CITY COUNCIL AGENDA REPORT

MEETING DATE: OCTOBER 19, 2009 ITEM NUMBER: VII-5

SUBJECT: CODE AMENDMENT CO-10-07: ORDINANCE AMENDING THE COSTA MESA MUNICIPAL CODE REGARDING MEDICAL MARIJUANA DISPENSARIES

DATE: OCTOBER 15, 2010

FOR FURTHER INFORMATION CONTACT: KIMBERLY HALL BARLOW, CITY ATTORNEY (714) 754-5152

PROJECT DESCRIPTION

City staff is bringing a Zoning Code amendment to the City Council, after a public hearing and recommendation for adoption by the Planning Commission, for the City Council's review and adoption. This ordinance amends the City's regulations regarding medical marijuana dispensaries and would take effect thirty days after second reading and adoption by the City Council.

RECOMMENDATION

Adopt the proposed ordinance code amendment.

BACKGROUND

The City adopted a ban on medical marijuana dispensaries in 2005. This area of the law is in constant flux. Therefore, the City's Zoning Code provisions need to be updated as new legal information emerges.

ANALYSIS

The proposed ordinance would implement the exact same changes as those proposed in the urgency ordinance code amendment that is also on the Council's agenda (Item No. VII.4). See the agenda report for the urgency ordinance for analysis and discussion of the specific changes proposed to be made to the Zoning Code.

Since the proposed ordinance is identical to the urgency ordinance, except for procedural aspects relating to when the proposed revisions take effect, the proposed regular ordinance is also consistent with the City's General Plan and any applicable specific plans. In addition, since the substance of the ordinances is identical, it is expected that the City Council will be able to take the same action on both ordinances, unless, for some reason, the urgency findings in the urgency ordinance cannot be made, for instance.

ALTERNATIVES CONSIDERED

If the proposed ordinance is not adopted, the City's Zoning Code provisions could be subject to legal challenge. Even with the proposed amendments, the provisions of the City's Zoning Code could be found invalid by a court of law. However, the proposed amendments represent the City's good faith effort to amend its Zoning Code in line with anticipated legal conclusions by courts in the jurisdiction in which the City is located.

The City Council does also have the option of adopting the Regular Ordinance, but not adopting the Urgency Ordinance (Item No. VII.4). However, the City Attorney's Office recommends adopting both, as long as the City Council can make the additional urgency findings contained in the recitals to the Urgency version of the proposed ordinance (Item No. VII.4).

LEGAL REVIEW

The City Attorney's Office has drafted the proposed ordinance and recommends its adoption, in conjunction with the Urgency Ordinance.

FISCAL REVIEW

The proposed ordinance is not likely to have any direct fiscal impact, as it codifies the current practices of the City with respect to medical marijuana dispensaries. Both the proposed ordinance and the existing Zoning Code have the potential to draw the City into litigation over the validity and content of the Zoning Code prohibition.

CONCLUSION

The proposed ordinance will make modifications to the City's Zoning Code which are recommended by City Staff, the City Attorney and the Planning Commission, and the ordinance will become effective thirty days after its adoption.

Kimberly Hall Barlow /KB

KIMBERLY HALL BARLOW
City Attorney

Kimberly Brandt

KIMBERLY BRANDT, AICP
Development Services Director

ATTACHMENTS: 1 – Proposed Ordinance

DISTRIBUTION: City Manager
Assistant City Manager
City Attorney
City Clerk (2)
Police Dept.
Staff
File (2)

File: 101910CO1007NonUrg	Date: 101510	Time: 10:45 a.m.

ORDINANCE NO. 10-__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COSTA MESA, CALIFORNIA FOR CODE AMENDMENT CO-10-07 AMENDING ZONING CODE SECTIONS 13-6 (DEFINITIONS) AND 13-16 (ENFORCEMENT) OF TITLE 13 (PLANNING, ZONING AND DEVELOPMENT) OF THE COSTA MESA MUNICIPAL CODE REGARDING MEDICAL MARIJUANA DISPENSARIES.

WHEREAS, the City of Costa Mesa Zoning Code currently defines medical marijuana dispensaries and this definition is in need of minor revisions to insure applicability of the City's zoning prohibition to all store-front and multi-user distribution of marijuana within the City of Costa Mesa; and

WHEREAS, the Fourth District Court of Appeal has indicated in dictum in its published opinion in *Qualified Patients' Association v. City of Anaheim*, Case No. G040077, filed on August 18, 2010, that criminal prosecution of possession, cultivation, transportation, distribution, sales, etc. of medical marijuana contrary to the Compassionate Use Act (Cal. Health & Saf. Code § 11356.2) or the Medical Marijuana Program Act (Cal. Health & Saf. Code §§ 11362.7-11362.83) may be preempted by State law; and

WHEREAS, the City of Costa Mesa has never criminally prosecuted medical marijuana dispensaries for any violation of the City's Zoning Code; does not intend to do so in the future; and desires to clarify the City's Zoning Code to make these facts explicit; and

WHEREAS, the City would also like to make explicit its desire to prohibit all businesses and uses, generally, that are in violation of any local, state or federal law or regulation, in order to permit and allow only those businesses and uses which are in compliance with all laws and regulations in furtherance of the health, safety and welfare of the citizens, residents and visitors to the City of Costa Mesa; and

WHEREAS, the City Council of the City of Costa Mesa hereby finds that businesses or uses in violation of the City's municipal code constitute a public nuisance, injurious to the public health, safety and welfare; and

WHEREAS, the City has not enforced its Zoning Code prohibition against medical marijuana dispensaries against individuals or very small groups of individuals for the possession, cultivation, transportation, distribution, sales, etc. of medical marijuana, even though such activities presently remain a violation of federal law; and

WHEREAS, the City intends to circumscribe its Zoning Code prohibitions to apply them to groups of three or more individuals possessing, cultivating, transporting, distributing, selling, etc. medical marijuana, which prohibition includes facilities engaging in the retail sale, dispensing or distribution of medical marijuana, when such facilities do not have an active role in the cultivation of their marijuana product or when the cultivation of their marijuana product occurs off-site; and

WHEREAS, the limitations as to the applicability of the City's prohibition on medical marijuana dispensaries are necessary due to the urban and highly suburban nature of the City of Costa Mesa, and in order to fully preserve the health, safety, welfare and general well-being of the residents, businesses and visitors to the City of Costa Mesa.

THE CITY COUNCIL OF THE CITY OF COSTA MESA DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The definition of the term "Medical Marijuana Dispensary" in Section 13-6 (Definitions) of Title 13 (PLANNING, ZONING AND DEVELOPMENT) of the Costa Mesa Municipal Code is hereby repealed and replaced in its entirety with the following:

"Medical marijuana dispensary. A facility or location where medical marijuana is cultivated or by any other means made available to and/or distributed by or to three (3) or more ~~one (1) or more~~ of the following: a primary caregiver, a qualified patient, or a person with an identification card in strict accordance with State Health and Safety Code Sections 11362.5 et seq. and 11362.7 et seq., which shall include, but not be limited to any facility or location engaging in the retail sale, dispensation, or distribution of marijuana for medical purposes that does not have an active role in the cultivation of the marijuana product that it sells, dispenses, or distributes, or when its cultivation of the marijuana product is off-site from the facility or location for retail sale, dispensation, or distribution."

Section 2. Section 13-16 (Enforcement) of Title 13 (PLANNING, ZONING AND DEVELOPMENT) of the Costa Mesa Municipal Code is hereby repealed and replaced in its entirety with the following:

"Sec. 13-16. Enforcement.
(a) Criminal prosecution. Any person, whether as principal, agent, or employee, violating the terms of this Zoning Code may be prosecuted as provided in section 1-33 of this Municipal Code.
(b) Criminal citation. For the purposes of this Zoning Code, a violation of the terms of this Zoning Code may be cited as either an infraction or misdemeanor pursuant to State Government Code Sections 36900 and 36901 and as provided in section 1-33 of this Municipal Code.
(c) Civil action. As an alternative to prosecution or citation, or as an additional action, the city attorney may, at the request of the development services director, institute an action in any court of competent jurisdiction to restrain, enjoin, or abate the condition(s) or activity(ies) found to be in violation of the provisions of this Zoning Code.
(d) No criminal prosecution, citation or penalty. Notwithstanding the provisions of subsections (a) and (b) of this Section, no person shall be criminally prosecuted or cited, or suffer any criminal penalty, for any violation of the provisions of Section 13-30, Table 13-30, row 31a relating to the prohibition of medical marijuana dispensaries within the City.

(e) Nuisance. Any use, structure, or property that is altered, enlarged, erected, established, maintained, moved, or operated contrary to the provisions of this Title or any condition of approval, is hereby declared to be unlawful and a public nuisance and may be abated by the City through civil proceedings by means of a restraining order, preliminary or permanent injunction, or in any other manner provided by law for the abatement of such nuisances."

Section 3. Environmental Determination. The project has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA Guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061(b)(3) of the CEQA Guidelines.

Section 4. Inconsistencies. Any provision of the Costa Mesa Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to the extent necessary to affect the provisions of this Ordinance.

Section 5. Severability. If any chapter, article, section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this Ordinance or its application to other persons. The City Council hereby declares that it would have adopted this Ordinance and each chapter, article, section, subsection, subdivision, sentence, clause, phrase or portion thereof, irrespective of the fact that any one or more subsections, subdivisions, sentences, clauses, phrases, or portions of the application thereof to any person, be declared invalid or unconstitutional. No portion of this Ordinance shall supersede any local, State, or Federal law, regulation, or codes dealing with life safety factors.

Section 6. This Ordinance shall take effect and be in full force thirty days from and after its passage. The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published prior to the expiration of fifteen (15) days from its passage once in the ORANGE COAST DAILY PILOT, a newspaper of general circulation, printed and published in the City of Costa Mesa or, in the alternative, the City Clerk may cause to be published a summary of this Ordinance and a certified copy of the text of this Ordinance shall be posted in the office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post in the office of the City Clerk a certified copy of this Ordinance together with the names and member of the City Council voting for and against the same.

PASSED AND ADOPTED this ____ day of _____, 2010

_____
Mayor

ATTEST:

_____
City Clerk of the City of Costa Mesa

APPROVED AS TO FORM:

_____
City Attorney

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss
CITY OF COSTA MESA)

I, Julie Folcik, City Clerk and ex-officio clerk of the City Council of the City of Costa Mesa, hereby certify that the above and foregoing Ordinance No. 10-__ was introduced and considered section by section at a regular meeting of said City Council held on the ____ day of _____, 2010, and thereafter passed and adopted as a whole at a regular meeting of said City Council held on the ____ day of _____, 2010, by the following roll call vote:

AYES:

NOES:

ABSENT:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the City of Costa Mesa this ____ day of _____, 2010.

_____
City Clerk and ex-officio
Clerk of the City Council of the
City of Costa Mesa

RECEIVED
CITY CLERK
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CITY OF COSTA MESA
BY _____