

COUNCIL COMMUNICATION

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| Meeting Date: October 27, 2009 | 1 st Reading _____ 2 nd Reading <u> X </u> | Legal Review: | Agenda Location: Action Item | Agenda Item: 10A |
| Subject: AN ORDINANCE ENACTING SECTION 18-231 OF THE THORNTON CITY CODE TO DEFINE MEDICAL MARIJUANA DISPENSARIES, GROWING FACILITIES AND USE FACILITIES; AND PROHIBITING THESE USES; AND AMENDING SECTION 38-297 TO PROVIDE AN AFFIRMATIVE DEFENSE FOR CARE-GIVERS. | | | | |
| Prepared by: Debby Myers | | Approved by: Jack Ethredge | | Ordinance previously introduced by: _____ |
| Reviewed by: Debby Myers | | Presented by: Jack Ethredge, City Manager | | |

KEY CONSIDERATIONS:

- At the October 13, 2009 public hearing, City Council approved an ordinance on first reading defining medical marijuana dispensaries, growing facilities and use facilities, and prohibiting these uses by a majority vote of 7 to 2.
- Additionally, City Council amended the ordinance to include item 8 which states that “the City Council will review the ordinance in 24 months”.
- Two ordinances are included for Council’s consideration. The first (A) is the ordinance, amended as noted above, that Council passed on first reading. The second (B) is an ordinance with one additional recommended change to specify Council’s intent that the only location a care-giver may grow medical marijuana for up to five patients is within their residence, not in storefronts, outside, or in any other location.
- In the November 2000 general election, the voters of the State of Colorado adopted Amendment 20 to the Colorado Constitution (“Amendment 20”) which authorizes the use of marijuana in the treatment of debilitating medical conditions.
- Amendment 20 protects patients and their primary care-givers from criminal liability for possession and cultivation of marijuana for the patient’s medical use if approved by a physician and submitting a registration to the State. Physicians are also protected from being denied any right or privilege for approving a patient’s use of medical marijuana.
- Amendment 20 does not authorize medical marijuana dispensaries, growing facilities, or use facilities for patients, nor does it address zoning or business licenses in any form.
- The federal Controlled Substances Act prohibits the possession, growth and sale of marijuana generally, and is thereby in conflict with Amendment 20.
- Several businesses have approached the City wishing to cultivate medical marijuana and/or provide it to those who qualify under State law.
- The existing City land use regulations do not provide for the location and regulation of medical marijuana businesses operating as “primary care-givers” under the provisions of Amendment 20.
- The City imposed a moratorium on the submission, acceptance, processing, and approval of all applications for City licenses relating to the operation of medical marijuana businesses to allow City staff and the City Council to investigate the City’s ability to regulate these businesses.
- City Council requested the input of the Businesses of Thornton Advisory Commission regarding the potential impact of medical marijuana dispensaries and growing facilities. The nine participants at the September 24 meeting unanimously agreed that these facilities would be unfavorable for the City.
- The City of Thornton is a home rule municipality organized and existing under the provisions of Colorado Constitutional Article XX. Land use decisions are specifically determined by City Council.

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- Pursuant to the Constitution and State statutes, the City has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the community and its residents, including the power to regulate the nature and type of businesses allowed within in the community.
- The Colorado Attorney General is taking action to address the conflict between federal law and the State Constitution in several ways, including seeking State legislative amendments to address the potential illegal activities that may occur related to Amendment 20.
- The possession, growth, sale and distribution of marijuana remains a violation of federal law, and the City makes no assurances that a medical marijuana business, patient, or care-giver will not be prosecuted by the federal government.

BUDGET/STAFF IMPLICATIONS:

- None.

RECOMMENDATION:

- Staff recommends that Council amend and adopt ordinance B on second reading. The rights of patients to use and grow medical marijuana within their homes would continue under Amendment 20 of the State Constitution. The ordinance establishes a limit of five patients for whom a care-giver could grow medical marijuana in their home, as recommended by the Medical Director of the Colorado Department of Public Health and the Environment.

HISTORY: (includes previous City Council action)

- November 2000: Voters permitted the medical use of marijuana by approving Amendment 20 to the Colorado Constitution.
- March 2009: The U.S. Attorney General announced that the Justice Department would not enforce against medical marijuana use or sales as long as state laws were satisfied, creating increased interest in the operation of businesses providing medical marijuana.
- September 1, 2009: City Council discussed the issue of medical marijuana at a Planning Session.
- September 8, 2009: City Council enacted a temporary moratorium on the submission, acceptance, processing or approval of any applications related to medical marijuana businesses until October 28, 2009.
- October 6, 2009: City Council discussed possible land use and licensing regulatory measures that would assist the City mitigate the impacts of allowing medical marijuana dispensaries or growing facilities, should either be allowed.

ORDINANCE A

INTRODUCED BY: Bach

AN ORDINANCE ENACTING SECTION 18-231 OF THE THORNTON CITY CODE TO DEFINE MEDICAL MARIJUANA DISPENSARIES, GROWING FACILITIES AND USE FACILITIES; AND PROHIBITING THESE USES; AND AMENDING SECTION 38-297 TO PROVIDE AN AFFIRMATIVE DEFENSE FOR CARE-GIVERS.

WHEREAS, in the November 2000 general election, the voters of the State of Colorado adopted Amendment 20 to the Colorado Constitution ("Amendment 20") which authorizes the use of marijuana in the treatment of debilitating medical conditions; and

WHEREAS, Amendment 20 protects physicians from being denied any right or privilege for approving a patient's use of medical marijuana; and

WHEREAS, Amendment 20 protects patients and their primary care-givers from criminal liability for possession and cultivation of marijuana for the patient's medical use if approved by a physician and submitting a registration to the State; and

WHEREAS, Amendment 20 does not authorize medical marijuana dispensaries, growing facilities, or use facilities for patients; and

WHEREAS, Amendment 20 does not address zoning or business licenses in any form; and

WHEREAS, the federal Controlled Substances Act prohibits the possession, growth and sale of marijuana generally, and is thereby in conflict with Amendment 20; and

WHEREAS, the City Council has been made aware of a proliferation of businesses wishing to cultivate medical marijuana and/or provide it to those who qualify under State law; and

WHEREAS, the City imposed a moratorium on the submission, acceptance, processing, and approval of all applications for City licenses relating to the operation of medical marijuana businesses to allow the City staff and the City Council to investigate the City's ability to regulate these businesses; and

WHEREAS, the City of Thornton is a home rule municipality organized and existing under the provisions of Colorado Constitutional Article XX; and

WHEREAS, pursuant to the Constitution, and as further authorized by State statutes, including, but not limited to C.R.S. Section 31-15-401, the City has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the community and its residents; and

WHEREAS, such powers include the power to regulate the nature and type of businesses allowed within such community; and

WHEREAS, Chapter 18 of the Code regulates land development in the City and allows for the classification of uses; and

WHEREAS, the existing City land use regulations do not provide for the location and regulation of medical marijuana businesses operating as “primary care-givers” under the provisions of Amendment 20; and

WHEREAS, the prohibition of businesses related to medical marijuana growing, sales or distribution requires clarification of affirmative defenses to prosecution in Chapter 38 of the Code; and

WHEREAS, the Colorado Attorney General is taking action to address the conflict between federal law and the State Constitution by, among other actions, seeking State legislative amendments to address the potential illegal activities that may occur related to Amendment 20; and

WHEREAS, until the Attorney General has had the opportunity to propose legislative action and resolve the conflict between federal law and the State Constitution, the creation of medical marijuana businesses in the City should remain a prohibited use; and

WHEREAS, the possession, growth, sale and distribution of marijuana remains a violation of federal law, and the City makes no assurances that a medical marijuana business, patient, or care-giver will not be prosecuted by the federal government; and

WHEREAS, the City finds these Code amendments are necessary to promote the public health, safety and welfare.

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF THORNTON, COLORADO, AS FOLLOWS:

1. Section 18-231 of the Code is hereby repealed and reenacted to read as follows:

Sec. 18-231. Medical marijuana prohibited uses.

(a) *Definitions.*

- (1) *Medical marijuana growing facility* shall mean a property or structure where one or more primary care-givers cultivate medical marijuana plants for distribution of any form of marijuana at a medical marijuana dispensary or directly to patients or parents.
- (2) *Medical marijuana dispensary* shall mean a property or structure where one or more primary care-givers distribute, transmit, give, dispense, sell, or otherwise provide any form of marijuana in any manner to patients or parents.
- (3) *Medical marijuana use facilities shall mean* a property or structure, or any part thereof, where medical marijuana patients gather to smoke, ingest, or

otherwise use medical marijuana and that is not open to the general public, except for the dwelling unit of one of the patients.

- (4) *Parent* shall have the same meaning as defined in Section 14 of Article XVIII of the Colorado Constitution.
- (5) *Patient* shall mean a person with a valid registry identification card issued by the State of Colorado.
- (6) *Primary care-giver* shall have the same meaning as defined in Section 14 of Article XVIII of the Colorado Constitution.

(b) *Prohibition.*

- (1) Medical marijuana growing facilities, medical marijuana dispensaries, and medical marijuana use facilities are prohibited uses in all zoning districts.
- (2) This prohibition does not apply to:
 - a. Patients who are utilizing or growing marijuana only for personal use in accordance with Section 14 of Article XVIII of the Colorado Constitution; and
 - b. Marijuana grown or provided by a primary care-giver for only five patients, who may or may not live with the primary care-giver, in accordance with Section 14 of Article XVIII of the Colorado Constitution.

2. Section 38-297(g) of the Code is hereby amended by the deletion of the words stricken and the addition of the words double-underlined to read as follows:

Sec. 38-297. Possession unlawful; violations and penalties.

(g) Affirmative defenses.

(1) It shall be an affirmative defense to a prosecution under Subsections 38-297(a) and (b) that a person is in possession of a valid registry identification card authorizing the medicinal use of marijuana issued by the State Health Agency, so long as possession or use does not occur in a public place.

(2) It shall be an affirmative defense to a prosecution under Subsection 38-297(a) that a person is a primary care-giver and is in possession of marijuana, as both those terms are defined in the Colorado Constitution.

3. The City Council hereby finds, determines, and declares that this Ordinance is necessary and proper to provide for the safety, preserve the health, and improve the order of the City and the residents thereof.

4. The City Council hereby finds, determines and declares that it has the power to adopt this Ordinance pursuant to: (i) the Local Government Land Use Control Enabling Act, Article 20 of Title 29, C.R.S.; (ii) Part 3 of Article 23 of Title 31,

C.R.S. (concerning municipal zoning powers); (iii) Section 31-15-103, C.R.S. (concerning municipal police powers); (iv) Section 31-15-401, C.R.S. (concerning municipal police powers); (v) Section 31-15-501 (concerning municipal power to regulate businesses); (vi) the authority granted to home rule municipalities by Article XX of the Colorado Constitution; and (vii) the powers contained in the Thornton City Charter.

5. If any portion of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the constitutionality or validity of the remaining portions of this ordinance. City Council hereby declares that it would have passed this ordinance and each part hereof irrespective of the fact that any one part be declared unconstitutional or invalid.
6. All other ordinances or portions thereof inconsistent or conflicting with this ordinance or any portion hereof are hereby repealed to the extent of such inconsistency or conflict.
7. The repeal or amendment of any provision of the Code by this ordinance shall not release, extinguish, alter, modify, or change in whole or in part any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such provision, and each provision shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings, and prosecutions for the enforcement of the penalty, forfeiture, or liability, as well as for the purpose of sustaining any judgment, decree, or order which can or may be rendered, entered, or made in such actions, suits, proceedings, or prosecutions.
8. The City Council will review the ordinance in 24 months.
9. This ordinance shall take effect upon final passage.

INTRODUCED, READ, PASSED on first reading, ordered posted in full, and title ordered published by the City Council of the City of Thornton, Colorado, on October 13, 2009.

PASSED AND ADOPTED on second and final reading on _____, 2009.

CITY OF THORNTON, COLORADO

Erik Hansen, Mayor

ATTEST:

Nancy A. Vincent, City Clerk

THIS ORDINANCE IS ON FILE IN THE CITY CLERK'S OFFICE FOR PUBLIC INSPECTION.

APPROVED AS TO LEGAL FORM:

Margaret Emerich, City Attorney

PUBLICATION:

Posted in six (6) public places after first and second readings.

Published in the Northglenn-Thornton Sentinel after first reading on October 22, 2009, and after second and final reading on _____, 2009.

ORDINANCE B

INTRODUCED BY: Bach

AN ORDINANCE ENACTING SECTION 18-231 OF THE THORNTON CITY CODE TO DEFINE MEDICAL MARIJUANA DISPENSARIES, GROWING FACILITIES AND USE FACILITIES; AND PROHIBITING THESE USES; AND AMENDING SECTION 38-297 TO PROVIDE AN AFFIRMATIVE DEFENSE FOR CARE-GIVERS.

WHEREAS, in the November 2000 general election, the voters of the State of Colorado adopted Amendment 20 to the Colorado Constitution ("Amendment 20") which authorizes the use of marijuana in the treatment of debilitating medical conditions; and

WHEREAS, Amendment 20 protects physicians from being denied any right or privilege for approving a patient's use of medical marijuana; and

WHEREAS, Amendment 20 protects patients and their primary care-givers from criminal liability for possession and cultivation of marijuana for the patient's medical use if approved by a physician and submitting a registration to the State; and

WHEREAS, Amendment 20 does not authorize medical marijuana dispensaries, growing facilities, or use facilities for patients; and

WHEREAS, Amendment 20 does not address zoning or business licenses in any form; and

WHEREAS, the federal Controlled Substances Act prohibits the possession, growth and sale of marijuana generally, and is thereby in conflict with Amendment 20; and

WHEREAS, the City Council has been made aware of a proliferation of businesses wishing to cultivate medical marijuana and/or provide it to those who qualify under State law; and

WHEREAS, the City imposed a moratorium on the submission, acceptance, processing, and approval of all applications for City licenses relating to the operation of medical marijuana businesses to allow the City staff and the City Council to investigate the City's ability to regulate these businesses; and

WHEREAS, the City of Thornton is a home rule municipality organized and existing under the provisions of Colorado Constitutional Article XX; and

WHEREAS, pursuant to the Constitution, and as further authorized by State statutes, including, but not limited to C.R.S. Section 31-15-401, the City has broad authority to exercise its police powers to promote and protect the health, safety and welfare of the community and its residents; and

WHEREAS, such powers include the power to regulate the nature and type of businesses allowed within such community; and

WHEREAS, Chapter 18 of the Code regulates land development in the City and allows for the classification of uses; and

WHEREAS, the existing City land use regulations do not provide for the location and regulation of medical marijuana businesses operating as “primary care-givers” under the provisions of Amendment 20; and

WHEREAS, the prohibition of businesses related to medical marijuana growing, sales or distribution requires clarification of affirmative defenses to prosecution in Chapter 38 of the Code; and

WHEREAS, the Colorado Attorney General is taking action to address the conflict between federal law and the State Constitution by, among other actions, seeking State legislative amendments to address the potential illegal activities that may occur related to Amendment 20; and

WHEREAS, until the Attorney General has had the opportunity to propose legislative action and resolve the conflict between federal law and the State Constitution, the creation of medical marijuana businesses in the City should remain a prohibited use; and

WHEREAS, the possession, growth, sale and distribution of marijuana remains a violation of federal law, and the City makes no assurances that a medical marijuana business, patient, or care-giver will not be prosecuted by the federal government; and

WHEREAS, the City finds these Code amendments are necessary to promote the public health, safety and welfare.

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF THORNTON, COLORADO, AS FOLLOWS:

10. Section 18-231 of the Code is hereby repealed and reenacted to read as follows:

Sec. 18-231. Medical marijuana prohibited uses.

(c) *Definitions.*

- (1) *Medical marijuana growing facility* shall mean a property or structure where one or more primary care-givers cultivate medical marijuana plants for distribution of any form of marijuana at a medical marijuana dispensary or directly to patients or parents.
- (2) *Medical marijuana dispensary* shall mean a property or structure where one or more primary care-givers distribute, transmit, give, dispense, sell, or otherwise provide any form of marijuana in any manner to patients or parents.
- (3) *Medical marijuana use facilities shall mean* a property or structure, or any part thereof, where medical marijuana patients gather to smoke, ingest, or

otherwise use medical marijuana and that is not open to the general public, except for the dwelling unit of one of the patients.

- (4) *Parent* shall have the same meaning as defined in Section 14 of Article XVIII of the Colorado Constitution.
- (5) *Patient* shall mean a person with a valid registry identification card issued by the State of Colorado.
- (6) *Primary care-giver* shall have the same meaning as defined in Section 14 of Article XVIII of the Colorado Constitution.

(d) *Prohibition.*

- (1) Medical marijuana growing facilities, medical marijuana dispensaries, and medical marijuana use facilities are prohibited uses in all zoning districts.
- (2) This prohibition does not apply to:

- a. Patients who are utilizing or growing marijuana at the patient's primary residence only for personal use in accordance with Section 14 of Article XVIII of the Colorado Constitution; and

- b. ~~Marijuana grown or provided by a primary care-giver for only five patients~~ Primary care-givers who grow and provide marijuana for up to five patients, who may or may not live with the primary care-giver, at the primary care-giver's primary residence in accordance with Section 14 of Article XVIII of the Colorado Constitution.

- c. Marijuana grown in compliance with 'a' or 'b' above shall be grown inside a structure. No outside growing of marijuana is permitted.

11. Section 38-297(g) of the Code is hereby amended by the deletion of the words stricken and the addition of the words double-underlined to read as follows:

Sec. 38-297. Possession unlawful; violations and penalties.

(h) Affirmative defenses.

(3) It shall be an affirmative defense to a prosecution under Subsections 38-297(a) and (b) that a person is in possession of a valid registry identification card authorizing the medicinal use of marijuana issued by the State Health Agency, so long as possession or use does not occur in a public place.

(4) It shall be an affirmative defense to a prosecution under Subsection 38-297(a) that a person is a primary care-giver and is in possession of marijuana, as both those terms are defined in the Colorado Constitution.

12. The City Council hereby finds, determines, and declares that this Ordinance is necessary and proper to provide for the safety, preserve the health, and improve the order of the City and the residents thereof.

13. The City Council hereby finds, determines and declares that it has the power to adopt this Ordinance pursuant to: (i) the Local Government Land Use Control Enabling Act, Article 20 of Title 29, C.R.S.; (ii) Part 3 of Article 23 of Title 31, C.R.S. (concerning municipal zoning powers); (iii) Section 31-15-103, C.R.S. (concerning municipal police powers); (iv) Section 31-15-401, C.R.S. (concerning municipal police powers); (v) Section 31-15-501 (concerning municipal power to regulate businesses); (vi) the authority granted to home rule municipalities by Article XX of the Colorado Constitution; and (vii) the powers contained in the Thornton City Charter.
14. If any portion of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the constitutionality or validity of the remaining portions of this ordinance. City Council hereby declares that it would have passed this ordinance and each part hereof irrespective of the fact that any one part be declared unconstitutional or invalid.
15. All other ordinances or portions thereof inconsistent or conflicting with this ordinance or any portion hereof are hereby repealed to the extent of such inconsistency or conflict.
16. The repeal or amendment of any provision of the Code by this ordinance shall not release, extinguish, alter, modify, or change in whole or in part any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such provision, and each provision shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings, and prosecutions for the enforcement of the penalty, forfeiture, or liability, as well as for the purpose of sustaining any judgment, decree, or order which can or may be rendered, entered, or made in such actions, suits, proceedings, or prosecutions.
17. The City Council will review the ordinance in 24 months.
18. This ordinance shall take effect upon final passage.

INTRODUCED, READ, PASSED on first reading, ordered posted in full, and title ordered published by the City Council of the City of Thornton, Colorado, on October 13, 2009.

PASSED AND ADOPTED on second and final reading on _____, 2009.

CITY OF THORNTON, COLORADO

Erik Hansen, Mayor

ATTEST:

Nancy A. Vincent, City Clerk

THIS ORDINANCE IS ON FILE IN THE CITY CLERK'S OFFICE FOR PUBLIC INSPECTION.

APPROVED AS TO LEGAL FORM:

Margaret Emerich, City Attorney

PUBLICATION:

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