



# City of Carlsbad

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COUNTY GRAND JURY

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July 27, 2010

The Honorable Kevin A. Enright  
Presiding Judge  
San Diego County Superior Court  
330 W. Broadway  
San Diego, CA 92101-3830

Re: *2009/2010 San Diego County Grand Jury Report on Medical Marijuana in San Diego*

Dear Judge Enright:

This letter is written in response to the 2009/2010 San Diego County Grand Jury Report on *Medical Marijuana in San Diego* ("Report") on behalf of the City Council of Carlsbad. This letter responds to those finding and recommendations relevant to the City of Carlsbad and does not address those findings and recommendation related to other jurisdictions within the County.

Response to Findings:

**Finding 5** – "Adopting cost neutral zoning and land use ordinances is an effective method for the licensing, regulation and periodic inspection of cooperatives and collectives distributing medical marijuana in the unincorporated areas and eighteen cities of San Diego County." The City of Carlsbad disagrees with this finding.

The City of Carlsbad views medical marijuana collectives and cooperatives as an enterprise that are prohibited under the City's zoning ordinance as a non-permitted use and non-permitted business under its licensing ordinance.

Neither the Compassionate Use Act ("CUA") of 1996 nor the Medical Marijuana Program Act, ("MMPA") Senate Bill 420 legalized marijuana. See, e.g., Cal. Health & Saf. Code § 11054 (d)(13) (marijuana designated as Schedule I controlled substance); § 11158 (permitting use of controlled substances under supervision of medical providers as to only Schedules II through V). The CUA provides only a *defense* to charges of criminal use or possession, for instance, as to medical marijuana. *Ross v. RagingWire Telecommunications* (2008) 42 Cal. 4th 920, 928-29 (emphasis added); *Chavez v. Superior Court* (2004) 123 Cal. App. 4th 104, 110 (CUA provides "only limited immunity ... to raise the medical use defense to set aside an information, indictment, or as a defense at trial"). Similarly, the MMPA provides protection against arrest for



certain criminal statutory provisions relating to marijuana, if voluntary identification and statutory quantity limitations are followed. *People v. Kelly* (2010) 47 Cal. 4th 1008, 1047.

Notably, neither the CUA nor the MMPA gave any person or business the right to obtain, possess, distribute or otherwise use and possess medical marijuana. The California Court of Appeal has recognized that the CUA, for instance, did “not [create] a constitutional right to obtain marijuana.” *People v. Urziceanu* (2005) 132 Cal. App. 4th 747, 774.

The City retains its very broad and general police powers to regulate and define business regulations, and land uses by local law, notwithstanding the CUA and the MMPA. *California Constitution*, Art. XI, § 5 (“city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws”). See also, California Business & Professions Code § 16000 (a) (permits cities to license and regulate businesses); California Government Code § 37101 (a) (cities may “license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city”). See also, California Government Code § 65851 (city authority to divide city into zones); *Village of Euclid v. Ambler Realty Company* (1926) 272 U.S. 365, 388; *Miller v. Board of Public Works* (1925) 195 Cal. 477, 485 (broad police power authority is for protection of public health, welfare and safety and “to promote the economic welfare, public convenience and general prosperity of the community”); *Beverly Oil Co. v. Los Angeles* (1953) 40 Cal. 2d 552, 557 (zoning authority is “one of the most essential powers of the government, one that is the least limitable”).

The City of Carlsbad prohibits any business, operation or use that cannot be conducted or carried out if in violation of state or federal laws. See, Carlsbad Municipal Code, § 5.04.160. California Government Code § 37100, which provides that the legislative body of a city may enact ordinances “not in conflict with the Constitution and laws of the State or the *United States*.” (Emphasis added.) The United States Supreme Court has clearly stated that the use of marijuana is illegal; thereby affirming that there is no exception for medicinal use under California law.” Furthermore, “our Supreme Court has recognized this principle in *Ross* when it stated that despite the passage of California’s Compassionate Use Act, marijuana was not a legal prescription drug ....” *Ross v. RagingWire Telecommunications, Inc.*, *supra* 42 Cal.4th 920, 926.

The MMPA cannot reasonably be interpreted so broadly as to disturb longstanding and broad police power authority that cities have to regulate businesses and land uses generally. In fact, the Second Appellate District of the California Court of Appeal has held that neither the CUA nor the MMPA preempt a city from regulating medical marijuana dispensaries by business license requirements as well as zoning requirements. See *City of Claremont v. Kruse* (2009) 177 Cal. App. 4th 1153.

Specifically, the *Kruse* Court found that a medical marijuana dispensary was properly enjoined as a nuisance per se, since it was conducted without the city’s approval, as required by business license regulations, and that such use was in violation of the city’s zoning code as to permitted

uses. *Id.* 1163-1167. Furthermore, the city's business license and zoning regulations were not preempted by either the CUA or the MMPA. *Id.* at 1168-1177.

**Finding 6** – “The recommendations of the City of San Diego’s Medical Marijuana Task Force for zoning and land use ordinances for cooperatives and collectives may serve as a model for adoption by other cities in the County. The City of Carlsbad agrees with this finding that the City of San Diego’s Medical Marijuana Task Force for zoning and land use ordinances for cooperatives and collectives *may* serve as a model for jurisdictions, other than the City of Carlsbad, to adopt.

**Finding 9** – “The lack of zoning and land use ordinances for the licensing, regulation and periodic inspection of cooperatives and collectives distributing medical marijuana in the cities of Carlsbad, Coronado, Del Mar, Encinitas, La Mesa, Lemon Grove, Poway and Solana Beach deprives some qualified medical marijuana patients of access to marijuana in their communities.” The City of Carlsbad disagrees with this finding as it relates to the City of Carlsbad.

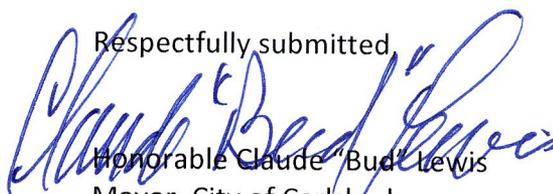
The Report does not indicate that it examined the availability of or access to medical marijuana in the City of Carlsbad. The Report does not state that any qualified medical marijuana patient living in Carlsbad has been unable to obtain medical marijuana from another location(s).

**Finding 11** – “The imposition of regulatory fees and associated costs could create a financial hardship for the smaller medical marijuana cooperatives and collectives.” The City of Carlsbad disagrees with this finding as it relates to the City of Carlsbad.

The Report is silent related to any comparison between medical marijuana cooperatives and collectives’ revenue and the burden of paying regulatory fees imposed by a local jurisdiction charged with regulating medical marijuana cooperatives and collectives. The City of Carlsbad has no reason to believe that legitimate medical marijuana cooperatives and collectives would have any difficulty in paying reasonable regulatory fees.

The City of Carlsbad thanks the Grand Jury for its reports and recommendations.

Respectfully submitted,



Honorable Claude "Bud" Lewis  
Mayor, City of Carlsbad

cc: City Council  
City Attorney  
City Manager