverse effects represent a significant threat to the health, safety, and welfare of Novato residents.

California Government Code Section 65858(a) allows a legislative body to adopt an urgency ordinance to protect public safety, health or welfare. Adoption of the urgency ordinance requires a four-fifths vote of the City Council. Should the Council adopt the urgency ordinance it would take effect immediately and remain valid for an initial period of 45-days. The City Council may take action to extend the effective date of the urgency ordinance a maximum of two times, with a maximum total duration of 2-years, subject to making specific findings of fact to support the extension(s).

ALTERNATIVES

1. Adopt the urgency ordinance.
2. Adopt the urgency ordinance with revisions.
3. Do not adopt the urgency ordinance.
4. Continue the item with direction to staff.

ATTACHMENTS

1. Draft Urgency Ordinance

CITY COUNCIL OF THE CITY OF NOVATO

ORDINANCE NO. _____

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF NOVATO ESTABLISHING A TEMPORARY MORATORIUM ON THE ESTABLISHMENT AND OPERATION OF MARIJUANA DISPENSARIES AND RELATED ACTIVITIES, TO BECOME EFFECTIVE IMMEDIATELY

WHEREAS, in 1996 the voters of California approved Proposition 215, codified as California Health and Safety Code Section 11362.5 and entitled "The Compassionate Use Act of 1996"; and

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

WHEREAS, in 2003, the State Legislature enacted SB 420, codified as California Health and Safety Code Section 11362.7 *et seq.* and entitled the "Medical Marijuana Program Act" ("MMPA") to clarify the scope of The Compassionate Use Act of 1996; and

WHEREAS, in 2010, the State Legislature enacted AB 2650, codified as California Health and Safety Code Section 11362.768, to (i) require that as to local regulations adopted on or after Jan. 1, 2011, such regulations may not permit a medical marijuana cooperative, collective, dispensary, operator, establishment or provider to be located within six hundred feet (600 ft.) of any public or private school and (ii) provide that said restriction shall not prohibit a city from adopting ordinances or policies that further restrict the location or establishment of medical marijuana cooperatives, collectives, dispensaries, operators, establishments or providers. AB 2650 goes into effect on January 1, 2011; and

WHEREAS, the Federal Controlled Substances Act ("CSA") provides that the manufacture, cultivation, distribution and dispensing of marijuana is illegal for any purpose, and further provides for criminal penalties for marijuana use; and

WHEREAS, the City of Novato has consistently adopted strict land use controls to protect the unique character of Novato and the land use zones contained therein and, in several cases has prohibited certain types of retail, commercial and industrial uses entirely within the City limits by excluding their listing in Novato Municipal Code, Chapter 19, Article 2; and

WHEREAS, the City of Novato has invested considerable time, effort, energy, resources, and funds in successfully enforcing the provisions of the Novato Municipal Code, by requiring that all uses of property in the City comply with the applicable laws, rules and regulations of the

City in order to protect the health, safety and welfare of the citizens of Novato; and

WHEREAS, the City of Novato Municipal Code does not permit the use of any real property within the City of Novato for the establishment or operation of any marijuana dispensaries, cooperatives, collectives, operators, establishments or providers, in that such uses are not listed as permitted or conditionally permitted uses in any zoning district, as described in Novato Municipal Code, Chapter 19, Article 2, within the City and are therefore prohibited and declared to constitute a public nuisance; and

WHEREAS, the City of Novato Municipal Code additionally provides that the use of real property located within the jurisdictional boundaries of the City that is conducted or maintained in violation of any lawful federal or state statute or provisions of the United States or California Constitution shall constitute a violation of the zoning code and shall be a public nuisance subject to abatement proceedings; and

WHEREAS, the adoption of the Compassionate Use Act ("CUA") and the MMPA has spawned many pieces of litigation throughout the State of California involving the CUA's and MMPA's interpretation, validity and application. For example, the United States Supreme Court held in *Gonzales v. Raich*¹ that the provisions of the federal Controlled Substances Act apply to the personal medical use of marijuana in California; and

WHEREAS, the City's existing zoning provisions described above prohibit the establishment and operation of marijuana dispensaries, cooperatives, collectives, operators, establishments or providers (collectively referred to herein as "MMD" or "MMD's") in the City, but notwithstanding these provisions, a number of individuals have stated their intentions or desires to open MMD's in the City. Numerous individuals contact the Community Development Department regularly inquiring about establishing MMDs in the City. Several individuals have stated their belief that the City's existing regulations would permit MMD's to operate in many zoning districts in the City arguing that MMD's are equivalent to other permitted and conditional uses listed in Novato Municipal Code, Chapter 19, Article 2; and

WHEREAS, the Novato Zoning Administrator has consistently advised City staff that MMD's are not equivalent to other uses listed in Novato Municipal Code Chapter 19, Article 2, and are therefore prohibited uses pursuant Novato Municipal Code Section 19.02.030F. The Zoning Administrator's position has been consistently conveyed to all prospective operators of MMD's inquiring as the establishment and operation of MMD's in the City of Novato.

WHEREAS, in the *City of Claremont v. Kruse* case, the court of appeal held that even where the operative effect of local zoning laws prohibits MMD's within the zoning districts established by a city's zoning code, a city possesses the authority, as a rightful exercise of its police and zoning powers, to additionally prohibit the establishment of MMD's within their jurisdictional boundaries through the adoption of moratoria pursuant to Cal. Gov't Code section

¹ *Gonzales v. Raich* (2005) 545 U.S. 1

65858, and given the fact that notwithstanding the City's existing zoning code's prohibition against the establishment of MMD's, MMD's have opened in the City and that most other communities in Marin County have banned MMD's, there is a substantially increased likelihood that more such establishments will seek to locate in the City until such time as the City adopts additional zoning regulations within the City applicable to MNDs; and

WHEREAS, operations of some MMD's in other California jurisdictions have resulted in reported increases in illegal drug activity, illegal drug sales, robbery, loitering around some MMD's, and other increase in criminal activity; and

WHEREAS, Article XI, Section 7 of the California Constitution provides that a City may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws; and

WHEREAS, California Government Code Section 65858 (a), provides: that City legislative bodies may, to protect public safety, health or welfare, adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body is considering or studying or intends to study within a reasonable time; that adoption of such urgency measures requires a four-fifths vote of the legislative body; and that such measures shall be of no effect 45 days from the date of adoption, but may be extended a maximum of two times and have a maximum total duration of 2 years; and

WHEREAS, California Government Code Section 65858, subdivision (c), provides: that legislative bodies may not adopt or extend such interim ordinances unless they contain findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional entitlements would result in that threat to the public health, safety or welfare; and

WHEREAS, given the above facts, including the myriad litigation surrounding the construction and enforceability of the Compassionate Use Act and the MMPA and the recent changes in state law, the City is considering how to most effectively address zoning regulations applicable to MNDs in the City in order to prevent the potential impacts such facilities may have on the public health, safety and/or welfare, and particularly the impact they may have on the City's youth. Given the modest size of Novato, the close proximity of residential, school, park and religious uses to commercial and industrially zoned properties, developing clear and concise zoning language addressing regulation of MMD's is particularly important and urgent; and

WHEREAS, in order to determine the most appropriate and publicly beneficial manner in which to address the issues implicated by the applicable laws and the effect of MNDs, and in order to protect residents and businesses from the potential harmful effects of some MNDs and their operators, the City needs time to study the law and the types of regulations which are most appropriate to such uses within the City, and to permit the public adequate time to review and comment upon the issue in accordance with state law; and

WHEREAS, it would be destructive of and render ineffective any proposed policies, restrictions, ordinances and regulations if, during the period they are being studied and considered, parties seeking to avoid their operation and effect establish and operate such uses, which said operations and activities will defeat, in whole or in part, the objectives of such policies, restrictions, ordinances and regulations; and

WHEREAS, absent the adoption of this interim urgency ordinance, it is likely that the establishment and operation of MMD's within the City will result in harmful effects to the businesses, property owners and residents of the City; and

WHEREAS, because of the facts set forth above, there exists a current and immediate threat that MMD's may locate in the City or will seek to locate in the City, that such poses a current and immediate threat to the health, safety and welfare of the citizens of the City and having such uses locate, commence operations and operate in the City before the City has had an opportunity to consider, study and/or adopt additional regulations relating to said uses will render such regulations ineffective and destroy the purpose of engaging in such an analysis and process in the first place, thus constituting a current and immediate threat to the health, safety and welfare of the citizens of the City; and

WHEREAS, in accordance with California Government Code Section 65858, subdivision (c), which provides that interim ordinances that have the effect of denying approvals needed for the development of projects with a significant component of multifamily housing (as defined in California Government Code Section 65858, subdivisions (g) and (h)) may not be extended except upon written findings adopted by the legislative body as specified in subdivision(c), the City Council hereby finds that the moratorium established pursuant to this ordinance will not have the effect of denying approvals needed for the development of projects with a significant component of multi-family housing; and that, therefore, the findings specified in Section 65858, subdivision (c), need not be made; and

WHEREAS, pursuant to Section 15001 of the California Environmental Quality Act (CEQA) Guidelines, this ordinance is exempt from CEQA based on the following findings:

(1) This ordinance is not a project within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in physical change in the environment, directly or ultimately.

(2) This ordinance is categorically exempt from CEQA under Section 15308 of the CEQA Guidelines as a regulatory action taken by the City pursuant to its police power and in accordance with Government Code Section 65858 to assure maintenance and protection of the environment pending the consideration, evaluation and possible adoption of contemplated local legislation, regulation and policies.

(3) This ordinance is not subject to CEQA under the general rule that CEQA applies

only to projects which have the potential for causing a significant effect on the environment. For the reasons set forth in subparagraphs (1) and (2), above, it can be seen with certainty that there is no possibility that this ordinance will have a significant effect on the environment:

NOW THEREFORE, the City Council of the City of Novato does ordain as follows:

Section 1. Recitals Made Findings. The above recitals are hereby declared to be true and correct and represent the findings of the City Council of the City of Novato, made in the exercise of its independent judgment.

Section 2. Moratorium Imposed.

A. Scope.

In accordance with the authority granted the City of Novato under Article XI, Section 7 of the California Constitution and California Government Code Section 65858, from and after the effective date of this ordinance, no permit, variance, building permit, approval or any other applicable license or entitlement for use, including, but not limited to any land use entitlement, or the issuance of a business license, shall be approved or issued for the establishment or operation of a marijuana dispensary in the City of Novato. The establishment or operation of a marijuana dispensary in the City is hereby expressly prohibited in all areas and in all zoning districts of the City during the period of time which this ordinance, and any extension thereof, if any, is in effect.

B. Definitions.

1. For purposes of this ordinance, "marijuana" means all parts of the plant *cannabis sativa* L, whether growing or not, the resin extracted from any part of the plant; cannabis; concentrated cannabis; edible products containing any part of marijuana; any form of marijuana that may be eaten, injected, ingested, digested or otherwise introduced into the human body; and every active compound, manufacture, derivative, or preparation of the plant, or resin.

2. For purposes of this ordinance, a "marijuana dispensary" shall mean a facility, place, location, building, and/or storefront or mobile retail outlet (as "storefront" and "mobile retail outlet" are used in Cal. Health & Safety Code sec. 11362.768) where marijuana is provided or made available for medical purposes, whether or not in accordance with the Compassionate Use Act and/or the Medical Marijuana Program Act, including, but not limited to the cultivation, processing, dispensing, distribution, sharing, transportation, contribution, sale, trade or gift of marijuana by any person, entity, operator, provider, business or establishment, for profit or otherwise, or by or through a club, membership, collective, cooperative, or other entity or organization. "Collective" and "cooperative" shall have the same meaning as set forth in the "State Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use", August 2008.

C. Statutory Findings and Purpose

This ordinance is declared to be an interim ordinance as defined under California Government Code Section 65858. This ordinance is deemed necessary based on the findings of the City Council of the City of Novato as set forth in the recitals, incorporated by Section 1 of this Ordinance.

Section 3. Zoning Code

The establishment, maintenance or operation of a marijuana dispensary, as defined herein, is not permitted within any zone in the City of Novato, pursuant to Novato Municipal Code Chapter 19, Article 2.

Section 4. Establishment, Maintenance or Operation of Commercial Marijuana Establishments declared public nuisance.

The establishment, maintenance or operation of a marijuana dispensary as defined herein within the City limits of the City of Novato is declared to be a public nuisance. Violations of this ordinance may be enforced by any applicable laws or ordinances, including but not limited to injunctions, or administrative penalties under the City of Novato Municipal Code.

Section 5. Severability

If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this ordinance are severable. The City Council of the City of Novato hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

Section 6. Effective Date and Duration.

This Ordinance shall become effective immediately if passed and adopted by at least four-fifths vote of the City Council and shall be in effect for 45 days from its adoption unless extended by the City Council in accordance with California Government Code Section 65858.

* * * * *

THE FOREGOING ORDINANCE was first read at a regular meeting of the Novato City Council on the ____ day of _____, 20____, and was passed and adopted on the same day by the following vote:

AYES: Councilmembers

NOES: Councilmembers

ABSTAIN: Councilmembers

ABSENT: Councilmembers

Mayor of the City of Novato

Attest:

City Clerk of the City of Novato

Approved as to form:

City Attorney of the City of Novato