

ORDINANCE NO. 2015-1415

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, AMENDING CHAPTER 5.54 OF THE SAN MARCOS MUNICIPAL CODE TO PROHIBIT THE CULTIVATION OF MARIJUANA, THE DELIVERY OF MARIJUANA, THE PROCESSING OF MARIJUANA AND ALL ASSOCIATED BUSINESS AND OPERATIONAL ACTIVITIES, AS BUSINESSES WITHIN THE CITY OF SAN MARCOS

WHEREAS, Congress passed the Federal Controlled Substances Act (CSA) in 1970, which prohibits the manufacture, cultivation, distribution and possession of marijuana and classifies it as a Schedule 1 drug meaning it has no accepted medical value in treatment; and

WHEREAS, California law generally makes it a crime to possess and cultivate marijuana under Health and Safety (H&S) Code Sections 11357 and 11358, respectively; and

WHEREAS, California voters approved Proposition 215 (Health and Safety Code Sections 11362.5 et seq.), entitled the Compassionate Use Act (CUA), in 1996, for which the intent was to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempted patients and their primary caregivers from criminal prosecution or sanctions under H&S Code Sections 11357 and 11358; and

WHEREAS, the California Legislature passed Senate Bill 420 (H&S Code Sections 11362.7 et seq.) in 2003 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients; set limits on the amount of marijuana any individual could possess; and provided an exemption from State criminal liability for persons “who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes”; and

WHEREAS, although State law creates a limited affirmative defense to criminal prosecution for qualified patients and their primary caregivers, the operation of medical marijuana dispensaries as for profit is expressly prohibited, and it is difficult to determine whether or not a dispensary is operating for profit; and

WHEREAS, the United States Supreme Court has continuously held that marijuana, including medical marijuana, violates Federal law under the CSA. In 2001, the Court held in *United States v. Oakland Cannabis Buyers Cooperative, et al.* that there was no “medical necessity” defense under the CSA, and therefore a medical marijuana dispensary could be enjoined from distribution and manufacturing. In 2005, the Court held in *Gonzalez v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. The significance of the *Raich* decision is that Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or use marijuana for medical purposes; and

WHEREAS, on October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which goes into effect on January 1, 2016, and establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills 243 and 266 and Senate Bill 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana and/or the delivery of medical marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, in 2006, the City added Chapter 5.54 to the San Marcos Municipal Code (SMMC) to prohibit the establishment of medical marijuana dispensaries in all zones within the City's jurisdictional limits; and

WHEREAS, Title 20 of the SMMC (the City's Zoning Ordinance) expressly provides that uses which are not specifically permitted are prohibited. As medical marijuana dispensaries are not permitted by right or with a conditional use permit, they are prohibited; and

WHEREAS, because the SMMC does not currently expressly and separately prohibit the cultivation of marijuana, the delivery of marijuana, or the processing of marijuana within the City of San Marcos, Chapter 5.54 has historically been applied to prohibit or preclude these types of activities; and

WHEREAS, prohibiting the cultivation of marijuana, the delivery of marijuana, and the processing of marijuana within the City as business activities and uses is necessary to protect the health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, in 2010, the Fourth District Court of Appeal noted in *Qualified Patients Association v. City of Anaheim* that criminal enforcement actions involving medical marijuana dispensaries appears to be inconsistent with the CUA and the MMPA. As a result, the City amended SMMC Chapter 5.54 to expressly provide that the City will initiate only civil enforcement actions and remedies concerning violations of the SMMC involving medical marijuana dispensaries. That case has since been superseded, and the deletion of Section 5.54.030 in its current form will allow the City to criminally enforce any violations of Chapter 5.54, when warranted; and

WHEREAS, the City desires to amend Chapter 5.54 of the SMMC to prohibit the cultivation marijuana in all zones within the City's jurisdictional boundaries and to prohibit marijuana delivery and processing and any and all associated services, operational activities and businesses, as businesses within the City; and to delete Section 5.54.030 to allow the City to enforce violations of Chapter 5.54 by criminal enforcement when warranted.

NOW, THEREFORE, the City Council of the City of San Marcos, California, in accordance with the freedom afforded to charter cities generally, and by the Charter of the City of San Marcos specifically, does ordain as follows:

Section 1. The San Marcos Municipal Code is hereby amended to read as shown in blacklined underlined additions and strikeouts, as follows:

CHAPTER 5.54

MEDICAL MARIJUANA DISPENSARIES

SECTIONS:

5.54.010	Definitions
5.54.020	Medical Marijuana Dispensaries as a Prohibited Use <u>and/or Activity</u>
5.54.030	Violations
5.54.030	<u>Cultivation of Marijuana as a Prohibited Use and/or Activity</u>
5.54.040	<u>Delivery of Marijuana as a Prohibited Use and/or Activity</u>
5.54.050	<u>Processing of Marijuana as a Prohibited Use and/or Activity</u>

5.54.010 Definitions.

(a) **“Medical Marijuana Dispensary” or “Dispensary”** means any facility or location, whether fixed or mobile, where medical marijuana is made available to or distributed by or distributed to one (1) or more of the following: a primary caregiver, a qualified patient, or a patient with an identification card. All three of these terms are identified in strict accordance with California Health and Safety Code Section 11362.5 et. seq. A “medical marijuana dispensary” shall not include the following uses, as long as the location of such uses is otherwise regulated by this code or applicable law, a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code, a healthcare facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a residential care facility for persons with chronic life- threatening illnesses licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code, a residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code, as long as such use complies strictly with applicable law, including but not limited to, Health and Safety Code Section 11362.5 et seq., and the San Marcos Municipal Code, including but not limited to, the City’s Zoning Code. **(Ord. No. 2006-1265, 2/28/06)**

(b) **“Marijuana Cultivation” or “Cultivation”** means the planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

(c) **“Marijuana Delivery” or “Delivery”** means the commercial delivery, transfer or transport, or arranging for the delivery, transfer or transport, or the use of any technology platform to arrange for

or facilities the commercial delivery, transfer or transport of marijuana, marijuana edibles, and/or any marijuana products to or from any location within the jurisdictional limits of the City of San Marcos, and any and all associated business and/or operational activities.

(d) “Marijuana Processing” or “Processing” means any method used to prepare marijuana, marijuana edibles and/or marijuana byproducts for commercial retail and/or wholesale sales, including, but not limited to: cleaning, curing, preparation, laboratory testing, manufacturing, packaging, and extraction of active ingredients to create marijuana related products and concentrates.

5.54.020 Medical Marijuana Dispensaries as a Prohibited Use and/or Activity. A medical marijuana dispensary as defined in Section 5.54.010 is prohibited in all zones within the city’s jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such use. **(Ord. No. 2006-1265, 2/28/06)**

~~**5.54.030 Violations.** The provisions of this Chapter will be enforced by means of civil proceedings and remedies rather than by criminal prosecution. **(Ord. No. 2010-1339, 10/26/2010)**~~

5.54.030 Cultivation of Marijuana as a Prohibited Use and/or Activity. Marijuana Cultivation by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in all zones within the City’s jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Cultivation that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, make legal any Cultivation activity that is otherwise prohibited under California law. Nothing in this Chapter is intended to, nor shall it be construed to, preclude any landlord from limiting or prohibiting Marijuana Cultivation by its tenants.

5.54.040 Delivery of Marijuana as a Prohibited Use and/or Activity. Marijuana Delivery by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in the City. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Delivery that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, make legal any Delivery activity that is otherwise prohibited under California law.

5.54.050 Processing of Marijuana as a Prohibited Use and/or Activity. Marijuana Processing by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in all zones within the City’s jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Processing that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, preclude any landlord from limiting or prohibiting Marijuana Processing by its tenants.

Section 2. The foregoing recitals are true and correct.

Section 3. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent

jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 4. This Ordinance shall be effective thirty (30) days following its adoption. Within fifteen (15) days following its adoption, the City Clerk shall publish this Ordinance, or the title thereof, as a summary as required by state law.

Section 5. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published in accordance with the provisions of state law in a newspaper of general circulation designated for legal notices publication in the City of San Marcos.

INTRODUCED at a regular meeting of the City Council of the City of San Marcos held on the 8th day of December, 2015; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos held on the ____ day of _____, 2016, by the following roll call vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

APPROVED:

James M. Desmond, Mayor
City of San Marcos

ATTEST:

APPROVED AS TO FORM:

Phillip Scollick, City Clerk
City of San Marcos

Helen Holmes Peak, City Attorney
City of San Marcos