

Office of the City Manager

December 4, 2008

To: Honorable Mayor
and Members of the City Council

From:  Phil Kamlarz, City Manager

Subject: Implementation of Measure JJ – Medical Cannabis

Measure JJ, Patients Access to Medical Cannabis Act of 2008, was passed in the November 4, 2008 election. The measure amends BMC Chapter 12.26 and adds Zoning Ordinance Sections 23E.16.060 and .070 as generally described below.

- Medical marijuana dispensaries must be approved as a matter of right (without a public hearing) with a Zoning Certificate in areas that allow retail sales.
- The numerical limit on the amount of medical marijuana possessed by dispensaries was eliminated and replaced with a “reasonable quantity” to meet the needs of the patients.
- A Peer Review Committee was established to regulate medical marijuana dispensaries.

The election results will be certified at the December 8, 2008 City Council meeting. This memo provides an overview of how the City will implement Measure JJ. A memo from the City Attorney is attached, which provides a more detailed analysis of the Measure.

No more than three medical marijuana dispensaries are allowed in Berkeley (Section 12.26.130; this was not changed by Measure JJ). Prior to Measure JJ, a Use Permit was required for a medical marijuana dispensary. Until December 2007, there were three operating dispensaries, all of which began operations prior to the Use Permit requirement. There is a question about whether one of the three, located at 3124 Shattuck Avenue, is still a medical marijuana dispensary. Staff is looking into this; if not, it would be possible for one additional dispensary to be approved. Four applications for Zoning Certificates have been filed since November 4, 2008.

A Zoning Certificate (ZC) is a ministerial permit that is required for as-of-right uses. Applications are filed at the Permit Service Center's Zoning Counter. Although ZCs can often be approved over-the-counter, applications for medical marijuana dispensaries will need to be taken in for analysis to determine conformance with local and state codes.

Prior to approving a ZC, staff must determine conformance with:

- Buffer zone: Medical marijuana dispensaries are not allowed within 1000 feet of another such dispensary, nor within 1000 feet of a public elementary, middle or high school (Section 12.26.130).

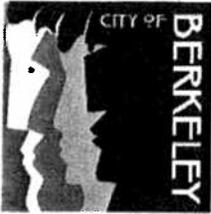
- Location restrictions: Medical marijuana dispensaries are only allowed in areas where retail sales are allowed (Section 23E.16.070).
- Zoning requirements that apply to other by-right retail operations, such as parking requirements for a change of use, must also be met by these dispensaries.
- Under state law, a medical marijuana dispensary must be a non-profit business (H&S Code Section 11362.765a).
- Peer Review Committee: A Peer Review Committee must be formed and provide the City with certification that “the proposed Medical Cannabis Collective or dispensary has a strategy for compliance with the published safety and operational standards before the new Medical Cannabis Collective or dispensary commences lawful operation.” (Section 12.26.110).

Staff considered several alternative processes for approving a Zoning Certificate for a third dispensary when a slot is available. We decided that the most fair and impartial option was to have a lottery. To participate in the lottery, a potential dispensary would need to meet certain minimum criteria, such as non-profit status as required by state law and a retail business location and property owner permission. They would fill out a Zoning Certificate application and the first selected dispensary then would be analyzed further to determine conformance with zoning and other regulations. If in compliance, the dispensary would be forwarded to the Peer Review Committee for review. The ZC would be approved if a certification were issued.

Based on a meeting with an attorney and representative for Berkeley patient groups, the Peer Review Committee will be forming shortly and safety and operational standards will be prepared. We anticipate that the Committee will hold its first meeting in December.

Attachment

cc: Lisa Caronna, Deputy City Manager
Christine Daniel, Deputy City Manager
Zach Cowan, Acting City Attorney
Deanna Despain, Acting City Clerk
Ann-Marie Hogan, City Auditor
Dan Marks, Planning Director



Office of the City Attorney

Date: December 4, 2008

To: Honorable Mayor and
Members of the City Council and Phil Kamlarz, City Manager

From: Zach Cowan, Acting City Attorney
By: Matthew J. Orebic, Deputy City Attorney **MJO**

Subject: 2008 Medical Marijuana Initiative Ordinance – Measure JJ

Issue:

What are the impacts of the passage of Measure JJ, the 2008 medical marijuana initiative ordinance?

Conclusion:

Measure JJ did *not* modify the current cap of 3 medical marijuana dispensaries that may operate at any one time in Berkeley. The primary impacts of Measure JJ are that it:

- Established that new medical marijuana dispensaries (if a slot comes open) may obtain a Zoning Certificate as a matter-of-right in any location where retail sales are allowed;
- Established a Peer Review Committee to implement safety and operational standards for the three medical marijuana dispensaries; and
- Eliminated numerical limits on medical marijuana possessed by qualified patients, their primary caregivers, collectives, and dispensaries, replacing such limits with “reasonable amounts” on a case-by-case basis that are needed by a patient, or the members of a collective or dispensary.

While this opinion discusses the immediate impacts of Measure JJ, other issues will probably arise in the future as staff implements Measure JJ. Staff will be working with medical marijuana dispensary applicants and the Peer Review Committee to resolve issues and make appropriate interpretations as additional issues arise.

Discussion:

In 2001, the City Council enacted Berkeley Municipal Code (BMC) Chapter 12.26, entitled “Protocols for Medical Cannabis.”¹ A chart summarizing Measure JJ’s revisions to BMC

¹ Cannabis means marijuana.

Chapter 12.26 and Berkeley Zoning Ordinance Sections 23C.16.060 and 23E.16.070 is attached as Exhibit A. Each revision is explained below. The full text of Measure JJ is also attached to this opinion as Exhibit B.

I. Medical Marijuana Dispensaries No Longer Need A Use Permit; They May Be Established With A Zoning Certificate In Any District Where Retail Sales Are Allowed, Assuming Compliance With Both The Existing Buffer Zone And 3-Dispensary Citywide Cap, As Well As Non-Profit Status

In 2004, Council added BMC Section 12.26.110 to Chapter 12.26, which Measure JJ re-numbered as BMC Section 12.26.130. Section 12.26.130 (formerly Section 12.26.110) imposed a cap of 3 medical marijuana dispensaries that may operate at any one time in Berkeley and also imposed a 1,000-foot buffer zone between any dispensary and any public elementary, middle, or high school as well as any other dispensary. Measure JJ did not modify either of the 3-dispensary cap or the 1,000-foot buffer zone.

A. A Use Permit Is No Longer Required For Dispensaries In Retail Locations

BMC 12.26.140 (formerly BMC 12.26.120) provides the City can make compliance with all laws a condition of deeming a person or entity in compliance with local law under BMC Chapter 12.26, unless requiring such compliance with such a law (e.g. federal law prohibiting medical marijuana) conflicts with the purpose of Chapter 12.26. Prior to Measure JJ's passage, under the "compliance with all laws" provision in BMC 12.26.140, as to any dispensary not already in a "grandfathered" location prior to the enactment of Chapter 12.26, the City required medical marijuana collectives to obtain a Use Permit to operate in a retail district.

Measure JJ eliminated the City's Use Permit requirement for dispensaries by amending the City's Zoning Ordinance as follows:

Section 23E.16.070 Medical Cannabis Collectives

As proper regulation is crucial to the safety of our community, medical cannabis collectives that operate dispensaries from which medical cannabis is dispensed to members shall be issued a Zoning Certificate for as long as it complies with Chapter 12.26. This section does not apply in districts where retail sales uses are prohibited. Zoning Certificates for medical cannabis dispensaries shall be issued without undue delay and following normal and expedient consideration of the permit application.

Measure JJ does not expressly eliminate the need for a Use Permit to operate a dispensary. However, Measure JJ does state, "medical cannabis collectives that operate dispensaries ... shall be issued a Zoning Certificate ... as long as it complies with Chapter 12.26." Since a Zoning Certificate is a ministerial permit and not a discretionary permit, this revision of the Zoning Ordinance eliminates the need for a collective to obtain a discretionary Use Permit to operate a dispensary.

The next sentence states that this section “does not apply in districts where retail sales uses are prohibited.” This use of a double negative obscures the meaning of this sentence, but the apparent meaning is that dispensaries *are* allowed with only a Zoning Certificate in districts where retail sales are allowed under the Zoning Ordinance.²

B. Non-Profit Status Is Still Required By State Law

In 2004, the state Legislature enacted enabling legislation for implementing the original 1996 medical marijuana state voter initiative, Proposition 215. As part of the 2004 legislation, Health and Safety Code section 11362.765 provides that individuals and groups authorized to cultivate and distribute medical marijuana under state law are not authorized to do so for a profit. Thus, state law prohibits medical marijuana collectives and dispensaries from being profit-making operations.

Nonprofit status can be established by a collective or dispensary in any number of ways. Under state law, this can be done through organizing as an unincorporated nonprofit association, a nonprofit corporation, or a nonprofit trust. Corp. Code §§18020(a), 18105, 5000 *et seq.*, and 7110 *et seq.* However, compensation paid to those working in the nonprofit organization must be reasonable. See Corp. Code §5235(a).

C. The 3-Dispensary Cap Will Be Implemented By The Planning Department

As stated above, Measure JJ did not modify the 3-dispensary cap for the number of medical marijuana dispensaries that are allowed at one time within the City or the 1,000-foot buffer zone from public schools and other dispensaries. Up until recently, there were already 3 medical marijuana dispensaries in the City, but it is unclear whether all 3 dispensaries remain in operation. Staff is in the process of confirming whether one slot has or will come open. Measure JJ has eliminated the need for a Use Permit for a new dispensary applying for permission to operate in a zoning district in which retail uses are allowed. If a slot becomes open for a new dispensary, the Planning Department is in the process of issuing a protocol for administering the allocation of a medical marijuana dispensary Zoning Certificate (subject to Zoning Certificate compliance).

II. Peer Review Committee

Measure JJ established under BMC 12.26.110 a new Peer Review Committee for dispensaries and collectives currently in operation. The Committee is to be composed of no more than two spokespeople from each existing collective and dispensary and is to meet at least once a month for the purpose of overseeing the operation of collectives and dispensaries and “ensuring their

² Measure JJ also added Section 23C.16.060 to the Zoning Ordinance to expressly state that no Use Permit is required for qualified patients to cultivate medical marijuana on their residential property. This provision is merely declaratory of existing law prior to Measure JJ’s passage in that cultivation of medical marijuana by a qualified patient at home is considered an incidental residential use.

compliance with operational and safety standards published annually” by the Committee. BMC 12.26.110 provides the Committee is to certify that any new collective or dispensary “has a strategy for compliance with the published safety and operational standards” before the collective or dispensary commences lawful operation. Once a new collective or dispensary commences operation, it must also “designate no more than two spokespeople to serve” on the Committee.

This new section establishing the Committee appears to address only dispensaries or collectives that operate at a retail location subject to a Zoning Certificate. Given this limitation, the Committee will start with 4 or 6 members depending on whether all three of the dispensaries are still in operation when the Committee is formed.

A. Committee Authority

BMC 12.26.110 goes on to state the Committee will “monitor the compliance” of all collectives or dispensaries in Berkeley “for the purpose of correcting any violations of the safety and operational standards”, and that collectives or dispensaries “found to be in willful or ongoing violation of the standards” shall be (a) “removed from membership” on the Committee, and (b) “deemed in violation of this Chapter and referred to the City for appropriate action.” Given this mandate, the Committee may vote on whether a violation of a standard has occurred and probably remove members whose dispensary is in violation of Committee rules. However, the text of BMC 12.26.110 does not appear to contemplate direct enforcement by the Committee, but rather, referral “to the City for appropriate action.” Moreover, due to the Committee’s small size and the competing interests of the three dispensaries represented on the Committee, the Committee’s authority over an individual collective or dispensary is limited by due process considerations when the issue to be decided poses a possible conflict of interest. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (adjudicator with substantial financial interest in the outcome violates due process). Thus, the proper scope of the Committee’s authority on any given compliance issue will have to be evaluated as issues involving a “violation of standards” develop.

B. The Brown Act, Public Records Act, and Conflict Of Interest Rules Apply To The Committee

Under the Brown Act (Government Code section 54940 *et seq.*), a “legislative body” includes a “committee ... of a local agency, whether permanent or temporary, decision making or advisory, created by ... ordinance” Thus, the Peer Review Committee is governed by the Brown Act. The Brown Act requires, among other things, that all meetings of the Committee where a majority of the members attend must be open to the public and must be held in accessible locations. A meeting agenda must also be published 72 hours in advance of regular meetings and the Committee is limited to discussing and acting on the matters listed in the posted agenda.

Additionally, the Committee’s records will be public records subject to disclosure under the Public Records Act (Government Code section 6250 *et seq.*) and the Committee members will be

subject to local and state conflict of interest laws. Accordingly, staff will need to orient the Committee members on how to comply with these various laws.

C. The Federal Immunity Provision For Committee Members Is Likely Unviable

Measure JJ provides in BMC 12.26.110(E) that Committee members “shall be deputized by the City of Berkeley as Drug Control Officers for the purpose of providing immunity under the provisions of Section 885(d) of Title 21 of the United States Code.” Federal law provides in 21 United States Code section 885(d) that “no civil or criminal liability shall be imposed ... upon any duly authorized officer of any State, territory, political subdivision thereof ... who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.” Thus, Section 885(d) provides immunity from federal prosecution to an undercover narcotics officer when engaged in enforcing narcotics laws.

BMC 12.26.110(E) is intended to extend this federal immunity (e.g. for narcotics officers) to Committee members in their roles as persons running medical marijuana dispensaries. However, *United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006) rejected a very similar attempt to use a local medical marijuana ordinance to gain immunity from federal law violations under 21 U.S.C. Section 885(d). In *Rosenthal*, the defendant argued he was “lawfully engaged in the enforcement” of the City of Oakland Cannabis Ordinance by ensuring legal distribution of marijuana to seriously ill Californians, and Oakland officials encouraged him to participate in the distribution of medical marijuana, “deputized him to perform that function, and promised, in writing, his immunity from liability.” *Id.* For these reasons, Mr. Rosenthal claimed he was a “duly authorized officer” of the City of Oakland and immunized from federal prosecution by 21 U.S.C. Section 885(d). The court rejected Mr. Rosenthal’s argument, holding instead that “cultivating marijuana for medical use does not constitute ‘enforcement’ within the meaning of Section 885(d).” *Id.* The court further noted that “ ‘enforcement’ means ‘to compel compliance with the law At best, Rosenthal was implementing or facilitating the purpose of the statute; he was not compelling anyone to do or not to do anything.’ ” *Id.* The court stated “Rosenthal’s interpretation of the immunity provision contradicts the purpose of the” federal Controlled Substances Act. The court concluded “we reject the premise that an ordinance such as the one Oakland enacted can shield a defendant from prosecution for violation of federal drug laws.” *Id.*

Here, like in *Rosenthal*, it appears the Committee members would be “implementing or facilitating” the purpose of BMC Chapter 12.26, but would not be “enforcing” the local ordinance due to the limitations of the Committee’s authority in both the text of BMC 12.26.110 (“referring” enforcement to the City) and the due process limitations (such as conflicts of interest) on the Committee’s authority. Further, it is unclear whether citizens can use an initiative ordinance can deputize a drug control officer. In any event, under the *Rosenthal* case, the deputization of a Committee member as a “drug control officer” through a medical marijuana ordinance does not appear likely to succeed as a viable defense to a federal criminal prosecution.

III. Amount of Dried Medical Marijuana And The Number Of Plants Possessed By Individuals Must Now Be Determined On A Case-By-Case Basis

Measure JJ deleted the provisions in BMC 12.26.070(A) and (C) that imposed numerical limits on the amount of dried medical marijuana a qualified patient and/or the patient's primary caregiver could possess absent a doctor's recommendation that the patient could possess more. Measure JJ also deleted the provisions in BMC 12.26.070(B) and (D) that imposed numerical limits on the amount of medical marijuana plants a qualified patient and/or the patient's primary caregiver could cultivate absent a doctor's recommendation that the patient could cultivate more. Under Measure JJ, with respect to dried marijuana, BMC 12.26.070(B) now provides, "pursuant to California Health and Safety Code Section 11362.77(c) as effective on January 1, 2004, all *possession* of cannabis for medical purposes by a Qualified Patient or Primary Caregiver shall be lawful ... when ... solely for the personal medical purposes of Qualified Patients." Moreover, "Qualified Patients (and), Primary Caregivers ... may possess individually or collectively." With respect to cultivation of plants, under Measure JJ, BMC 12.26.070(A) now provides, "pursuant to California Health and Safety Code Section 11362.77(c) as effective on January 1, 2004, all *cultivation* of cannabis for medical purposes by a Qualified Patient or Primary Caregiver shall be lawful ... when ... conducted solely for the personal medical purposes of Qualified Patients." As with possession of dried marijuana discussed above, "cultivators may cultivate individually or collectively."

Under Health and Safety Code Section 11362.77(a), with respect to dried marijuana, "a qualified patient or primary caregiver may ... possess no more than eight ounces of dried marijuana per qualified patient." With respect to plants, Health and Safety Code Section 11362.77(a) provides "a qualified patient or primary caregiver may ... maintain no more than six mature or 12 immature marijuana plants per qualified patients." However, Health and Safety Code Section 11362.77(c) provides, "cities may ... enact medical marijuana guidelines allowing qualified patients or primary caregivers to exceed the state limits set forth in subdivision (a)." In other words, Section 11362.77(c) gives the City authority to set a higher limit than state law on the amount of dried marijuana and/or plants a qualified patient or primary caregiver can possess. Measure JJ does exactly that.

Measure JJ allows a qualified patient or primary caregiver to possess as much dried marijuana and/or cultivate as many plants as needed for "the personal medical purposes of Qualified Patients." It is important to note that Measure JJ allows one qualified patient or primary caregiver to possess or cultivate marijuana for other qualified patients. Accordingly, Measure JJ implements a new case-by-case limit on the amount of marijuana a qualified patient or primary caregiver may possess and/or cultivate, depending on the number of qualified patients for whom the marijuana is being held or cultivated and the collective needs of those patients.

IV. Amounts of Dried Medical Marijuana And Plants Possessed By Collectives Must Now Be Determined On A Case-By-Case Basis

Measure JJ also deleted the provisions in BMC 12.26.040(D) that imposed numerical limits on the amount of dried medical marijuana and the number of plants a medical marijuana collective

can possess or cultivate. Under Measure JJ, BMC 12.26.040(D) now provides a collective “may possess a reasonable quantity of dried marijuana and cannabis plants to meet the needs of their patients.” Medical marijuana collectives comprised of qualified patients and primary caregivers are expressly recognized by state law. H & S Code §11362.775. Accordingly, Measure JJ implements a new case-by-case limit on the amount of dried marijuana and/or plants a collective may possess and/or cultivate, depending on the number of qualified patients for whom the marijuana is being held or cultivated, and the collective needs of those patients.

V. Number of Medical Marijuana Plants Cultivated Outdoors Is Still Limited To 10 For Collective Cultivation, But Must Now Be Determined On A Case-By-Case Determination For An Individual

Measure JJ retained, in part, the 10-plant limit for outdoor medical marijuana plants that are visible from other properties. BMC 12.26.070(D). However, this 10-plant limit for outdoor medical marijuana plants that are visible from other properties was *eliminated* for individuals (former BMC 12.26.070(D)), and retained only for medical marijuana that is grown collectively for more than one qualified patient. Thus, if an individual qualified patient on his or her own behalf, or his or her primary caregiver acting solely on his or her behalf, grows medical marijuana plants outdoors, the 10-plant limit no longer applies. Rather, the outdoor plant limit for an individual is now governed only by the “personal medical purposes” provision in BMC 12.26.070(A).

VI. New Provision Requiring City Distribution Of Medical Marijuana In An Emergency Is Largely Void Under State And Federal Law

Measure JJ added BMC 12.26.120 that requires the City to “make all reasonable accommodation for the provision of medical cannabis to Qualified Patients or their Primary Caregivers in the event that access to medical cannabis is interrupted or severely diminished as the result of civil or criminal federal enforcement activity.” BMC 12.26.120 also states the “City shall accommodate distribution of medical cannabis as early as possible following such a disruption and no later than thirty (30) days after the disruption.” To the extent BMC 12.26.120 envisions direct distribution of medical marijuana by the City, it is likely void in this respect under state law because a city generally cannot be a “primary caregiver” authorized to provide medical marijuana to a qualified patient.

To review, under state law, Health and Safety Code section 11362.5 provides that a qualified patient and the patient’s primary caregiver may possess or cultivate marijuana for the patient’s personal medical use. Section 11362.5(e) defines a “primary care giver” as a “person who has consistently assumed responsibility for the housing, health, or safety of the patient.” In *People v. Peron* (1997) 59 Cal.App.4th 1383, 1392-99, the court held that neither a marijuana club nor the marijuana club proprietor in question met the definition of primary caregiver because they did not consistently assume responsibility for the health or safety of the patient, but merely sold marijuana to qualified patients on demand. The court held that a patient simply designating a marijuana seller or club as a primary caregiver was “clearly a subterfuge designed to subvert the plainly expressed intent of section 11362.5 continuing the proscriptions of marijuana sale and

possession for sale.” 59 Cal.App.4th at 1397.

In the 2004 state legislation regarding medical marijuana, Health and Safety Code section 11362.775 attempted to avoid this problem in the club model by expressly allowing medical marijuana to be cultivated collectively by qualified patients and primary caregivers, and by necessary implication, distributed among the collective’s members. Thus, “collectives” that are comprised *exclusively* of qualified patients and primary caregivers can legally cultivate medical marijuana under Section 11362.775. Under the collective model, qualified patients who are unwilling or unable to cultivate marijuana on their own can still have access to marijuana by joining together with other qualified patients to form a collective. Even under Section 11362.775, however, collectives still cannot include third parties such as directors or employees who are neither qualified patients nor primary caregivers. Under *Peron*, such third parties remain prohibited from distributing or selling medical marijuana. This ruling was recently reiterated by the California Supreme Court in *People v. Mentch* (2008) Cal. Lexis 13630 (Section II).

In the 2004 state legislation regarding medical marijuana, Health and Safety Code section 11362.7(d) reiterated the original definition of primary caregiver stated above under Section 11362.5(e), but also added non-exclusive examples of what health care institution employees can be deemed a primary caregiver. Specifically, Section 11362.7(d)(1) further included in the definition of “primary caregiver” a *state-licensed health clinic*, health care facility, residential care facility for persons with chronic life-threatening illnesses, hospice, or home health agency, and the owner or operator and up to three employees who are designated by the owner or operator. Therefore, while a municipality itself cannot generally be deemed a primary caregiver because a municipality has not “consistently assumed responsibility for the housing, health, or safety of the patient,” a possible exception under Section 11362.7(d)(1) would be municipality’s state-licensed health clinic that is designated by a qualified patient as his or her primary caregiver. In other words, there is a narrow circumstance through which a municipality could be considered a primary caregiver, namely, when its public health clinic has accepted the role of primary caregiver to a qualified patient.

However, even assuming the City’s state licensed health clinic were willing to accept the role of primary caregiver to a qualified patient for the purpose of supplying medical marijuana, doing so would be a direct violation of federal law. It is one thing for the City to enact ordinances and create regulations to implement state law regarding medical marijuana, but it is quite another to directly distribute medical marijuana. The former does not violate federal law; the latter does.

To review, possession, distribution, and cultivation of medical marijuana violates the federal Controlled Substances Act and there is no medical necessity exception under federal law. 21 U.S.C. §§ 812, Schedule I(c)(10), 841(a), and 844(a); *United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483, 491, 121 S. Ct. 1711, 149 L. Ed. 2d 722; *Gonzales v. Raich* (2005) 545 U.S. - , 125 S.Ct. 2195, 2209, 2212, 162 L.Ed. 2d 1, 22, 26. Therefore, qualified patients, primary caregivers, collectives, and dispensaries are in violation of federal law as it is currently written. However, under the City’s ordinances and regulations (prior to Section 12.26.120 in Measure JJ), the City itself does not possess, distribute, or cultivate medical

marijuana, and therefore, does not violate federal law.

To the extent the City's ordinances and regulations merely implement state law regarding medical marijuana, the City is also not aiding and abetting a violation of federal law. This is because the federal crime of aiding and abetting requires criminal intent to (1) associate with the criminal venture, (2) participate in it as in something the person wished to bring about, and (3) make it succeed. *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 635. In *Conant*, the Ninth Circuit held that doctors who recommend marijuana are not guilty of aiding and abetting a violation of federal marijuana laws, unless the doctor had the "specific intent" to provide the patient with the means to acquire marijuana. *Id.* at 636. A doctor's mere anticipation that the patient would use the recommendation to acquire marijuana does not rise to the level of specific intent to aid and abet. *Id.* at 635-36. However, a doctor who writes an actual prescription for marijuana would be aiding and abetting. *Id.* Thus, under *Conant*, while the City may provide a regulatory structure for others to cultivate, distribute, and possess medical marijuana (in order to implement state law) without committing the federal crime of aiding and abetting the violation of federal law, the City itself may not cultivate, distribute, or possess medical marijuana. Doing so would violate the federal Controlled Substances Act.

Given the above restrictions under both state and federal law, the provision in BMC 12.26.120 in Measure JJ requiring the City to "make all reasonable accommodation" to ensure the continued distribution of medical marijuana in the event of "civil or criminal federal enforcement activity" is limited to facilitating others in doing so through a regulatory framework, and cannot extend to direct City distribution.

Opn. Idx: II.F.6; V.H.6; VIII.E.4

Exhibit A

Prior Ordinance	Measure JJ – 2008 Initiative Ordinance
Marijuana – amounts for individuals: 1.5 pounds (if grown indoors) or 2.5 pounds (if grown outdoors), unless doctor recommends more. BMC 12.26.070(A) and (C)	Marijuana – amounts for individuals: Reasonable amount. BMC 12.26.070(B)
Marijuana - plants for individuals: 10 (or 12 immature plants per state law), unless doctor recommends more, but no more than 10 plants outdoors. BMC 12.26.070 (B) and (D)	Marijuana - plants for individuals: Reasonable amount. BMC 12.26.070(A)
Marijuana – amounts for collectives: 12.5 pounds. BMC 12.26.040(D)	Marijuana – amounts for collectives: Reasonable amount. BMC 12.26.040(D)
Marijuana - plants for collectives: 50 , but no more than 10 plants outdoors that are visible from other property. BMC 12.26.040(E) and (F)	Marijuana - plants for collectives: Reasonable amount, but no more than 10 plants outdoors that are visible from other property. BMC 12.26.040(D) and (E)
Zoning: Dispensaries must comply with applicable use permit process. BMC 12.26.140 (implied)	Zoning: No use permit needed for a Dispensary and zoning certificate issued as-of-right in locations where retail sales are allowed under the Zoning Ordinance. BMC 23E .16.070
No “Peer Review” Committee or rules for Dispensaries.	“Peer Review” Committee and rules for Dispensaries. BMC 12.26.110(A) through (D)
No requirement to deputize individuals.	Individuals operating collectives or dispensaries, who are on the Peer Review Committee, are deemed “Drug Control Officers” for the purpose of providing them with immunity from federal prosecution under federal law 21 U.S.C. Section 885(d). BMC 12.26.110(E)
No requirement for direct City involvement in distribution.	City to “make all reasonable accommodation for the provision of medical cannabis to Qualified Patients or their Primary Caregivers” if access is interrupted by federal law enforcement. BMC 12.26.120

Exhibit B

FULL TEXT OF MEASURE JJ

THE PATIENTS ACCESS TO MEDICAL CANNABIS ACT OF 2008

The People of the City of Berkeley do hereby enact as follows:

THE PATIENTS ACCESS TO MEDICAL CANNABIS ACT OF 2008

SECTION 1 TITLE

This initiative shall be known and may be cited as the Patients Access to Medical Cannabis Act of 2008.

SECTION 2 FINDINGS AND DECLARATIONS

The People of the City of Berkeley find all of the following to be true:

- A. We strongly support the right of seriously ill patients to use medical cannabis in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraines, or any other serious illness or condition for which cannabis provides relief.
- B. We strongly oppose the arrest, prosecution, and incarceration of persons legally-qualified under the Compassionate Use Act of 1996 (Proposition 215) by local, state, or federal law enforcement.
- C. There is a need in our community for safe and affordable access to medical cannabis.
- D. In the absence of meaningful state regulation, it is necessary for local governments to adopt policies and guidelines for the purpose of facilitating safe access and protecting patients.
- E. The provision of medical cannabis should occur in a safe and orderly manner in order to protect patients and the community. In the absence of clear guidelines, there has been a lack of consistency in the permitting and regulation of medical cannabis dispensing.
- F. There is a need for specific instructions for City officials and staff in order to eliminate this inconsistency.
- G. There are no scientifically valid studies that determine the yield of medicine based on specific numbers of plants or the quantity of medication necessary for a patient.

Berkeley's arbitrarily- low cultivation limits place undue burdens on local patients, and therefore require revision based on patient's needs.

H. The People of the City of Berkeley further find and declare that we enact this initiative pursuant to the powers reserved to the State of California, the City of Berkeley, and its people under the Tenth Amendment to the United States Constitution.

SECTION 3 AMENDMENTS TO BERKELEY MUNICIPAL CODE CHAPTER 12.26

Chapter 12.26 of the Berkeley Municipal Code is hereby amended to read:

Section 12.26.010 Purposes.

The purpose of this chapter is to implement California Health and Safety Code Section 11362.5, known as the Compassionate Use Act of 1996 and to regulate the location of facilities lawfully used for the storage, dispensing and use of medical cannabis, other than the cultivation or possession of medical cannabis by an individual patient or caregiver at the patient or caregiver's home, lawfully incident to the residential use of that home. The Compassionate Use Act is the state law removing state law penalties for qualified patients, and primary care givers to those patients, for possession and cultivation of a personal amount of medical cannabis for qualified patients. This chapter is intended:

- A. To help ensure that seriously ill Berkeley residents can obtain and use cannabis for medical purposes where that medical use has been deemed appropriate and recommended or approved by a physician who has determined that the patient's health would benefit from the use of cannabis in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraines, or any other serious illness or condition for which cannabis provides relief.
- B. To help ensure that qualified patients and their primary caregivers who obtain or cultivate cannabis solely for the qualified patient's medical treatment with the recommendation or approval of a physician are not subject to criminal prosecution or sanction.
- C. To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of medical cannabis to patients whose medical doctors approve or recommend medical cannabis to treat a serious illness or condition.
- D. To protect citizens from the adverse impacts of irresponsible medical cannabis distribution, storage and use practices. (Ord. 6826-NS § 1 (part), 2004: Ord. 6620-NS § 1, 2001)

Section 12.26.030 Definitions.

A. "Cannabis" shall have the same meaning as the definition of "Marijuana" provided in California Health and Safety Code Section 11018 at this time, but if that definition is amended by state law in the future, as amended. Currently, under Health and Safety Code Section 11018, "marijuana means all parts of the plant cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination."

B. "Qualified patient" shall mean a person who has a written or oral recommendation or approval from a licensed medical doctor to use cannabis for medical purposes.

C. "Primary caregiver" shall mean the individual person or persons designated by a qualified patient, provided that said individual person or persons has consistently assumed responsibility for the housing, health, or safety of the qualified patient.

D. "Medical cannabis collective" shall mean a cooperative, affiliation, association, or collective of persons comprised exclusively and entirely of qualified patients and the primary caregivers of those patients, the purpose of which is to provide education, referral, or network services to qualified patients, and to facilitate or assist in the cultivation and manufacture or acquisition of medical cannabis for qualified patients.

E. "Medical cannabis dispensary" shall mean any person or entity that dispenses, cultivates, stores or uses medical cannabis except where such cultivation, storage or use is by a patient or that patient's caregiver, incidental to residential use by such patient, and for the sole use of the patient who resides there. (Ord. 6826-NS § 1 (part), 2004; Ord. 6620-NS § 1, 2001)

Section 12.26.040 Medical cannabis collectives.

A. Pooling of Resources Recognized. The City of Berkeley recognizes that some qualified patients may not have primary caregivers and also may not be able to undertake all the physical activities necessary to cultivate cannabis for personal medical use. Accordingly, this section recognizes that qualified patients may join together with or without their primary caregivers to form medical cannabis collectives for the purpose of acquiring or cultivating and manufacturing medical cannabis solely for the personal medical use of the members who are qualified patients. The City recognizes that not all members of a medical cannabis collective will perform the same tasks or contribute to the collective in an equal manner. Accordingly, medical cannabis collectives are free to

decide how to best pool their resources and divide responsibilities in cultivating medical cannabis for the personal medical use of their members who are qualified patients.

B. Restriction on Membership. Membership in a medical cannabis collective must be restricted to qualified patients and their primary caregivers. However, primary caregivers shall not be allowed to obtain cannabis for their own personal use. In addition, a primary caregiver cannot be a member of a medical cannabis collective, unless the primary caregiver's qualified patient is also a member.

C. Restriction on Distribution to Non-Members. Medical cannabis collectives and each member thereof, shall not sell, barter, give away, or otherwise distribute cannabis to non-members of the medical cannabis collective.

D. Amount of Dried Cannabis and Plants. Medical Cannabis Collectives may possess a reasonable quantity of dried cannabis and cannabis plants to meet the needs of their patient members. Medical Cannabis Collectives shall not accumulate more cannabis than is necessary to meet the personal medical needs of their Qualified Patients.

~~D. Amount of Dried Cannabis and Plants. The limits on quantity of dried medical cannabis and cannabis plants set forth in this chapter for qualified patients are not increased by membership in a medical cannabis collective. Medical cannabis collectives are subject to the same quantity limits on possession of dried medical cannabis and limits on the number of cannabis plants that are set forth in this chapter, multiplied by the number of qualified patients in the collective, but are also subject to maximum cap amounts set forth below. Thus, if a medical cannabis collective has five qualified patients, then the total amount of dried medical cannabis that the medical cannabis collective can possess is 7.5 pounds of cannabis cultivated indoors or 12.5 pounds of cannabis cultivated outdoors, minus the amount of dried medical cannabis that each qualified patient and/or his or her primary caregiver possesses individually. In addition, a medical cannabis collective cannot possess more than 12.5 pounds of dried cannabis at any one time, regardless of the number of members. Similarly, if a medical cannabis collective has five qualified patients, then the total amount of cannabis plants that the medical cannabis collective can possess is 50 in compliance with Section 12.26.040(E) of this chapter, minus the number of cannabis plants that each qualified patient and/or his or her primary caregiver possesses individually. In addition, a medical cannabis collective cannot cultivate more than 50 cannabis plants at any one time, regardless of the number of members.~~

E. Size of Visible Cannabis Gardens. The City of Berkeley recognizes that large scale outdoor cultivation of medical cannabis will create a risk of theft and violence due to the high monetary value of a large number of cannabis plants and the relative ease of theft by trespassing. Large-scale outdoor cannabis cultivation will also unfairly create tension and fear among the surrounding residents of trespassing, thefts, and violence. Accordingly, any medical cannabis collective or Collectives that cultivate medical cannabis plants outdoors (excluding secure rooftops or balconies that are not visible

from other buildings or land) or in any place that is visible with the naked eye from any public or other private property, can only cultivate 10 such plants at one time on a single parcel or adjacent parcels of property.

~~F. Size of Indoor Cannabis Gardens That Are Not Visible. A medical cannabis collective can cultivate 10 cannabis plants per qualified patient up to a maximum of 50 cannabis plants total at one time, provided however, that no more than 10 of those plants are planted outdoors (excluding secure rooftops or balconies that are not visible from other buildings or land) or in any place that is visible with the naked eye from any public or other private property. Nothing in this chapter shall be construed as creating an exemption for the cultivator or cultivators of any such cannabis garden from complying with any permit or other requirements imposed by local law that may be applicable. (Ord. 6620-NS § 1, 2001)~~

F. Restriction on Excessive Cultivation and Possession. Nothing in this Section shall authorize any individual, organization, affiliation, collective, cooperative or other entity to (1) cultivate or possess a quantity of medical cannabis that is inappropriate for the personal medical need of the patient(s) for whom it is intended; or (2) cultivate or possess any quantity of cannabis for non-medical purposes. (Ord. 6620-NS § 1, 2001)

Section 12.26.050 Availability in pharmacies.

To encourage the standardization of medical cannabis, the City of Berkeley urges the federal government to reschedule cannabis so that it may be made available to qualified patients through legally licensed pharmacies and urges the state government to urge the federal government to do so as well. (Ord. 6620-NS § 1, 2001)

Section 12.26.060 Quality control encouraged.

The City of Berkeley strongly encourages all qualified patients, primary caregivers, and medical cannabis collectives to consult the available cannabis cultivation literature to ensure that the medical cannabis lawfully cultivated under state law is free of undesired toxins or molds. The City of Berkeley cautions that natural molding from improper storage, certain soils for indoor growing, foreign materials that unintentionally becomes lodged in cultivated cannabis, and pesticides, can all potentially render the medical cannabis totally unsafe for consumption. Collectives are encouraged to use their best effort to determine whether or not cannabis is organically grown. (Ord. 6620-NS § 1, 2001)

Section 12.26.070 Permissible quantities of medical cannabis.

The Compassionate Use Act allows Qualified Patients or their Primary Caregivers to possess or cultivate cannabis for the Qualified Patient's "personal medical purposes." Because each Qualified Patient will have different needs regarding appropriate Personal Medical Use, this Section seeks to ensure that each Qualified Patient or his or

her Primary Caregiver can possess enough cannabis to meet the Qualified Patient's personal medical need.

A. Cultivation of Medical Cannabis. Notwithstanding any other provision of law, and pursuant to California Health and Safety Code Section 11362.77(c) as effective on January 1, 2004, all cultivation of cannabis for medical purposes by a Qualified Patient or Primary Caregiver shall be lawful and shall in no way be subject to criminal prosecution when said cultivation is conducted solely for the personal medical purposes of Qualified Patients. Such lawful cultivation may include the cultivation and possession of both female and male plants at all stages of growth, clones, seedlings, and seeds, and related cultivation equipment and supplies. Medical Cannabis Collectives, Qualified Patients, Primary Caregivers, and cultivators may cultivate individually or collectively.

B. Possession of Medical Cannabis. Notwithstanding any other provision of law, and pursuant to California Health and Safety Code Section 11362.77(c) as effective on January 1, 2004, all possession of cannabis for medical purposes by a Qualified Patient or Primary Caregiver shall be lawful and shall in no way be subject to criminal prosecution when said possession is undertaken solely for the personal medical purposes of Qualified Patients. Medical Cannabis Collectives, Qualified Patients, Primary Caregivers, and cultivators may possess individually or collectively.

C. Property and Equipment. The rental, leasing, or providing of equipment or space utilized for cultivation, processing, or storage of medical cannabis in accordance with this Section shall be deemed lawful.

D. Size of Visible Cannabis Gardens. The City of Berkeley recognizes that large scale outdoor cultivation of cannabis may create a risk of theft. Accordingly, any Medical Cannabis Collective that cultivates cannabis plants outdoors (excluding secure rooftops, balconies, or other locations that are not visible from other buildings or land) or in a place that is visible with the naked eye from other public or private property, may cultivate no more than ten such visible plants at one time on a single parcel of property.

~~The Compassionate Use Act allows qualified patients or their primary caregivers to possess or cultivate medical cannabis for the qualified patient's "personal medical purposes." While each qualified patient will have different needs regarding appropriate personal medical use, this section seeks to standardize the maximum allowable amounts of medical cannabis that qualified patients and their primary caregivers can possess or cultivate under state law, in the absence of a medical doctor's authorization to possess or cultivate a greater amount of cannabis as a result of the patient's particular illness or health condition.~~

~~A. Dried Cannabis Cultivated Indoors. Qualified patients who cultivate cannabis indoors may possess up to 1.5 pounds of dried cannabis for personal medical use. This 1.5 pound allotment may be possessed by the qualified patient, or may be held in trust by the qualified patients' primary caregiver(s), but the total amount of dried cannabis~~

~~possessed by the qualified patient and his or her primary caregiver(s) shall not exceed 1.5 pounds for that qualified patient.~~

~~B. Indoor Cannabis Plants. In addition, qualified patients may also possess up to 10 cannabis plants for personal medical use. This 10 cannabis plant allotment may be possessed by the qualified patient, or may be held in trust by the qualified patients' primary caregiver(s), but the total amount of plants possessed by the qualified patient and his or her primary caregiver(s) shall not exceed 10 cannabis plants for that qualified patient.~~

~~C. Dried Cannabis Cultivated Outdoors. Qualified patients who cultivate cannabis outdoors may possess up to 2.5 pounds of dried cannabis for personal medical use. This 2.5 pound allotment may be possessed by the qualified patient, or may be held in trust by the qualified patient and his or her primary caregiver(s), but the total amount of dried cannabis possessed by the qualified patient and his or her primary caregiver(s) shall not exceed 2.5 pounds for that qualified patient.~~

~~D. Outdoor Cannabis Plants. In addition, qualified patients who cultivate cannabis outdoors may also possess up to 10 cannabis plants, for personal medical use, provided that such cultivation meets the guidelines set forth in Section 12.24.040(E) of this chapter. This 10 plant allotment may be possessed by the qualified patient, or may be held in trust by the qualified patients' primary caregiver(s), but the total amount of plants possessed by the qualified patient and his or her primary caregiver(s) shall not exceed 10 plants for that qualified patient. (Ord. 6620-NS § 1, 2001)~~

Section 12.26.080 Transportation of medical cannabis.

A qualified patient or a primary caregiver of a qualified patient may transport medical cannabis within the City of Berkeley to the extent that the quantity transported and the method, timing, and distance of the transportation are reasonably related to the qualified patient's current medical need at the time of transport. (Ord. 6620-NS § 1, 2001)

Section 12.26.090 Medical cannabis paraphernalia.

A qualified patient and the primary caregiver of a qualified patient may possess paraphernalia that the qualified patient needs to smoke or otherwise consume medical cannabis. (Ord. 6620-NS § 1, 2001)

Section 12.26.100 Police procedures and training.

A. Within six months of the date that this chapter becomes effective, the training materials handbooks, and printed procedures of the Police Department shall be updated to reflect its provisions. These updated materials shall be made available to police officers in the regular course of their training and service.

B. Medical cannabis-related activities shall be the lowest possible priority of the Police Department.

C. Qualified patients, their primary caregivers, and medical cannabis collectives who come into contact with law enforcement will not be cited or arrested and dried cannabis or cannabis plants in their possession will not be seized if they are in compliance with the provisions of this chapter.

D. Qualified patients, their primary caregivers, and medical cannabis collectives who come into contact with law enforcement and cannot establish or demonstrate their status as a qualified patient, primary caregiver, or medical cannabis collective, but are otherwise in compliance with the provisions of this chapter, will not be cited or arrested and dried cannabis or cannabis plants in their possession will not be seized if (1) based on the activity and circumstances, the officer determines that there is no evidence of criminal activity; (2) the claim to be a qualified patient, primary caregiver, or medical cannabis collective is credible; and (3) proof of status as a qualified patient, primary caregiver, or medical cannabis collective can be provided to the Police Department within three business days of the date of contact with law enforcement. (Ord. 6620-NS § 1, 2001)

Section 12.26.110 Peer Review Committee.

The purpose of this Section is to ensure that medical cannabis provision in Berkeley is conducted in a safe and orderly manner to protect the welfare of Qualified Patients and the community.

A. Peer Review Committee. The Medical Cannabis Collectives and dispensaries in operation at the time this Chapter becomes effective shall each designate no more than two spokespeople to serve on a peer review committee that shall meet at least one time each month for the purpose of overseeing the operation of Medical Cannabis Collectives and dispensaries and ensuring their compliance with operational and safety standards published annually by the committee.

B. New Dispensaries. The peer review committee shall consult with any individual, organization, affiliation, collective, cooperative or other entity which seeks to open a new Medical Cannabis Collective or dispensary in Berkeley or to relocate an existing Medical Cannabis Collective or dispensary. The peer review committee shall certify that the proposed Medical Cannabis Collective or dispensary has a strategy for compliance with the published safety and operational standards before the new Medical Cannabis Collective or dispensary commences lawful operation.

C. New Members on the Peer Review Committee. Upon commencing lawful operation in Berkeley, each new Medical Cannabis Collective or dispensary shall designate no more than two spokespeople to serve on the peer review committee.

D. Operational Oversight. The peer review committee will monitor the compliance of all Medical Cannabis Collectives or dispensaries in Berkeley for the purpose of correcting any violations of the safety and operational standards. Medical Cannabis Collectives or dispensaries found to be in willful or ongoing violation of the standards shall be removed from membership on the peer review committee and shall be deemed in violation of this Chapter and referred to the City for appropriate action.

E. Immunity. Individuals operating Medical Cannabis Collectives or dispensaries represented on the peer review committee shall be deputized by the City of Berkeley as Drug Control Officers for the purpose of providing immunity under the provisions of Section 885(d) of Title 21 of the United States Code.

Section 12.26.120 Emergency Distribution.

The City of Berkeley strongly opposes the federal prosecution of medical cannabis patients, caregivers, and providers. The City shall make all reasonable accommodation for the provision of medical cannabis to Qualified Patients or their Primary Caregivers in the event that access to medical cannabis is interrupted or severely diminished as the result of civil or criminal federal law enforcement activity. The City shall accommodate distribution of medical cannabis as early as possible following such a disruption and no later than thirty (30) days after the disruption.

Section 12.26.130 Medical cannabis dispensary.

No more than three medical cannabis dispensaries shall be located within the limits of the City of Berkeley. No such dispensary shall be located within a 1000 foot range of another such dispensary, nor within 1000 feet of a public elementary, middle or high school. Any dispensary existing at the time this ordinance becomes effective, may continue at its current location, notwithstanding its violation of the de-concentration requirements of this section. The City Manager may issue regulations to implement this section. (Ord. 6826-NS § 2 (part), 2004)

Section 12.26.140 Compliance with all applicable laws.

Nothing in this chapter shall be construed as excusing any person or entity from compliance with all other applicable federal, state and local laws. The City may make compliance with such laws a condition of deeming such person or entity in compliance with local law, except to the extent it would conflict with the purposes of this chapter. (Ord. 6826-NS § 2 (part), 2004)

SECTION 4 PERMITTING OF DISPENSARIES

Sections 23C.16.060 and 23E.16.070 shall be added to the Berkeley Zoning Code as follows:

Section 23C.16.060 Medical Cannabis Residential Cultivation

No Use Permit shall be required for qualified patients to cultivate medical cannabis in their residence or on their residential property.

Section 23E.16.070 Medical Cannabis Collectives

As proper regulation is crucial to the safety of our community, medical cannabis collectives that operate dispensaries from which medical cannabis is dispensed to members shall be issued a Zoning Certificate for as long as it complies with Chapter 12.26. This section does not apply in districts where retail sales uses are prohibited. Zoning Certificates for medical cannabis dispensaries shall be issued without undue delay and following normal and expedient consideration of the permit application.

SECTION 5 SEVERABILITY

If any provision of this initiative, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provision or application of this initiative that can be given without the invalid provision or application; and to this end, the provisions or applications of this initiative are severable.