

## ORDINANCE 2251

### AN URGENCY ORDINANCE OF THE TOWN OF LOS GATOS AMENDING LOS GATOS MUNICIPAL CODE TITLE 18, SECTION 14.120 PROHIBITING THE ESTABLISHMENT OF MEDICAL MARIJUANA DISPENSARIES, TO FURTHER PROHIBIT MARIJUANA CULTIVATION AND DELIVERIES

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THE TOWN COUNCIL OF THE TOWN OF LOS GATOS DOES ORDAIN AS FOLLOWS:

#### **SECTION 1.** FINDINGS

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.
2. In 1996, voters of the State of California approved Proposition 215, known as the Compassionate Use Act (CUA), codified as Health and Safety (H&S) Code Section 11362.5.
3. The CUA creates limited exemptions from state criminal liability for seriously ill qualified patients who are in need of medical marijuana for specified purposes and who obtain and use marijuana under limited, specified circumstances.
4. In 2003, the State Legislature enacted the Medical Marijuana Program Act (MMPA) (H&S Code §§ 11362.7 - 11362.83) to clarify the scope of the CUA and allow cities and other governing bodies to adopt and enforce regulations consistent with the MMPA.
5. The CUA expressly anticipates the enactment of additional local legislation by stating: “[n]othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.” (H&S Code § 11362.5).
6. Neither the CUA nor MMPA create a right to the unregulated cultivation of medical marijuana and California courts recognize that the regulation of cultivation of medical marijuana does not conflict with either the CUA or MMPA. (*Browne v. County of Tehama* (2013) 213 Cal.App.4th 704; *Maral v. TOWN of Live Oak* (2013) 221 Cal.App. 4th 975.)
7. Neither the CUA nor MMPA preempt a TOWN’s police power to prohibit the cultivation of all marijuana within that TOWN. (*Maral v. TOWN of Live Oak*, supra, 221 Cal.App. 4th 975.)
8. Several California cities and counties have experienced offensive and serious adverse impacts associated with and resulting from cultivation of marijuana. According to these cities, cultivation of marijuana increases risks of criminal activity, degrades the natural environment, and poses fire hazards to the land itself and surrounding areas.

9. In 2008, the California Attorney General adopted guidelines for interpreting and implementing California's medical marijuana laws, entitled "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (August 2008.)" (The "Attorney General Guidelines"). The Attorney General Guidelines state that patients, caregivers, or "[a]ny group that is collectively or cooperatively cultivating and distributing marijuana for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes."
10. The experience of other cities has been that many individuals who cultivate marijuana are not qualified patients, caregivers, cooperatives or collectives in compliance with the MMPA and Attorney General Guidelines, and thus are engaged in cultivation, distribution and sale of marijuana in a manner illegal under both California and federal law. As a result, the TOWN would be obligated to commit substantial resources to regulate and oversee the cultivation of medical marijuana to ensure that such cultivation is lawful and not a means for illegal drug trafficking. Furthermore, it is unclear whether even with significant resources and dedication toward the problem, the Town would be able to prevent illegal conduct associated with marijuana cultivation, such as illegal transport and distribution of that marijuana between persons who are not qualified patients or caregivers under the CUA and MMPA.
11. Both state and federal courts recognize concerns about nonmedical marijuana use in connection with the CUA and MMPA. (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; *Gonzales v. Raich* (2005) 545 U.S. 1).
12. The use, possession, and cultivation of marijuana remain illegal under the federal CSA (*Bearman v. California Medical Bd.*, supra, 176 Cal.App.4th 1588). Federal courts recognize that marijuana is deemed to have no accepted medical use (*Gonzales v. Raich*, supra, 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491), that medical necessity is not a defense to prosecution under the CSA (*United States v. Oakland Cannabis Buyers' Cooperative*, supra, 532 U.S. 483, 491), and that despite protections under California's CUA and MMPA, the federal government may enforce the CSA (*Gonzales v. Raich*, supra, 545 U.S. 1).
13. Neither the CUA nor the MMPA create implied or actual limitations on local land use or police power regulation of land used for the cultivation of marijuana. (*TOWN of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, (2013) 56 Cal. 4<sup>th</sup> 729, 759-760). 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 (hereafter "MMRSA"). The MMRSA set up a State licensing scheme for commercial medical marijuana uses 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 TOWN to completely prohibit commercial medical marijuana activities and all cultivation activities.
14. Marijuana plants cultivated outdoors often produce, especially as they mature to harvest, a distinctive, strong odor that can be detectable and offensive beyond the borders of the property on which it is grown.

15. Cities, counties, and air quality districts in which marijuana is grown outdoors have received large numbers of complaints of odors related to the cultivation of marijuana.
16. Marijuana grown indoors has likewise led to dozens of complaints made to the TOWN from nearby uses based on a concern over criminal activity and its impact on neighborhood safety, including but not limited to excessive foot and vehicle traffic, erratic driving, and marijuana smoke emanating from the subject location.
17. Marijuana, even when grown for medical purposes, has a high market value.
18. The strong smell and visibility of marijuana creates an “attractive nuisance” that entices others to the cultivation, and increases the risk of crimes such as burglary, trespass, robbery, and armed robbery, potentially resulting in serious injury or death. The cultivation of medical marijuana can also result in various code violations, including improper and dangerous electrical alterations and use. These secondary effects pose serious safety risks, and require the commitment of scarce police and public resources.
19. An ordinance prohibiting all cultivation and delivery is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of Los Gatos.

## **SECTION 2.            AMENDMENTS**

Los Gatos Municipal Code, Title 14 (Licenses and Miscellaneous Business Regulations), Article XII (Medical Marijuana Dispensaries) is amended to read as follows:

### **ARTICLE XII. - MEDICAL MARIJUANA DISPENSARIES**

#### **Sec. 14.120.010. - Purpose, findings and intent.**

(a) In enacting this article, the town 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.
- (2) In 1996, the voters of the State of California approved Proposition 215 [the Compassionate Use "Act" (codified as Health and Safety (H&S) 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 H&S 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." (H&S Code Section 11362.5.)

- (6) The Town 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 town council reasonably anticipates that the Town of Los Gatos will experience similar adverse impacts and effects. A California Police Chiefs Association compilation of police reports, news stories and statistical research regarding such 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 Town Council further takes legislative notice that as of June 2011, according to at least one compilation, 103 cities and 15 counties have adopted moratoria or interim ordinances prohibiting medical marijuana dispensaries. The town council further takes legislative notice that 143 cities and 12 counties have adopted prohibitions against medical marijuana dispensaries.
- (8) The Town 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)." 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 Town Council further takes legislative notice that concerns about nonmedical marijuana use arising in connection with Proposition 215 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 Town Council further takes legislative notice that the use, possession, distribution and sale of marijuana remain illegal under the CSA (*Bearman v. California Medical Bd.* (2009) 176 Cal.App.4th 1588); that the federal courts have recognized that despite California's 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 Town 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 uncoded 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 Controlled Substances Act (CSA) in jurisdictions considering legislation that would sanction and regulate commercial cultivation and distribution of marijuana for purportedly medical use.
- (13) 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 (hereafter "MMRSA"). The MMRSA set up a State licensing scheme for commercial medical marijuana uses 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 Town to completely prohibit commercial medical marijuana activities and all cultivation activities.
- (14) Marijuana plants cultivated outdoors often produce, especially as they mature to harvest, a distinctive, strong odor that can be detectable and offensive beyond the borders of the property on which it is grown. Cities, counties, and air quality districts in which marijuana is grown outdoors have received large numbers of complaints of odors related to the cultivation of marijuana.
- (15) Marijuana, even when grown for medical purposes, has a high market value.
- (16) The strong smell and visibility of marijuana creates an "attractive nuisance" that entices others to the cultivation, and increases the risk of crimes such as burglary, trespass, robbery, and armed robbery, potentially resulting in serious injury or death. The cultivation of medical marijuana can also result in various code violations, including improper and dangerous electrical alterations and use. These secondary effects pose serious safety risks, and require the commitment of scarce police and public resources.
- (17) An ordinance prohibiting medical marijuana dispensaries, all cultivation and delivery of marijuana and prohibiting the issuance of any permits, licenses and entitlements for medical marijuana dispensaries cultivation and delivery, is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of Los Gatos.
- (b) The purpose of this article is to prohibit the establishment, operation, and location (fixed or mobile) of medical marijuana dispensaries and cultivation in the Town of Los Gatos.

#### **Sec. 14.120.015. Definitions and exceptions.**

(a) For the purposes of this article, "marijuana" shall have the same meaning as set forth in California Health and Safety Code Section 11018 as of the effective date of this article and as subsequently amended. Currently under 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. "Marijuana" shall also include

concentrated cannabis, the separated resin, whether crude or purified, obtained from marijuana, and any foodstuffs infused with marijuana or concentrated cannabis.

(b)For the purposes of this article, "medical marijuana dispensary" shall have the same meaning as "dispensary" as set forth in California Business and Professions Code Section 19300.5(n) as that section may be amended from time to time. A medical marijuana dispensary also 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.

(c)For the purposes of this article, 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.

(d)For purposes of this article, 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.

(2)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.

(e) For purposes of this article "Medical marijuana cultivation" shall have the same meaning as "cultivation" set forth in California Business and Professions Code Section 19300.5(l) as that section may be amended from time to time.

(f) For purposes of this article "Medical marijuana delivery" shall have the same meaning as "delivery" set forth in California Business and Professions Code Section 19300.5(m) as that section may be amended from time to time.

#### **Sec. 14.120.020. Prohibition of medical marijuana dispensaries.**

(a)Medical marijuana dispensaries are prohibited in the Town of Los Gatos. No medical marijuana dispensary, fixed or mobile, shall establish, locate, operate, or otherwise be permitted within the Town of Los Gatos.

(b)The town shall not issue, approve or grant any permit, license or other entitlement for the establishment or operation of a medical marijuana dispensary.

**Sec. 14.120.025. Prohibition of medical marijuana cultivation and delivery.**

(a) The cultivation and delivery of medical marijuana are prohibited in all areas of the Town of Los Gatos. This prohibition includes, but is not limited to:

(1) Cultivation of marijuana, either indoors or outdoors.

(2) Operation of a marijuana nursery, as defined by California Business and Professions Code section 19300.5(a-h) as it now reads or as amended.

(3) Medical marijuana manufacturing sites, as defined by California Business and Professions Code section 19300.5(a-f) as it now reads or as amended.

(b) Notwithstanding Subsection (a), nothing in this Chapter shall prohibit:

(1) The carriage of medical cannabis or medical cannabis products on public roads by licensees acting in compliance with California Business and Professions Code section 19340 and any adopted state and local regulations.

(2) Licensed transporters operating in compliance with California Business and Professions Code sections 19337 and 19338 and any adopted state and local regulations.

**Section 14.120.030 Enforcement.**

(a) The remedies provided by this Chapter are cumulative and in addition to any other remedies available at law or in equity.

(b) Violations of this Chapter are subject to a civil action brought by the district attorney or Town Attorney, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

(c) Any violation of this Chapter is hereby declared to be a misdemeanor. Violations of this Chapter may, in the discretion of the district attorney, be prosecuted as infractions or misdemeanors. Notwithstanding this declaration, consistent with the holding in Kirby v. County of Fresno (2015) 242 Cal.App.4th 940, neither a qualified patient nor a primary caregiver who cultivates or delivers marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician shall be subject to arrest or criminal prosecution for a violation of this Chapter as a misdemeanor.

(d) Violations of this Chapter are hereby declared to be public nuisances and may be enforced pursuant to the procedure of this Code.

(e) Any person that violates this chapter shall be guilty of a separate offense for each and every day during any portion of which such person commits, continues, permits, or causes a violation thereof, and shall be penalized accordingly.

(f) In addition to other remedies provided by this chapter or by other law, any violation of this Chapter may be remedied by a civil action brought by the planning director or his designee, including, for example, administrative or judicial nuisance abatement

proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

#### **SECTION 4.      URGENCY DECLARATION**

The Town Council finds that this Ordinance is necessary for the immediate preservation of the public peace, health, and safety and must take effect immediately pursuant to California Government Code Section 36937(b). The above findings are incorporated here as facts constituting the urgency. In addition, the Town Council declares the following as facts constituting the urgency:

A. This Ordinance must be adopted and become effective immediately to protect residents from imminent harm due to the risk of criminal activity associated with marijuana cultivation, deliveries, and dispensaries.

B. This Ordinance must be adopted and become effective immediately to protect residents from imminent harm due to the risk of fires associated with the cultivation of marijuana.

C. The potential for marijuana cultivation, dispensaries, or deliveries to occur before the effective date of an ordinance presents a current and immediate threat to the public health, safety, and welfare.

D. A prohibition on marijuana cultivation, dispensaries, and deliveries is difficult to enforce once those uses have commenced within a community. Those uses must be immediately prohibited to prevent them from establishing and causing negative secondary effects in the Town.

E. This Ordinance must take effect by March 1, 2016, to reaffirm that the Town retains local licensing and regulatory authority over marijuana cultivation sites due to the State deadline set forth in California Health and Safety Code Section 11362.777.

#### **SECTION 4.      CEQA**

The Town Council finds and determines that the adoption of this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) per CEQA Guidelines under the General Rule (Section 15061(b)(3)), which sets forth that the CEQA applies only to projects which have the potential for causing a significant effect on the environment. It can be seen with certainty that the proposed Town Code text amendments will have no significant negative effect on the environment.

#### **SECTION 5.      SEVERABILITY**

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this ordinance. The Town Council of the Town of Los Gatos hereby declares that it would have passed this ordinance and each section or subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid. Except as expressly modified in this Ordinance, all other



sections set forth in the Los Gatos Town Code shall remain unchanged and shall be in full force and effect.

**SECTION 6.        EFFECTIVE DATE**

This ordinance shall take effect immediately and will be enforced thirty (30) days after its adoption.

**SECTION 7.        PUBLICATION AND POSTING**

In lieu of publication of the full text of the ordinance within fifteen (15) days after its passage, a summary of the ordinance may be published at least five (5) days prior to and fifteen (15) days after adoption by the Town Council and a certified copy shall be posted in the office of the Town Clerk, pursuant to GC 36933(c)(1).

**SECTION 8.        INTRODUCTION AND ADOPTION**

This Ordinance was introduced at a regular meeting of the Town Council of the Town of Los Gatos on the 2<sup>nd</sup> day of February 2016 and adopted by the following vote as an ordinance of the Town of Los Gatos at a regular meeting of the Town Council of the Town of Los Gatos on the 16<sup>th</sup> day of February 2016.

COUNCIL MEMBERS:

AYES: Marcia Jensen, Steve Leonardis, Rob Rennie, Marico Sayoc, Mayor Barbara Spector

NAYS:

ABSENT:

ABSTAIN:

SIGNED:

MAYOR OF THE TOWN OF LOS GATOS  
LOS GATOS, CALIFORNIA

DATE: \_\_\_\_\_

ATTEST:

CLERK ADMINISTRATOR OF THE TOWN OF LOS GATOS  
LOS GATOS, CALIFORNIA

DATE: \_\_\_\_\_