

ORDINANCE NO. 491

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
NEWARK AMENDING CHAPTER 5.36 (MEDICAL
MARIJUANA DISPENSARIES) OF TITLE 5 (BUSINESS
LICENSES AND REGULATIONS) OF THE NEWARK
MUNICIPAL CODE TO CLARIFY AND AFFIRM THE
PROHIBITION OF COMMERCIAL CULTIVATION OF
MEDICAL MARIJUANA

**THE CITY COUNCIL OF THE CITY OF NEWARK DOES ORDAIN AS
FOLLOWS:**

SECTION I. FINDINGS AND PURPOSE. The City Council finds and declares as follows:

A. In 1996, the voters of the State of California approved Proposition 215 (codified as California Health and Safety Code § 11362.5 and entitled “The Compassionate Use Act of 1996” or “CUA”).

B. The intent of Proposition 215 was to enable persons who are in need of marijuana for medical purposes to use it without fear of criminal prosecution under limited, specified circumstances. The proposition further provides that “nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, or to condone the diversion of marijuana for non-medical purposes.” The ballot arguments supporting Proposition 215 expressly acknowledged that “Proposition 215 does not allow unlimited quantities of marijuana to be grown anywhere.”

C. In 2004, the Legislature enacted Senate Bill 420 (codified as California Health & Safety Code § 11362.7 et seq. and referred to as the “Medical Marijuana Program” or “MMP”) to clarify the scope of Proposition 215 and to provide qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes with a limited defense to certain specified State criminal statutes. Assembly Bill 2650 (2010) and Assembly Bill 1300 (2011) amended the Medical Marijuana Program to expressly recognize the authority of counties and cities to “[a]dopt local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective” and to civilly and criminally enforce such ordinances.

D. In City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc. (2013) 56 Cal.4th 729, the California Supreme Court held that “[n]othing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land. . . .” Additionally, in Maral v. City of Live Oak (2013) 221 Cal.App.4th 975, the Court of Appeal held that “there is no right – and certainly no constitutional right – to cultivate medical marijuana. . . .” The Court in Maral

affirmed the ability of a local governmental entity to prohibit the cultivation of marijuana under its land use authority.

E. The Federal Controlled Substances Act, 21 U.S.C. § 801 et seq., classifies marijuana as a Schedule 1 Drug, which is defined as a drug or other substance that has a high potential for abuse, that has no currently accepted medical use in treatment in the United States, and that has not been accepted as safe for use under medical supervision. The Federal Controlled Substances Act makes it unlawful under federal law for any person to cultivate, manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, marijuana. The Federal Controlled Substances Act contains no exemption for medical purposes, although there is recent case law that raises a question as to whether the Federal Government may enforce the Act where medical marijuana is allowed.

F. On October 9, 2015 Governor Brown signed 3 bills into law (AB 266, AB 243, and SB 643) which collectively are known as the Medical Marijuana Regulation and Safety Act (hereinafter “MMRSA”). The MMRSA establishes a State licensing scheme for commercial medical cannabis activities while protecting local control by requiring that all such businesses must have a local license or permit to operate in addition to a State license. The MMRSA allows the City to prohibit commercial medical marijuana activities, including cultivation.

G. The City Council of the City of Newark finds that commercial medical marijuana activities can adversely affect the health, safety, and well-being of City residents. Citywide prohibition is proper and necessary to avoid the risks of criminal activity, degradation of the natural environment, malodorous smells and indoor electrical fire hazards that may result from such activities. Further, as recognized by the Attorney General’s August 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, marijuana cultivation or other concentration of marijuana in any location or premises without adequate security increases the risk that surrounding homes or businesses may be negatively impacted by nuisance activity such as loitering or a variety of crimes.

H. The limited immunity from specified state marijuana laws provided by the Compassionate Use Act and Medical Marijuana Program does not confer a land use right or the right to create or maintain a public nuisance.

I. The MMRSA contains language that requires the city to prohibit cultivation uses by March 1, 2016 either expressly or otherwise under the principles of permissive zoning, or the State will become the sole licensing authority.

J. The City Council of the City of Newark further finds and declares that commercial cultivation of marijuana for medicinal purposes is currently prohibited under the City’s permissive zoning regulations as no district permits or conditionally permits such a use. However, the Council desires to enact this ordinance to expressly make clear that all such commercial cultivation is prohibited in all zones throughout the City and the City shall not issue any such permit for cultivation. This ordinance is therefore consistent with the City’s zoning code.

K. This Ordinance is not detrimental to, and in fact protects, the public convenience, health, interest, safety, and welfare of the City for the reasons set forth above.

L. Personal cultivation as allowed by State law will not be prohibited by this ordinance.

M. This ordinance is not subject to review under CEQA pursuant to sections 15060(c) (2) and 15060(c) (3) (the activity is not a “project” within the meaning of Section 15378 of the State CEQA Guidelines), because it has no potential for resulting in physical change in the environment, directly or ultimately. This ordinance does not, in itself, authorize commercial cultivation of marijuana for medicinal purposes; therefore there is no potential for resulting in physical change in the environment, directly or ultimately.

SECTION II. AMENDMENT OF THE CODE. Chapter 5.36, currently entitled “Medical Marijuana Dispensaries” is hereby amended as set forth below. Additions are shown by underline text and deletions are shown by ~~strikeout~~.

CHAPTER 5.36 MEDICAL MARIJUANA DISPENSARIES AND COMMERCIAL CULTIVATION

Section 5.36.010 – Purpose, findings and intent.

Section 5.36.020 – Definitions.

Section 5.36.030 – Prohibition of medical marijuana dispensaries and commercial cultivation.

Section 5.36.040 – Public nuisance.

Section 5.36.050 – Civil penalties.

Section 5.36.010 Purpose, findings and intent.

A. In enacting this chapter, the city council finds as follows:

1. In 1970, Congress enacted the Controlled Substances Act (“CSA”) which, among other things, makes it illegal to import, manufacture, distribute, possess or use marijuana in the United States.

In 1996, the voters of the State of California approved Proposition 215 [the Compassionate Use Act (the “Act”) (codified as Health and Safety Code section 11362.5 *et seq.*)].

3. The Act creates a limited exception from criminal liability for seriously ill persons who are in need of medical marijuana for specified medical purposes and who obtain and use medical marijuana under limited, specified circumstances.

4. On January 1, 2004, the “Medical Marijuana Program” (“MMP”), codified as Health and Safety Code sections 11362.7 to 11362.83, was enacted by the State Legislature to clarify the scope of the Act and to allow cities and other governing bodies to adopt and enforce rules and regulations consistent with the MMP.
5. The Act expressly anticipates the enactment of additional local legislation. It provides: “Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others or to condone the diversion of marijuana for nonmedical purposes.” (Health and Safety Code section 11362.5)
6. The city council takes legislative notice of the fact that several California cities and counties which have permitted the establishment of medical marijuana dispensaries have experienced serious adverse impacts associated with and resulting from such dispensaries. According to these communities, according to news stories widely reported and according to medical marijuana advocates, medical marijuana dispensaries have resulted in and/or caused an increase in crime, including burglaries, robberies, violence, illegal sales of marijuana to, and use of marijuana by minors and other persons without medical need in the areas immediately surrounding such medical marijuana dispensaries. The city council reasonably anticipates that the City of Newark will experience similar adverse impacts and effects. A California Police Chiefs Association compilation of police reports, news stories and statistical research regarding secondary impacts is contained in a copyrighted 2009 white paper report entitled White Paper of Medical Marijuana Dispensaries by California Police Chiefs Association Task Force.
7. The city council further takes legislative notice that as of August 2011, according to at least one compilation, 161 cities and 17 counties have adopted moratoria or interim ordinances prohibiting medical marijuana dispensaries. The city council further takes legislative notice that 143 cities and 12 counties have adopted prohibitions against medical marijuana dispensaries.
8. The city council further takes legislative notice that the California Attorney General has adopted guidelines for the interpretation and implementation of the state’s medical marijuana laws, entitled “GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE (August 2008).” (http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf.) The Attorney General has stated in the guidelines that “[a]lthough medical marijuana ‘dispensaries’ have been operating in California for years, dispensaries, as such, are not recognized under the law.”
9. The city council further takes legislative notice that concerns about nonmedical marijuana use arising in connection with the Act and the MMP also have been recognized by state and federal courts. (See, e.g., *Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588; *People ex rel. Lungren*

v. Peron (1997) 59 Cal.App.4th 1383, 1386 to 1387; *Gonzales v. Raich* (2005) 545 U.S. 1.)

10. The city council further takes legislative notice that the use, possession, distribution and sale of marijuana remain illegal under the Controlled Substances Act (“CSA”) (*Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588); that the federal courts have recognized that despite the Act and MMP, marijuana is deemed to have no accepted medical use (*Gonzales v. Raich*, 545 U.S. 1; *United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483); that medical necessity has been ruled not to be a defense to prosecution under the CSA (*United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483); and that the federal government properly may enforce the CSA despite the Act and MMP (*Gonzales v. Raich*, 545 U.S. 1).
11. The city council further takes legislative notice that the United States Attorney General announced in 2008 its intention to maintain enforcement of federal laws as applied to medical marijuana dispensaries which otherwise comply with state law. There is no certainty how long this uncodified policy will remain in effect, and the underlying conflict between federal and state statutes still remains.
12. The United States Department of Justice issued a memorandum dated June 29, 2011 that outlined the Department’s intent to enforce the CSA in jurisdictions considering legislation that would sanction and regulate commercial cultivation and distribution of marijuana for purportedly medical use.
13. An ordinance prohibiting medical marijuana dispensaries and commercial cultivation, and prohibiting the issuance of any permits, licenses and entitlements for medical marijuana dispensaries and commercial cultivation, is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of the city.

B. The purpose of this chapter is to prohibit the establishment, operation, and location (fixed or mobile) of medical marijuana dispensaries and commercial cultivation in the city. Further, this chapter shall not prevent the limited cultivation of medical marijuana for personal use by a qualified patient or primary caregiver, provided such cultivation is in compliance with California Health & Safety Code Section 11362.777.

Section 5.36.020 Definitions.

A. For the purposes of this chapter, “medical marijuana dispensary” means any facility or location, whether fixed or mobile, where medical marijuana is provided, sold, made available or otherwise distributed to one or more of the following: a primary caregiver, a qualified patient or a person with an identification card.

B. For the purposes of this chapter, the terms “primary caregiver,” “qualified patient” and “person with an identification card” shall be as defined in California Health and Safety Code section 11362.7, and as the same may be amended from time to time.

C. For purposes of this chapter, a “medical marijuana dispensary” shall not include the following uses, provided that the location of such uses are otherwise regulated by applicable law, and further provided any such use complies strictly with applicable law, including, but not limited to, California Health and Safety Code section 11362.5 *et seq.* and California Health and Safety Code section 11362.7 *et seq.*:

1. A clinic licensed pursuant to Chapter 1 of Division 2 of the California Health and Safety Code.

A health-care facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code.
3. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code.
4. A residential care facility for the elderly, licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code.
5. A residential hospice, or a home health agency, licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code.

D. For purposes of this chapter, the terms “commercial cannabis activity”, “cannabis”, and “cultivation” shall have the same meaning as set forth in California Business & Professions Code Section 19300.5, and as the same may be amended from time to time.

Section 5.36.030 Prohibition of medical marijuana dispensaries and commercial cultivation.

A. Medical marijuana dispensaries and commercial cannabis activity constituting cultivation are prohibited in the city. No medical marijuana dispensary, fixed or mobile, shall establish, locate, operate, or otherwise be permitted within the city. No commercial cannabis activity constituting cultivation shall establish, locate, operate, or otherwise be permitted within the city.

B. The city shall not issue, approve or grant any permit, license or other entitlement for the establishment or operation of a medical marijuana dispensary or commercial cannabis activity constituting cultivation.

C. Cultivation of cannabis for non-commercial, personal purposes by a qualified patient or a primary caregiver, subject to the limitations and requirements of subsection (g) of California Health & Safety Code Section 11362.777, is not prohibited within the city.

Section 5.36.040 Public nuisance.

Any use or condition caused, or permitted to exist, in violation of any provisions of this Chapter 5.36 shall be, and hereby is declared to be, a public nuisance and may be summarily abated by the city pursuant to California Code of Civil Procedure Section 731 or any other remedy available to the city.

Section 5.36.050 Civil penalties.

In addition to any other enforcement permitted by this Chapter 5.36, the City Attorney may bring a civil action for injunctive relief and civil penalties pursuant to the provisions of this Code against any person or entity that violates this Chapter.

SECTION III. Declaration of Existing Law. Chapter 5.36, amended by this ordinance, is declaratory of, clarifies, and affirms existing law.

SECTION IV. Severability and Validity. If any section, subsection, sentence, clause, or phrase or word of this ordinance is for any reason held to be unconstitutional, unlawful, or otherwise invalid by a court of competent jurisdiction, then such decision shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Newark hereby declares that it would have passed and adopted this ordinance and each and all provisions thereof irrespective of the fact that any one or more of said provisions be declared unconstitutional, unlawful or otherwise invalid.

SECTION V. The passage of this ordinance is not a project according to the definition in the California Environmental Quality Act and, therefore, is not subject to the provisions requiring environmental review.

SECTION VI. Effective Date. This ordinance shall take effect thirty (30) days from the date of its passage. Before expiration of fifteen (15) days after its passage, this ordinance shall be published in The What's Happening Tri City Voice, a newspaper of general circulation published and printed in the City of Fremont, County of Alameda and circulated in the City of Newark.

The foregoing ordinance was introduced and read before the City Council of the City of Newark by Council Member Hannon at the regular meeting of the City Council of the City of Newark held on January 14, 2016.

This ordinance was read at the regular meeting of the City Council held January 28, 2016. Council Member Collazo moved that it be adopted and passed, which motion was duly seconded, and said ordinance was passed and adopted.

AYES: Council Members Hannon, Collazo, Bucci, Vice Mayor Freitas, and Mayor Nagy

NOES: None

ABSENT: None

SECONDED: Council Member Bucci

APPROVED:

ATTEST:

s/ALAN L. NAGY
Mayor

s/SHEILA HARRINGTON
City Clerk

APPROVED AS TO FORM:

s/DAVID J. BENOUN
City Attorney