AGENDA REPORT

Regular Meeting of the San Marcos Planning Commission

MEETING DATE: February 1, 2016

SUBJECT: Consideration of Existing and Proposed Medical Marijuana Regulations
P16-0003 (Text Amendment TA 16-001, Title 20 Amendments

Recommendation

Approve the attached Resolution ratifying existing medical marijuana regulations under San Marcos Municipal Code (SMMC) Chapter 5.54, and recommending that the City Council adopt an ordinance amending the Zoning Ordinance to prohibit the cultivation of marijuana in all zones within the City of San Marcos (City) by way of interim urgency, urgency and in regular course. It has been determined that the proposed Resolution is exempt from the California Environmental Quality Act (CEQA).

Introduction

Pursuant to recent legislation known as the Medical Marijuana Regulation and Safety Act (MMRSA), unless local agencies have express regulations or prohibitions in place by March 1, 2016 governing the cultivation of marijuana within their jurisdiction, these activities will be permitted and regulated by the State under the MMRSA.

On January 12, 2016, the City Council approved Ordinance No. 2015-1415 amending Chapter 5.54 of the SMMC to prohibit the commercial cultivation of marijuana and all related and associated businesses within the City. Currently, the City does not have any regulations in the Zoning Ordinance affirmatively governing medical marijuana, and specifically the cultivation of marijuana. Such uses have historically been precluded by Section 20.205.030 of the Zoning Ordinance, which expressly states that land uses are prohibited unless specifically permitted.

The proposed Resolution ratifies the City's existing prohibition on the commercial cultivation of marijuana under the SMMC, and further recommends that the City Council adopt an ordinance by way of interim urgency, urgency and regular course, amending the Zoning

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Ordinance to expressly prohibit the cultivation of marijuana as a land use activity in all zones within the City's jurisdictional limits, and to expressly exempt marijuana cultivation from the definition of "agricultural/horticultural" as a permitted land use in certain zones.

Discussion

Expressly prohibiting the cultivation of marijuana as a land use activity under the Zoning Ordinance is necessary to protect and preserve the public peace, health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residences.

Historical State and Federal Laws Regulating Medical Marijuana

In 1996, California voters approved Proposition 215, entitled the Compassionate Use Act (CUA) to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempts patients and their primary caregivers from criminal prosecution or sanctions under State laws that otherwise prohibit the cultivation or possession of marijuana. In 2003, the California Legislature adopted Senate Bill 420 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients, set limits on the amount of marijuana any individual could possess, and provided an exemption from State criminal liability for persons "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes."

Despite the passage of the CUA and the MMPA, marijuana remains illegal under Federal law pursuant to the Controlled Substances Act (CSA), which classifies it as a Schedule 1 drug and prohibits the manufacture, cultivation, distribution and possession of marijuana. Additionally, the United States Supreme Court has continuously held that the use of medical marijuana violates Federal law under the CSA. In 2005, the Supreme Court held in *Gonzales v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. (545 U.S. 1). Under this decision, Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or possess marijuana for medical purposes.

Additionally, in 2013, the California Supreme Court held in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* that California's medical marijuana statutes do not

preempt a local ban on facilities that distribute medical marijuana. (56 Cal.4th 729). The Court noted that the CUA and the MMPA did not expressly or impliedly limit the inherent authority of a local agency to regulate the use of its land, including the authority to provide that medical marijuana dispensaries are a prohibited use and a public nuisance within the local agency's jurisdictional limits.

Recent Legislation – Medical Marijuana Regulation and Safety Act

On October 9, 2015, Governor Brown approved the MMRSA, which goes into effect on January 1, 2016. The MMRSA is a series of three legislative bills that establish a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana.

The MMRSA includes Assembly Bill (AB) 243, which establishes a regulatory and licensing structure for marijuana cultivation sites under the Department of Food and Agriculture. It also includes AB 266, which created a dual licensing structure requiring both a State license and a local license or permit, for which the Department of Consumer Affairs heads the regulatory structure imposing health and safety and testing standards. Lastly, Senate Bill (SB) 643 establishes criteria for the licensing of medical marijuana businesses, regulates physicians, and recognizes local authority to levy taxes and fees.

According to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA. On January 13, 2016, the California legislature approved the medical marijuana cultivation clean-up measure, known as AB 21, to remove the March 1, 2016 deadline for local agencies to have cultivation regulations in place. However, it is unknown if AB 21 will become law prior to the current March 1, 2016 deadline, and therefore it is necessary to amend the Zoning Ordinance at this time to ensure compliance with the current regulations of the MMRSA.

City's Existing Medical Marijuana Regulations

In 2006, the City Council adopted Ordinance No. 2006-1265, which added Chapter 5.54 to the SMMC to prohibit medical marijuana dispensaries in all zones within the City's jurisdictional limits. The SMMC defines medical marijuana dispensaries to include any facility or location, whether

fixed or mobile, where medical marijuana is made available to or distributed by or distributed to one or more of the following: a primary caregiver, a qualified patient, or a patient with an identification card. The City's decision to enact a ban on medical marijuana dispensaries was based on a determination that it may regulate medical marijuana to the extent it is not preempted from doing so by State or Federal law, and that it has the police power to make land use and zoning decisions within its jurisdiction. The prohibition was adopted to protect the health, safety and welfare of the City and its residents based on research showing that medical marijuana dispensaries can cause adverse secondary effects in communities, such as an increase in crime.

On January 12, 2016, the City Council adopted Ordinance No. 2015-1415, which, among other things, expressly prohibits the cultivation of marijuana within the City's jurisdiction in compliance with the CUA and the MMPA. The ban, which extends to activities that would otherwise be permitted under the MMRSA, prohibits the cultivation of marijuana in a manner that protects the public health, safety and welfare of the community, and prevents adverse impacts that such activities may have on nearby properties and residents. It also expressly provides that the cultivation of marijuana is prohibited in all zones in the City, and that no permit or license of any type shall be issued for marijuana cultivation within the City's jurisdictional limits.

Currently, the City does not have any express regulations in the Zoning Ordinance governing medical marijuana or the cultivation of marijuana. The broad wording of the City's ban against activities that are not expressly permitted has historically been applied to prohibit or preclude these types of activities. Based on the new MMRSA statutory scheme, it is recommended that the City adopt express land use provisions under the Zoning Ordinance, in addition to the business regulations in the SMMC, as a comprehensive prohibition on the cultivation of marijuana so that it is clear that the State is not required by the City to act as the licensing authority under the MMRSA.

Proposed Zoning Regulations Governing Marijuana Cultivation

The proposed Resolution is intended to ratify the City's existing prohibition on marijuana cultivation under the SMMC, and further recommends that the City Council adopt an ordinance by way of interim urgency, urgency and regular course, to expressly prohibit marijuana cultivation in all zones within the City's jurisdiction. Section 20.205.030 of the SMMC identifies land uses that are prohibited within any zone in the City. These uses are prohibited outright and are not subject to the Planning Manager's discretion. The proposed Resolution will add "marijuana cultivation" to

this list, which will expressly prohibit marijuana cultivation on a City-wide basis. In addition, the text amendment includes revising Section 20.600.030 (definitions, agricultural/horticultural [land use]) to ensure there is no confusion that agricultural/horticultural uses do not include marijuana cultivation.

AB 243 requires local agencies that regulate or desire to regulate the cultivation of marijuana to enact an ordinance expressly regulating this type of activity. California courts have upheld various local regulations governing or prohibiting marijuana cultivation. In *County of Tulare v. Nunes* (2013), the Court of Appeal held that the CUA and the MMPA do not require Tulare County to define growing marijuana as an acceptable agricultural use of land. (215 Cal.App.4th 1188). Also in 2013, in *Browne v. County of Tehama*, the Court of Appeal found the MMPA did not preempt a local ordinance declaring that any cultivation of marijuana was a nuisance that could be abated. (213 Cal.App.4th 704). In *Maral v. City of Live Oak*, also decided in 2013, the Court of Appeal held that the CUA and the MMPA do not preempt a local agency's police power to prohibit the cultivation of all marijuana within that jurisdiction. (221 Cal.App.4th 975).

Regulations governing the cultivation of marijuana are necessary to protect the health, safety and welfare of the City. During the past five years, more than 40 cities and 25 counties in California have adopted ordinances that regulate or ban the cultivation of medical marijuana within their jurisdictions. It is anticipated that those numbers will increase significantly based on the recent MMRSA legislation. Several jurisdictions throughout the State have reported adverse effects and nuisance impacts relating to marijuana cultivation, including but not limited to the strong and potentially noxious odors associated with mature marijuana plants, damages to buildings in which cultivation occurs and inadequate ventilation, the proximity of children to areas under cultivation, the visibility of grows from the public right-of-way, and an increase in crime, including home invasion robberies and similar crimes.

An express prohibition is necessary under the Zoning Ordinance because the City has a compelling interest in protecting the public health, safety and welfare of its residents and businesses, in preserving the peace and integrity of its neighborhoods, and in providing clear local regulation consistent with the requirements of Federal and State law.

If adopted by the City Council, the urgency Ordinance would take effect immediately. Government Code Section 36937 authorizes the City to adopt an urgency ordinance to immediately preserve the public peace, health and safety. If adopted, the interim urgency Ordinance would also take

effect immediately, but would only temporarily prohibit marijuana cultivation activities under the Zoning Ordinance for a period of forty-five (45) days from the date of adoption, and may be extended, if necessary. Government Code Section 65858 authorizes the City to adopt an ordinance on an interim urgency basis to protect the public safety, health and welfare. If adopted, the regular Ordinance would require a first and second reading. If the interim urgency Ordinance and/or the urgency Ordinance or any findings contained therein are challenged, the regular Ordinance would become effective in due course to prohibit marijuana cultivation in all zones within the City under the Zoning Ordinance.

Environmental Determination

The proposed Resolution has been reviewed for compliance with the California Environmental Quality Act (CEQA), and it has been determined that this is not a project within the meaning of Section 15378 of the CEQA Guidelines because there is no potential for it to result in a physical change in the environment, either directly or indirectly. Even if the proposed Resolution was considered a project subject to CEQA, it would be exempt from CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines because it can be seen with certainty that there is no possibility that the proposed amendment to the Zoning Code would have a significant effect on the environment.

Fiscal Impact

As the City currently prohibits medical marijuana cultivation, the proposed legislation is consistent with the prohibition under SMMC Chapter 5.54, and no fiscal impact is anticipated as a result of the proposed Resolution.

Attachment(s)

A RESOLUTION PC 16-4519: A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF SAN MARCOS RATIFYING EXISTING MEDICAL MARIJUANA REGULATIONS UNDER SAN MARCOS MUNICIPAL CODE CHAPTER 5.54 AND RECOMMENDING CITY COUNCIL APPROVAL OF AN INTERIM URGENCY ORDINANCE, URGENCY ORDINANCE AND REGULAR ORDINANCE TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE TO PROHIBIT THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

B ORDINANCE NO. 2015-1415, adopted by the City Council on January 12, 2015

C AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, IMPOSING A TEMPORARY MORATORIUM ON THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

D AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

E AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

Prepared by:

Wendy L. House, Deputy City Attorney

Reviewed by:

Karen Brindley, Planning Division Manager

Reviewed by:

Matt Little, Development Services Director/City Engineer

ATTACHMENT A

RESOLUTION PC 16-4519

RESOLUTION PC 16-4519

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF SAN MARCOS RATIFYING EXISTING MEDICAL MARIJUANA REGULATIONS UNDER SAN MARCOS MUNICIPAL CODE CHAPTER 5.54 AND RECOMMENDING CITY COUNCIL APPROVAL OF AN INTERIM URGENCY ORDINANCE, URGENCY ORDINANCE AND REGULAR ORDINANCE TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE TO PROHIBIT THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

Case No. P16-0003 (Text Amendment TA 16-001)

WHEREAS, on October 9, 2015, California Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills (AB) 243 and 266 and Senate Bill (SB) 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, on January 13, 2016, the Senate Governance and Finance Committee approved the medical marijuana cultivation clean-up measure, known as AB 21, to remove the March 1, 2016 deadline for local agencies to have cultivation regulations in place. However, it is unknown if AB 21 will become law prior to the current March 1, 2016 deadline, and therefore it is necessary to comply with the regulations as currently drafted; and

WHEREAS, on January 12, 2016, the San Marcos City Council adopted Ordinance No. 2015-1514, as attached, to amend Chapter 5.54 of the San Marcos Municipal Code (SMMC) to expressly prohibit the cultivation of marijuana, the delivery of marijuana and the processing of marijuana within the City of San Marcos (City) as business activities and uses; and

WHEREAS, Title 20 of the SMMC (Zoning Ordinance) does not currently provide for the express regulation of marijuana cultivation as a land use in the City of San Marcos; and

WHEREAS, based on the new MMRSA statutory scheme, it is recommended that the City adopt express land use provisions under the Zoning Ordinance, in addition to the business regulations under the SMMC, as a comprehensive prohibition on marijuana cultivation so that it is clear that the State is not required by the City to act as the licensing authority under the MMRSA; and

WHERAS, expressly prohibiting the cultivation of marijuana in all zones within the City as a land use activity under the Zoning Ordinance is necessary to protect and preserve the public peace, health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, the City desires to amend Section 20.205.030(D) (Prohibited Uses) of the Zoning Ordinance to expressly prohibit marijuana cultivation as a prohibited use in all zones within the City; and to amend Section 20.600.030 ("M" Definitions) of the Zoning Ordinance to add the definition of "marijuana cultivation (land use)"; and to amend Section 20.600.030 ("A" Definitions) of the Zoning Ordinance to expressly preclude marijuana cultivation from the definition of "agricultural/horticultural (land use)" as a permitted land use.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Commission of the City of San Marcos, as follows:

Section 1. Recitals. The foregoing recitals are true and correct.

Section 2. Prohibition of Marijuana Cultivation under the Zoning Ordinance. The Planning Commission hereby recommends to the City Council for approval the attached interim urgency Ordinance, urgency Ordinance and regular Ordinance amending Title 20 of the Zoning Ordinance to read as shown in blacklined underlined additions, as follows:

CHAPTER 20.205 LAND USE AND DEVELOPMENT APPROVAL

Section 20.205.030 General Requirements

D. **Prohibited Uses.** For the purpose of conserving public health, safety, and general welfare, land uses listed in this section are prohibited within any Zone in the City. These uses shall be prohibited outright and not subject to the Director's discretion. The City is a community in the larger North County area and within the San Diego County metropolitan region, which comprises a broader economic area for industry and commerce. The combination of San Diego County's zoning requirements and the zoning requirements of the various cities within the county provide full provision for all types of uses necessary for development. The following land uses and business activities are prohibited in all Zones within the City:

- Automotive wrecking yards
- Hookah retailers or lounges
- Salvage and scrap yards

- Swap meets
- Marijuana cultivation

CHAPTER 20.600 DEFINITIONS

Section 20.600.030 "M" Definitions

Marijuana cultivation (land use). The planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

Section 20.600.030 "A" Definitions

Agricultural/Horticultural (land use). The growing of any horticulture or agricultural of crops, or the raising of animals, as further defined below in conjunction with a residential or agricultural use, subject to the regulations of the applicable Zone and chapters 20.210 (Agricultural Zones) and 20.415 (Animals). Does not include marijuana cultivation, which is a prohibited use under Section 20.205.030D.

1. Non-Commercial. This includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs. Raising of animals is not permitted within this land use.
2. Commercial. This includes commercial and wholesale greenhouses and nurseries for the production of vines, trees, and other horticultural stock.
3. Processing and Packaging. The on-site processing and packing of any horticulture or agricultural of crops, including animals, in conjunction with an agricultural use, subject to the regulations of the applicable Zone, chapters 20.210 (Agricultural Zones) and 20.415 (Animals), and the conditions of the required CUP.
4. Plans and Crops Wholesale Production. Includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs for wholesale distribution on a residential lot.

Section 3. Findings and Purpose. The Planning Commission's decision is based upon the following findings and determinations:

(a) The Zoning Ordinance does not currently provide for the regulation of marijuana cultivation as a land use in the City; and

(b) The Planning Commission has read and reviewed Ordinance No. 2015-1415 approved by the City Council on January 12, 2016, and further ratifies it. The Planning Commission believes the revisions to SMMC Chapter 5.54 would make appropriate findings for permitted land uses by businesses in the City; and

(c) During the past five years, more than 40 cities and 25 counties in California have adopted ordinances that regulate or ban the cultivation of medical marijuana within their jurisdictions. It is anticipated that those numbers will increase significantly based on the recent MMRSA legislation; and

(d) Several jurisdictions throughout the State have reported adverse effects and nuisance impacts relating to marijuana cultivation, including but not limited to the strong and potentially noxious odors associated with mature marijuana plants, damage to and inadequate ventilation in buildings in which cultivation occurs, the proximity of children to areas under cultivation, the visibility of grow from the public right-of-way, and an increase in crime, including home invasion robberies and similar crimes; and

(e) California courts have upheld various local regulations governing or prohibiting marijuana cultivation. In *County of Tulare v. Nunes* (2013), the Court of Appeal held that the CUA and the MMPA do not require Tulare County to define growing marijuana as an acceptable agricultural use of land. (215 Cal.App.4th 1188). Also in 2013, in *Browne v. County of Tehama*, the Court of Appeal found the MMPA did not preempt a local ordinance declaring that any cultivation of marijuana was a nuisance that could be abated. (213 Cal.App.4th 704). In *Maral v. City of Live Oak*, also decided in 2013, the Court of Appeal held that the CUA and the MMPA do not preempt a local agency's police power to prohibit the cultivation of all marijuana within the jurisdiction. (221 Cal.App.4th 975); and

(f) Adopting an ordinance expressly prohibiting the cultivation of marijuana within all zones in the City's jurisdictional boundaries is necessary to protect and preserve the public peace, health, safety and welfare, to prevent adverse impacts that such activities might have on nearby properties and residents, and to comply with the current deadline requirements under the MMRSA; and

(g) This is not a project within the meaning of Section 15378 of the California Environmental Quality Act (CEQA) Guidelines because there is no potential for it to result in a physical change in the environment, either directly or indirectly. In the event this Resolution is found to be subject to CEQA, it is exempt from CEQA pursuant to the exemption

contained in CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that there is no possibility of a significant effect on the environment.

PASSED AND ADOPTED by the Planning Commission of the City of San Marcos, at a regular meeting held on this 1st day of February, 2016, by the following roll call vote:

AYES:	COMMISSIONERS:
NOES:	COMMISSIONERS:
ABSENT:	COMMISSIONERS:
ABSTAIN:	COMMISSIONERS:

APPROVED:

_____
Eric Flodine, Chairman

ATTEST:

_____
Lisa Kiss, Office Specialist III

ATTACHMENT B

ORDINANCE NO. 2015-1415, adopted by the City Council on January 12, 2015

ORDINANCE NO. 2015-1415

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, AMENDING CHAPTER 5.54 OF THE SAN MARCOS MUNICIPAL CODE TO PROHIBIT THE CULTIVATION OF MARIJUANA, THE DELIVERY OF MARIJUANA, THE PROCESSING OF MARIJUANA AND ALL ASSOCIATED BUSINESS AND OPERATIONAL ACTIVITIES, AS BUSINESSES WITHIN THE CITY OF SAN MARCOS

WHEREAS, Congress passed the Federal Controlled Substances Act (CSA) in 1970, which prohibits the manufacture, cultivation, distribution and possession of marijuana and classifies it as a Schedule 1 drug meaning it has no accepted medical value in treatment; and

WHEREAS, California law generally makes it a crime to possess and cultivate marijuana under Health and Safety (H&S) Code Sections 11357 and 11358, respectively; and

WHEREAS, California voters approved Proposition 215 (Health and Safety Code Sections 11362.5 et seq.), entitled the Compassionate Use Act (CUA), in 1996, for which the intent was to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempted patients and their primary caregivers from criminal prosecution or sanctions under H&S Code Sections 11357 and 11358; and

WHEREAS, the California Legislature passed Senate Bill 420 (H&S Code Sections 11362.7 et seq.) in 2003 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients; set limits on the amount of marijuana any individual could possess; and provided an exemption from State criminal liability for persons "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes"; and

WHEREAS, although State law creates a limited affirmative defense to criminal prosecution for qualified patients and their primary caregivers, the operation of medical marijuana dispensaries as for profit is expressly prohibited, and it is difficult to determine whether or not a dispensary is operating for profit; and

WHEREAS, the United States Supreme Court has continuously held that marijuana, including medical marijuana, violates Federal law under the CSA. In 2001, the Court held in *United States v. Oakland Cannabis Buyers Cooperative, et al.* that there was no "medical necessity" defense under the CSA, and therefore a medical marijuana dispensary could be enjoined from distribution and manufacturing. In 2005, the Court held in *Gonzalez v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. The significance of the *Raich* decision is that Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or use marijuana for medical purposes; and

WHEREAS, on October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which goes into effect on January 1, 2016, and establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills 243 and 266 and Senate Bill 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana and/or the delivery of medical marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, in 2006, the City added Chapter 5.54 to the San Marcos Municipal Code (SMMC) to prohibit the establishment of medical marijuana dispensaries in all zones within the City's jurisdictional limits; and

WHEREAS, Title 20 of the SMMC (the City's Zoning Ordinance) expressly provides that uses which are not specifically permitted are prohibited. As medical marijuana dispensaries are not permitted by right or with a conditional use permit, they are prohibited; and

WHEREAS, because the SMMC does not currently expressly and separately prohibit the cultivation of marijuana, the delivery of marijuana, or the processing of marijuana within the City of San Marcos, Chapter 5.54 has historically been applied to prohibit or preclude these types of activities; and

WHEREAS, prohibiting the cultivation of marijuana, the delivery of marijuana, and the processing of marijuana within the City as business activities and uses is necessary to protect the health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, in 2010, the Fourth District Court of Appeal noted in *Qualified Patients Association v. City of Anaheim* that criminal enforcement actions involving medical marijuana dispensaries appears to be inconsistent with the CUA and the MMPA. As a result, the City amended SMMC Chapter 5.54 to expressly provide that the City will initiate only civil enforcement actions and remedies concerning violations of the SMMC involving medical marijuana dispensaries. That case has since been superseded, and the deletion of Section 5.54.030 in its current form will allow the City to criminally enforce any violations of Chapter 5.54, when warranted; and

WHEREAS, the City desires to amend Chapter 5.54 of the SMMC to prohibit the cultivation marijuana in all zones within the City's jurisdictional boundaries and to prohibit marijuana delivery and processing and any and all associated services, operational activities and businesses, as businesses within the City; and to delete Section 5.54.030 to allow the City to enforce violations of Chapter 5.54 by criminal enforcement when warranted.

NOW, THEREFORE, the City Council of the City of San Marcos, California, in accordance with the freedom afforded to charter cities generally, and by the Charter of the City of San Marcos specifically, does ordain as follows:

Section 1. The San Marcos Municipal Code is hereby amended to read as shown in blacklined underlined additions and strikeouts, as follows:

CHAPTER 5.54

MEDICAL MARIJUANA

SECTIONS:

5.54.010	**Definitions**
5.54.020	**Medical Marijuana Dispensaries as a Prohibited Use and/or Activity**
5.54.030	**Cultivation of Marijuana as a Prohibited Use and/or Activity**
5.54.040	**Delivery of Marijuana as a Prohibited Use and/or Activity**
5.54.050	**Processing of Marijuana as a Prohibited Use and/or Activity**

5.54.010 Definitions.

(a) **"Medical Marijuana Dispensary"** or **"Dispensary"** means any facility or location, whether fixed or mobile, where medical marijuana is made available to or distributed by or distributed to one (1) or more of the following: a primary caregiver, a qualified patient, or a patient with an identification card. All three of these terms are identified in strict accordance with California Health and Safety Code Section 11362.5 et. seq. A "medical marijuana dispensary" shall not include the following uses, as long as the location of such uses is otherwise regulated by this code or applicable law, a clinic licensed pursuant to Chapter 1 of Division 2 of the Health and Safety Code, a healthcare facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code, a residential care facility for persons with chronic life- threatening illnesses licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code, a residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health and Safety Code, a residential hospice, or a home health agency licensed pursuant to Chapter 8 of Division 2 of the Health and Safety Code, as long as such use complies strictly with applicable law, including but not limited to, Health and Safety Code Section 11362.5 et seq., and the San Marcos Municipal Code, including but not limited to, the City's Zoning Code. **(Ord. No. 2006-1265, 2/28/06)**

(b) **"Marijuana Cultivation" or "Cultivation"** means the planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

(c) **"Marijuana Delivery" or "Delivery"** means the commercial delivery, transfer or transport, or arranging for the delivery, transfer or transport, or the use of any technology platform to arrange for

or facilities the commercial delivery, transfer or transport of marijuana, marijuana edibles, and/or any marijuana products to or from any location within the jurisdictional limits of the City of San Marcos, and any and all associated business and/or operational activities.

(d) **"Marijuana Processing" or "Processing"** means any method used to prepare marijuana, marijuana edibles and/or marijuana byproducts for commercial retail and/or wholesale sales, including, but not limited to: cleaning, curing, preparation, laboratory testing, manufacturing, packaging, and extraction of active ingredients to create marijuana related products and concentrates.

5.54.020 Medical Marijuana Dispensaries as a Prohibited Use and/or Activity. A medical marijuana dispensary as defined in Section 5.54.010 is prohibited in all zones within the city's jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such use. **(Ord. No. 2006-1265, 2/28/06)**

5.54.030 Cultivation of Marijuana as a Prohibited Use and/or Activity. Marijuana Cultivation by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in all zones within the City's jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Cultivation that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, make legal any Cultivation activity that is otherwise prohibited under California law. Nothing in this Chapter is intended to, nor shall it be construed to, preclude any landlord from limiting or prohibiting Marijuana Cultivation by its tenants.

5.54.040 Delivery of Marijuana as a Prohibited Use and/or Activity. Marijuana Delivery by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in the City. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Delivery that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, make legal any Delivery activity that is otherwise prohibited under California law.

5.54.050 Processing of Marijuana as a Prohibited Use and/or Activity. Marijuana Processing by any person or entity, including, but not limited to, clinics, collectives, cooperatives and dispensaries, is prohibited in all zones within the City's jurisdictional limits. No permit, whether conditional or otherwise, shall be issued for the establishment of such activity. Any Processing that takes place in violation of any provision of this Chapter is unlawful, and is hereby declared a public nuisance. Nothing in this Chapter is intended to, nor shall it be construed to, preclude any landlord from limiting or prohibiting Marijuana Processing by its tenants.

Section 2. The foregoing recitals are true and correct.

Section 3. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the

fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 4. This Ordinance shall be effective thirty (30) days following its adoption. Within fifteen (15) days following its adoption, the City Clerk shall publish this Ordinance, or the title thereof, as a summary as required by state law.

Section 5. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published in accordance with the provisions of state law in a newspaper of general circulation designated for legal notices publication in the City of San Marcos.

INTRODUCED at a regular meeting of the City Council of the City of San Marcos held on the 8th day of December, 2015; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos, California, held on the 12th day of January, 2016, by the following roll call vote:

AYES: COUNCILMEMBERS: JABARA, JENKINS, JONES, ORLANDO, DESMOND
NOES: COUNCILMEMBERS: NONE
ABSENT: COUNCILMEMBERS: NONE

APPROVED:

James M. Desmond, Mayor
City of San Marcos

ATTEST:

Phillip Scollick, City Clerk
City of San Marcos

APPROVED AS TO FORM:

Helen Holmes Peak, City Attorney
City of San Marcos

ATTACHMENT C

AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, IMPOSING A TEMPORARY MORATORIUM ON THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

ORDINANCE NO. 2016-_____

AN INTERIM URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, IMPOSING A TEMPORARY MORATORIUM ON THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

WHEREAS, Congress passed the Federal Controlled Substances Act (CSA) in 1970, which prohibits the manufacture, cultivation, distribution and possession of marijuana and classifies it as a Schedule 1 drug meaning it has no accepted medical value in treatment; and

WHEREAS, California law generally makes it a crime to possess and cultivate marijuana under Health and Safety (H&S) Code Sections 11357 and 11358, respectively; and

WHEREAS, California voters approved Proposition 215 (Health and Safety Code Sections 11362.5 et seq.), entitled the Compassionate Use Act (CUA), in 1996, for which the intent was to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempted patients and their primary caregivers from criminal prosecution or sanctions under H&S Code Sections 11357 and 11358; and

WHEREAS, the California Legislature passed Senate Bill 420 (H&S Code Sections 11362.7 et seq.) in 2003 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients; set limits on the amount of marijuana any individual could possess; and provided an exemption from State criminal liability for persons "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes"; and

WHEREAS, the United States Supreme Court has continuously held that marijuana, including medical marijuana, violates Federal law under the CSA. In 2001, the Court held in *United States v. Oakland Cannabis Buyers Cooperative, et al.* that there was no "medical necessity" defense under the CSA, and therefore a medical marijuana dispensary could be enjoined from distribution and manufacturing. In 2005, the Court held in *Gonzalez v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. The significance of the *Raich* decision is that Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or use marijuana for medical purposes; and

WHEREAS, on October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills (AB) 243 and 266 and Senate Bill (SB) 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, in 2006, the City added Chapter 5.54 to the San Marcos Municipal Code (SMMC) to prohibit the establishment of medical marijuana dispensaries in all zones within the City's jurisdictional limits, and on January 12, 2016, the City amended Chapter 5.54 to expressly and separately prohibit the cultivation of marijuana, the delivery of marijuana, and the processing of marijuana within the City as business activities and uses; and

WHEREAS, Title 20 of the SMMC (Zoning Ordinance) does not currently expressly prohibit the cultivation of marijuana, but expressly provides that uses which are not specifically permitted are prohibited; and

WHEREAS, expressly prohibiting the cultivation of marijuana as a land use activity under the Zoning Ordinance is necessary to immediately protect the health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, the City desires to amend Section 20.205.030(D) (Prohibited Uses) of the Zoning Ordinance to expressly prohibit marijuana cultivation as a prohibited use in all zones within the City; and to amend Section 20.600.030 ("M" Definitions) of the Zoning Ordinance to add the definition of "marijuana cultivation (land use)"; and to amend Section 20.600.030 ("A" Definitions) of the Zoning Ordinance to expressly preclude marijuana cultivation from the definition of "agricultural/horticultural (land use)" as a permitted land use; and

WHEREAS, on February 1, 2016, the Planning Commission held a duly noticed public hearing on the subject request and recommended approval of the Ordinance.

NOW, THEREFORE, the City Council of the City of San Marcos, California, in accordance with the freedom afforded to charter cities generally, and by the Charter of the City of San Marcos specifically, and pursuant to Government Code Section 65858, does ordain as follows:

Section 1. Recitals. The foregoing recitals are true and correct.

Section 2. Definition of "Marijuana Cultivation" or "Cultivation". For purposes of this Ordinance, the term "marijuana cultivation" or "cultivation" means the planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

Section 3. Findings and Purpose. The adoption of this interim urgency Ordinance is necessary for the immediate protection of the public safety, health and welfare. Pursuant to Government Code Section 65858 and to protect the public safety, health and welfare, the City Council finds and declares that:

(a) On October 9, 2015, Governor Brown approved the MMRSA, which goes into effect on January 1, 2016. The MMRSA is a series of three legislative bills that establish a comprehensive State licensing and regulatory framework for, among other things, the cultivation of marijuana. The MMRSA includes AB 243, which establishes a statewide regulatory and licensing structure for marijuana cultivation sites. Unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits marijuana cultivation, these activities will be permitted and regulated by the State; and

(b) On January 13, 2016, the Senate Governance and Finance Committee approved the medical marijuana cultivation clean-up measure, known as AB 21, to remove the March 1, 2016 deadline for local agencies to have cultivation regulations in place. However, it is unknown if AB 21 will become law prior to the current March 1, 2016 deadline, and therefore it is necessary to adopt this Ordinance on an urgency basis; and

(c) The Zoning Ordinance does not currently provide for the regulation of marijuana cultivation as a land use in the City of San Marcos. Based on the new MMRSA statutory scheme, it is recommended that local agencies adopt express land use provisions under zoning codes, in addition to the business regulations adopted under municipal codes, as a comprehensive prohibition on marijuana cultivation so that it is clear that the State is not required by the City to act as the licensing authority under the MMRSA; and

(d) California courts have upheld various local regulations governing or prohibiting marijuana cultivation. In *County of Tulare v. Nunes* (2013), the Court of Appeal held that the CUA and the MMPA do not require Tulare County to define growing marijuana as an acceptable agricultural use of land. (215 Cal.App.4th 1188). Also in 2013, in *Browne v. County of Tehama*, the Court of Appeal found the MMPA did not preempt a local ordinance declaring that any cultivation of marijuana was a nuisance that could be abated. (213 Cal.App.4th 704). In *Maral v. City of Live Oak*, also decided in 2013, the Court of Appeal held that the CUA and the MMPA do not preempt a local agency's police power to prohibit the cultivation of all marijuana within the jurisdiction. (221 Cal.App.4th 975); and

(e) During the past five years, more than 40 cities and 25 counties in California have adopted ordinances that regulate or ban the cultivation of medical marijuana within their jurisdictions. It is anticipated that those numbers will increase significantly based on the recent MMRSA legislation; and

(f) Prohibiting the cultivation of marijuana as a land use under the Zoning Ordinance is necessary to protect the health, safety and welfare of the City. Several jurisdictions throughout the State have reported adverse effects and nuisance impacts relating to marijuana cultivation, including but not limited to the strong and potentially noxious odors associated with mature marijuana plants, damage to and inadequate ventilation in buildings in which cultivation occurs, the proximity of children to areas under cultivation, the visibility of grows from the public right-of-way, and an increase in crime, including home invasion robberies and similar crimes; and

(g) As an urgency measure to protect and preserve the public welfare, California Government Code Section 65858 authorizes local governments to adopt an interim urgency ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission, or planning department is considering, studying or intends to study within a reasonable time; and

(h) It is necessary for the City to impose a temporary moratorium prohibiting the cultivation of marijuana within all zones in the City's jurisdictional boundaries to provide time for the City to study potential impacts that these activities may have on the public welfare, minimize any negative effects these activities might have on nearby businesses, property owners and the residents of the City, and to preserve the public welfare.

Section 4. Temporary Moratorium Established. For the reasons described above, the City Council has determined it is necessary to enact an interim urgency ordinance imposing a temporary moratorium on the cultivation of marijuana within all zones in the City of San Marcos pursuant to Government Code Section 65858.

The City has a compelling interest in protecting the public health, safety and welfare of its residents and businesses, in preserving the peace and integrity of its neighborhoods, and in providing clear local regulation consistent with the requirements of Federal and State law. The adoption of this Ordinance is necessary on an urgency basis because of the current and immediate threat marijuana cultivation and the approval of any land use entitlements for these activities pose to the public health, safety and welfare if regulated by the State under the MMRSA.

No permit or other applicable license or entitlement for use, including but not limited to the issuance of a business license, building permit, conditional use permit, or other land use approval, shall be approved and/or issued for the cultivation of marijuana within any zone in the jurisdictional limits of the City.

Section 5. Consistency with the SMMC. Any provision of the SMMC that is inconsistent with any provision of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified only to the extent necessary to effect the provisions of this Ordinance. The City Council expressly finds that SMMC Chapter 5.54 is not inconsistent with this Ordinance.

Section 6. Severability. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 7. Effective Date. This Ordinance shall take effect immediately upon adoption as an urgency measure. The temporary moratorium shall be of no further force and effect forty five (45) days from the date of the adoption of this Ordinance, unless, prior to its expiration, following a noticed public hearing in accordance with Government Code Section 65090, the City Council extends the Ordinance pursuant to Government Code Section 65858.

Section 8. Publication. Within fifteen (15) days following the adoption of this Ordinance, the City Clerk shall publish this Ordinance, or the title thereof, as a summary as required by State law.

PASSED, APPROVED AND ADOPTED AS AN INTERIM URGENCY ORDINANCE at a regular meeting of the City Council of the City of San Marcos held on the 23rd day of February, 2016, by the following roll call vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

APPROVED:

_____
James M. Desmond, Mayor
City of San Marcos

ATTEST:

_____
Phillip Scollick, City Clerk
City of San Marcos

APPROVED AS TO FORM:

_____
Helen Holmes Peak, City Attorney
City of San Marcos

ATTACHMENT D

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

ORDINANCE NO. 2016-_____

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

WHEREAS, Congress passed the Federal Controlled Substances Act (CSA) in 1970, which prohibits the manufacture, cultivation, distribution and possession of marijuana and classifies it as a Schedule 1 drug meaning it has no accepted medical value in treatment; and

WHEREAS, California law generally makes it a crime to possess and cultivate marijuana under Health and Safety (H&S) Code Sections 11357 and 11358, respectively; and

WHEREAS, California voters approved Proposition 215 (Health and Safety Code Sections 11362.5 et seq.), entitled the Compassionate Use Act (CUA), in 1996, for which the intent was to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempted patients and their primary caregivers from criminal prosecution or sanctions under H&S Code Sections 11357 and 11358; and

WHEREAS, the California Legislature passed Senate Bill 420 (H&S Code Sections 11362.7 et seq.) in 2003 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients; set limits on the amount of marijuana any individual could possess; and provided an exemption from State criminal liability for persons "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes"; and

WHEREAS, the United States Supreme Court has continuously held that marijuana, including medical marijuana, violates Federal law under the CSA. In 2001, the Court held in *United States v. Oakland Cannabis Buyers Cooperative, et al.* that there was no "medical necessity" defense under the CSA, and therefore a medical marijuana dispensary could be enjoined from distribution and manufacturing. In 2005, the Court held in *Gonzalez v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. The significance of the *Raich* decision is that Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or use marijuana for medical purposes; and

WHEREAS, on October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills (AB) 243 and 266 and Senate Bill (SB) 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, in 2006, the City added Chapter 5.54 to the San Marcos Municipal Code (SMMC) to prohibit the establishment of medical marijuana dispensaries in all zones within the City's jurisdictional limits, and on January 12, 2016, the City amended Chapter 5.54 to expressly and separately prohibit the cultivation of marijuana, the delivery of marijuana, and the processing of marijuana within the City as business activities and uses; and

WHEREAS, Title 20 of the SMMC (Zoning Ordinance) does not currently expressly prohibit the cultivation of marijuana, but expressly provides that uses which are not specifically permitted are prohibited; and

WHEREAS, expressly prohibiting the cultivation of marijuana as a land use activity under the Zoning Ordinance is necessary to protect the health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, the City desires to amend Section 20.205.030(D) (Prohibited Uses) of the Zoning Ordinance to expressly prohibit marijuana cultivation as a prohibited use in all zones within the City; and to amend Section 20.600.030 ("M" Definitions) of the Zoning Ordinance to add the definition of "marijuana cultivation (land use)"; and to amend Section 20.600.030 ("A" Definitions) of the Zoning Ordinance to expressly preclude marijuana cultivation from the definition of "agricultural/horticultural (land use)" as a permitted land use; and

WHEREAS, on February 1, 2016, the Planning Commission held a duly noticed public hearing on the subject request and recommended approval of the Ordinance.

NOW, THEREFORE, the City Council of the City of San Marcos, California, in accordance with the freedom afforded to charter cities generally, and by the Charter of the City of San Marcos specifically, does ordain as follows:

Section 1. Recitals. The foregoing recitals are true and correct.

Section 2. Prohibition of Marijuana Cultivation under the Zoning Ordinance. Title 20 of the San Marcos Municipal Code (Zoning Ordinance) is hereby amended to read as shown in blacklined underlined additions, as follows:

CHAPTER 20.205 LAND USE AND DEVELOPMENT APPROVAL

Section 20.205.030 General Requirements

D. **Prohibited Uses.** For the purpose of conserving public health, safety, and general welfare, land uses listed in this section are prohibited within any Zone in the City. These uses shall be prohibited outright and not subject to the Director's discretion. The City is a community in the larger North County area and within the San Diego County metropolitan region, which comprises a broader economic area for industry and commerce. The combination of San Diego County's zoning requirements and the zoning requirements of the various cities within the county provide full provision for all types of uses necessary for development. The following land uses and business activities are prohibited in all Zones within the City:

- Automotive wrecking yards
- Hookah retailers or lounges
- Salvage and scrap yards
- Swap meets
- Marijuana cultivation

CHAPTER 20.600 DEFINITIONS

Section 20.600.030 "M" Definitions

Marijuana cultivation (land use). The planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

Section 20.600.030 "A" Definitions

Agricultural/Horticultural (land use). The growing of any horticulture or agricultural of crops, or the raising of animals, as further defined below in conjunction with a

residential or agricultural use, subject to the regulations of the applicable Zone and chapters 20.210 (Agricultural Zones) and 20.415 (Animals). Does not include marijuana cultivation, which is a prohibited use under Section 20.205.030D.

1. Non-Commercial. This includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs. Raising of animals is not permitted within this land use.
2. Commercial. This includes commercial and wholesale greenhouses and nurseries for the production of vines, trees, and other horticultural stock.
3. Processing and Packaging. The on-site processing and packing of any horticulture or agricultural of crops, including animals, in conjunction with an agricultural use, subject to the regulations of the applicable Zone, chapters 20.210 (Agricultural Zones) and 20.415 (Animals), and the conditions of the required CUP.
4. Plans and Crops Wholesale Production. Includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs for wholesale distribution on a residential lot.

Section 3. Findings and Purpose. The adoption of this urgency Ordinance is necessary for the immediate protection of the public peace, health and safety. Pursuant to Government Code Section 36937 and to protect the public peace, health and safety, the City Council finds and declares that:

(a) On October 9, 2015, Governor Brown approved the MMRSA, which goes into effect on January 1, 2016. The MMRSA is a series of three legislative bills that establish a comprehensive State licensing and regulatory framework for, among other things, the cultivation of marijuana. The MMRSA includes AB 243, which establishes a statewide regulatory and licensing structure for marijuana cultivation sites. Unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits marijuana cultivation, these activities will be permitted and regulated by the State; and

(b) On January 13, 2016, the Senate Governance and Finance Committee approved the medical marijuana cultivation clean-up measure, known as AB 21, to remove the March 1, 2016 deadline for local agencies to have cultivation regulations in place. However, it is unknown if AB 21 will become law prior to the current March 1, 2016 deadline, and therefore it is necessary to adopt this Ordinance on an urgency basis; and

(c) The Zoning Ordinance does not currently provide for the regulation of marijuana cultivation as a land use in the City of San Marcos. Based on the new

MMRSA statutory scheme, it is recommended that local agencies adopt express land use provisions under zoning codes, in addition to the business regulations adopted under municipal codes, as a comprehensive prohibition on marijuana cultivation so that it is clear that the State is not required by the City to act as the licensing authority under the MMRSA; and

(d) California courts have upheld various local regulations governing or prohibiting marijuana cultivation. In *County of Tulare v. Nunes* (2013), the Court of Appeal held that the CUA and the MMPA do not require Tulare County to define growing marijuana as an acceptable agricultural use of land. (215 Cal.App.4th 1188). Also in 2013, in *Browne v. County of Tehama*, the Court of Appeal found the MMPA did not preempt a local ordinance declaring that any cultivation of marijuana was a nuisance that could be abated. (213 Cal.App.4th 704). In *Maral v. City of Live Oak*, also decided in 2013, the Court of Appeal held that the CUA and the MMPA do not preempt a local agency's police power to prohibit the cultivation of all marijuana within the jurisdiction. (221 Cal.App.4th 975); and

(e) During the past five years, more than 40 cities and 25 counties in California have adopted ordinances that regulate or ban the cultivation of medical marijuana within their jurisdictions. It is anticipated that those numbers will increase significantly based on the recent MMRSA legislation; and

(f) Prohibiting the cultivation of marijuana as a land use under the Zoning Ordinance is necessary to protect the public peace, health and safety of the City. Several jurisdictions throughout the State have reported adverse effects and nuisance impacts relating to marijuana cultivation, including but not limited to the strong and potentially noxious odors associated with mature marijuana plants, damage to and inadequate ventilation in buildings in which cultivation occurs, the proximity of children to areas under cultivation, the visibility of grow from the public right-of-way, and an increase in crime, including home invasion robberies and similar crimes; and

(g) Government Code Section 63937 authorizes local governments to adopt an urgency ordinance for the immediate preservation of the public peace, health or safety; and

(h) It is necessary for the City to prohibit the cultivation of marijuana within all zones in the City's jurisdictional boundaries to protect and preserve the public peace, health and safety and to comply with the current deadline requirements under the MMRSA.

Section 4. Severability. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 5. Effective Date. This Ordinance shall take effect immediately upon adoption as an urgency measure.

Section 6. Publication. Within fifteen (15) days following the adoption of this Ordinance, the City Clerk shall publish this Ordinance, or the title thereof, as a summary as required by State law.

PASSED, APPROVED AND ADOPTED AS AN URGENCY ORDINANCE at a regular meeting of the City Council of the City of San Marcos held on the 23rd day of February, 2016, by the following roll call vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

APPROVED:

_____
James M. Desmond, Mayor
City of San Marcos

ATTEST:

_____
Phillip Scollick, City Clerk
City of San Marcos

APPROVED AS TO FORM:

_____
Helen Holmes Peak, City Attorney
City of San Marcos

ATTACHMENT E

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) AND 20.600.030 OF TITLE 20 OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

ORDINANCE NO. 2016-_____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, TO AMEND SECTION 20.205.030(D) OF THE SAN MARCOS MUNICIPAL CODE PROHIBITING THE CULTIVATION OF MARIJUANA IN ALL ZONES WITHIN THE CITY OF SAN MARCOS

WHEREAS, Congress passed the Federal Controlled Substances Act (CSA) in 1970, which prohibits the manufacture, cultivation, distribution and possession of marijuana and classifies it as a Schedule 1 drug meaning it has no accepted medical value in treatment; and

WHEREAS, California law generally makes it a crime to possess and cultivate marijuana under Health and Safety (H&S) Code Sections 11357 and 11358, respectively; and

WHEREAS, California voters approved Proposition 215 (Health and Safety Code Sections 11362.5 et seq.), entitled the Compassionate Use Act (CUA), in 1996, for which the intent was to ensure that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. The CUA also exempted patients and their primary caregivers from criminal prosecution or sanctions under H&S Code Sections 11357 and 11358; and

WHEREAS, the California Legislature passed Senate Bill 420 (H&S Code Sections 11362.7 et seq.) in 2003 to create the Medical Marijuana Program (MMPA), which established a voluntary program for the issuance of medical marijuana identification cards for qualified patients; set limits on the amount of marijuana any individual could possess; and provided an exemption from State criminal liability for persons "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes"; and

WHEREAS, the United States Supreme Court has continuously held that marijuana, including medical marijuana, violates Federal law under the CSA. In 2001, the Court held in *United States v. Oakland Cannabis Buyers Cooperative, et al.* that there was no "medical necessity" defense under the CSA, and therefore a medical marijuana dispensary could be enjoined from distribution and manufacturing. In 2005, the Court held in *Gonzalez v. Raich* that the Commerce Clause authorizes Congress to prohibit the cultivation or use of marijuana for medical purposes permitted by California law. The significance of the *Raich* decision is that Federal law enforcement agents may continue to enforce Federal drug laws against Californians who cultivate or use marijuana for medical purposes; and

WHEREAS, California courts have upheld various local regulations governing or prohibiting marijuana cultivation. In *County of Tulare v. Nunes* (2013), the Court of Appeal held that the CUA and the MMPA do not require Tulare County to define growing marijuana as an acceptable agricultural use of land. (215 Cal.App.4th 1188). Also in 2013, in *Browne v. County of Tehama*, the Court of Appeal found the MMPA did not preempt a local ordinance declaring that any cultivation of marijuana was a nuisance that could be abated. (213 Cal.App.4th 704). In *Maral v. City of Live Oak*, also decided in 2013, the Court of Appeal held that the CUA and the MMPA do not preempt a local agency's police power to prohibit the cultivation of all marijuana within the jurisdiction. (221 Cal.App.4th 975); and

WHEREAS, on October 9, 2015, Governor Brown approved the Medical Marijuana Regulation and Safety Act (MMRSA), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical marijuana through Assembly Bills (AB) 243 and 266 and Senate Bill (SB) 643; and

WHEREAS, according to the provisions of the MMRSA, unless local agencies have a land use ordinance in place by March 1, 2016 that expressly regulates or prohibits the cultivation of marijuana within their jurisdictions, these activities will be permitted and regulated by the State under the MMRSA; and

WHEREAS, on January 13, 2016, the Senate Governance and Finance Committee approved the medical marijuana cultivation clean-up measure, known as AB 21, to remove the March 1, 2016 deadline for local agencies to have cultivation regulations in place. However, it is unknown if AB 21 will become law prior to the current March 1, 2016 deadline, and therefore it is necessary to comply with the regulations as currently drafted; and

WHEREAS, in 2006, the City added Chapter 5.54 to the San Marcos Municipal Code (SMMC) to prohibit the establishment of medical marijuana dispensaries in all zones within the City's jurisdictional limits, and on January 12, 2016, the City amended Chapter 5.54 to expressly and separately prohibit the cultivation of marijuana, the delivery of marijuana, and the processing of marijuana within the City as business activities and uses; and

WHEREAS, Title 20 of the SMMC (Zoning Ordinance) does not currently provide for the regulation of marijuana cultivation as a land use in the City of San Marcos. Based on the new MMRSA statutory scheme, it is recommended that local agencies adopt express land use provisions under their zoning codes, in addition to the business regulations adopted under municipal codes, as a comprehensive prohibition on marijuana cultivation so that it is clear that the State

is not required by the City to act as the licensing authority in their jurisdictions under the MMRSA; and

WHEREAS, expressly prohibiting the cultivation of marijuana in all zones within the City as a land use activity under the Zoning Ordinance is necessary to protect and preserve the public peace, health, safety and welfare of the community, and to prevent adverse impacts that such activities may have on nearby properties and residents; and

WHEREAS, Several jurisdictions throughout the State have reported adverse effects and nuisance impacts relating to marijuana cultivation, including but not limited to the strong and potentially noxious odors associated with mature marijuana plants, damage to and inadequate ventilation in buildings in which cultivation occurs, the proximity of children to areas under cultivation, the visibility of grow from the public right-of-way, and an increase in crime, including home invasion robberies and similar crimes; and

WHEREAS, the City desires to amend Section 20.205.030(D) (Prohibited Uses) of the Zoning Ordinance to expressly prohibit marijuana cultivation as a prohibited use in all zones within the City; and to amend Section 20.600.030 ("M" Definitions) of the Zoning Ordinance to add the definition of "marijuana cultivation (land use)"; and to amend Section 20.600.030 ("A" Definitions) of the Zoning Ordinance to expressly preclude marijuana cultivation from the definition of "agricultural/horticultural (land use)" as a permitted land use; and

WHEREAS, on February 1, 2016, the Planning Commission held a duly noticed public hearing on the subject request and recommended approval of the Ordinance.

NOW, THEREFORE, the City Council of the City of San Marcos, California, in accordance with the freedom afforded to charter cities generally, and by the Charter of the City of San Marcos specifically, does ordain as follows:

Section 1. Recitals. The foregoing recitals are true and correct.

Section 2. Prohibition of Marijuana Cultivation under the Zoning Ordinance. Title 20 of the San Marcos Municipal Code (Zoning Ordinance) is hereby amended to read as shown in blacklined underlined additions and strikeouts, as follows:

CHAPTER 20.205 LAND USE AND DEVELOPMENT APPROVAL

Section 20.205.030 General Requirements

D. **Prohibited Uses.** For the purpose of conserving public health, safety, and general welfare, land uses listed in this section are prohibited within any Zone in the City. These uses shall be prohibited outright and not subject to the Director's discretion. The City is a community in the larger North County area and within the San Diego County metropolitan region, which comprises a broader economic area for industry and commerce. The combination of San Diego County's zoning requirements and the zoning requirements of the various cities within the county provide full provision for all types of uses necessary for development. The following land uses and business activities are prohibited in all Zones within the City:

- Automotive wrecking yards
- Hookah retailers or lounges
- Salvage and scrap yards
- Swap meets
- Marijuana cultivation

CHAPTER 20.600 DEFINITIONS

Section 20.600.030 "M" Definitions

Marijuana cultivation (land use). The planting, growing, harvesting, drying or processing of marijuana plants or any part thereof, and any and all associated business and/or operational activities.

Section 20.600.030 "A" Definitions

Agricultural/Horticultural (land use). The growing of any horticulture or agricultural of crops, or the raising of animals, as further defined below in conjunction with a residential or agricultural use, subject to the regulations of the applicable Zone and chapters 20.210 (Agricultural Zones) and 20.415 (Animals). Does not include marijuana cultivation, which is a prohibited use under Section 20.205.030 D.

1. Non-Commercial. This includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs. Raising of animals is not permitted within this land use.
2. Commercial. This includes commercial and wholesale greenhouses and nurseries for the production of vines, trees, and other horticultural stock.
3. Processing and Packaging. The on-site processing and packing of any horticulture or agricultural of crops, including animals, in conjunction with an

agricultural use, subject to the regulations of the applicable Zone, chapters 20.210 (Agricultural Zones) and 20.415 (Animals), and the conditions of the required CUP.

4. Plans and Crops Wholesale Production. Includes the raising of vegetables, flowers, fruit trees, nut trees, vines and ornamentals, and shrubs for wholesale distribution on a residential lot.

Section 3. Severability. If any section, sentence, clause or phrase of this Ordinance is determined to be invalid, illegal or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 4. Effective Date. This Ordinance shall be effective thirty (30) days following its adoption.

Section 5. Publication. Within fifteen (15) days following the adoption of this Ordinance, the City Clerk shall publish this Ordinance, or the title thereof, as a summary as required by State law.

INTRODUCED at a regular meeting of the City Council of the City of San Marcos held on the 23rd day of February, 2015; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos held on the _____ day of _____, 2016, by the following roll call vote:

AYES: COUNCILMEMBERS:
NOES: COUNCILMEMBERS:
ABSENT: COUNCILMEMBERS:

APPROVED:

_____
James M. Desmond, Mayor

City of San Marcos

ATTEST:

APPROVED AS TO FORM:

_____
Phillip Scollick, City Clerk
City of San Marcos

_____
Helen Holmes Peak, City Attorney
City of San Marcos