

1 CITY OF ALBANY ORDINANCE NO. 2011-08

2 AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ALBANY AMENDING THE  
3 ALBANY MUNICIPAL CODE BY REPEALING CHAPTER 20.20.110, IN ITS ENTIRETY RELATING  
4 TO MEDICAL MARIJUANA DISPENSARIES; AND ENACTING A NEW CHAPTER 20.20.110  
5 PROHIBITING THE ESTABLISHMENT AND OPERATION OF MEDICAL MARIJUANA  
6 DISPENSARIES WITHIN THE CITY OF ALBANY; DECLARING THE URGENCY THEREOF; AND  
7 DECLARING THAT THIS ORDINANCE SHALL TAKE EFFECT IMMEDIATELY

8 WHEREAS, the people of the State of California have enacted Proposition 215, the  
9 Compassionate Use Act of 1996 ("CUA") (codified in Health and Safety Code section 11362.5, *et*  
10 *seq.*), which allows for the possession and cultivation of marijuana for medical use by certain  
11 qualified persons; and

12 WHEREAS, the CUA creates a limited exception from criminal liability for seriously ill  
13 persons who are in need of medical marijuana for specified medical purposes and who obtain  
14 and use medical marijuana under limited circumstances; and

15 WHEREAS, in 2003, and effective January 1, 2004, the State of California enacted  
16 Senate Bill 420, the Medical Marijuana Program Act ("MMPA") (codified in California Health and  
17 Safety Code Section 11362.7 *et seq.*), which purports to clarify the scope of the CUA, and also  
18 which recognizes the right of cities and other governing bodies to adopt and enforce rules and  
19 regulations consistent with the MMPA; and

20 WHEREAS, notwithstanding the passage of the CUA and MMPA, the cultivation,  
21 possession, and distribution of marijuana is strictly prohibited by federal law and specifically by  
22 the Controlled Substances Act ("CSA") (codified in 21 U.S.C. section 841); and Section 841 of the

1 CSA makes it unlawful for a person to manufacture, distribute, or dispense, or possess with intent  
2 to manufacture, distribute, or dispense marijuana; and

3  
4 **WHEREAS**, in May 2001, the United States Supreme Court issued its decision in United  
5 States v. Oakland Buyers' Cooperative and Jeffrey Jones holding that distribution of medical  
6 marijuana is illegal under the CSA and there is no medical defense allowed under federal law;  
7 and

8 **WHEREAS**, on June 5, 2005, the Supreme Court issued its decision in Gonzales v. Raich  
9 which held that Congress, under the Commerce Clause of the United States Constitution has the  
10 authority and, under Federal Controlled Substances Act 21 USC Section 841 (CSA), the power to  
11 prohibit local cultivation and use of marijuana even though it would be in compliance with  
12 California law; and

13  
14 **WHEREAS**, the voters of the City of Albany approved a non-binding advisory measure in  
15 2006 indicating support for the enactment of a permitting ordinance for medical marijuana  
16 dispensaries containing the following language:

17 *“Do you support the establishment of a single medical marijuana dispensary in the City of*  
18 *Albany, to be subject to regulations that the City Council will incorporate into the Municipal*  
19 *Code prior to consideration of any permit for such a dispensary?”; and*

20  
21 **WHEREAS**, the City Council of the City of Albany adopted Ordinance No. 07-01,  
22 establishing extensive regulations and a permitting process related to the distribution and  
23 cultivation of medical marijuana in the City and adding Chapter 20.20.110 (“Medical Marijuana  
24 Dispensaries”) to the Albany Municipal Code; and

25  
26 **WHEREAS**, Chapter 20.20.110 (A) “Medical Marijuana Dispensaries” of the rescinded  
27 ordinance stated:

1           *“The purpose and intent of this subsection to regulate medical marijuana dispensaries in order*  
2 *to promote health, safety, morals and general welfare of residents and businesses within the City”*

3 This ordinance established use permit requirements, a business license investigation procedure,  
4 created standards for facility location, and performance standards for facility operation. These  
5 regulations required background checks of applicants, security systems and protection of the  
6 facilities, and record keeping to verify that the drugs dispensed conformed to requirements of the  
7 law; and

8  
9           **WHEREAS**, Government Code Section 37100 states that “The legislative body may pass  
10 ordinances not in conflict with the Constitution and laws of the State or the United States.” The City  
11 Council finds that at this time its present ordinance appears to be in conflict with Federal law. A  
12 ban, on the other hand, appears consistent with Federal law as well as State law in that many  
13 other jurisdictions have banned medical marijuana dispensaries; and

14  
15           **WHEREAS**, on October 4, 2011, the Second District Court of Appeal for the State of  
16 California issued a published opinion in the case of *Pack v. City of Long Beach* (2011 WL  
17 4553155 (Cal. App. 2 District)), ruling that the permitting and regulating of medical marijuana  
18 dispensaries and cultivation sites pursuant to Long Beach Municipal Code is preempted by the  
19 CSA; and

20  
21           **WHEREAS**, the ruling in *Pack* profoundly impacts the City’s ability to enforce regulatory  
22 measures by precluding the City from issuing any permit or imposing any regulation that could be  
23 construed as encouraging or authorizing the possession or use of marijuana contrary to federal  
24 law. Specifically, the *Pack* decision prohibits the City from issuing operating or construction  
25 permits, charging fees to recoup administrative costs, conducting lotteries to determine the location  
26 of facilities, imposing product or operational safeguards such as lighting, security, auditing, video  
27 recording, inspection or testing, or in any way mandating the geographic distribution of medical

1 marijuana facilities in the City; and

2

3       **WHEREAS**, the recent *Pack* ruling appears to limit the City’s authority to regulate the  
4 location, number, and operations of a dispensary as provided for in Albany Municipal Code  
5 Section 20.20.110 and described in the advisory measure; and

6

7       **WHEREAS**, Staff has consulted with planners in nearby communities regarding the  
8 operation of medical marijuana dispensaries and many dispensaries have operated in a manner  
9 that serves the community and are compatible with their setting. There are, however, serious  
10 considerations to the location of a dispensary. The Police Chief expects that the police department  
11 would face peripheral neighborhood "quality of life" issues related to businesses of this sort,  
12 particularly if it is located near a residential neighborhood. Based upon factual and anecdotal  
13 documentation of the types of neighborhood issues and crimes commonly associated with these  
14 businesses, and the criminal element attracted to the sale of federally controlled substances such  
15 as marijuana, it is also expected that criminal activity could increase in the vicinity of the business;  
16 and

17       **WHEREAS**, pursuant to the City’s police powers authorized in Article XI, Section 7 of the  
18 California Constitution, the Albany Municipal Code, Albany City Charter, and other provisions of  
19 California law, including, but not limited to California Government Code Section 38771, the City  
20 has the power through its City Council to declare actions and activities that constitute a public  
21 nuisance; and

22

23       **WHEREAS**, the City Council wishes to repeal Chapter 20.20.110 of the Municipal Code  
24 (“Medical Marijuana Dispensaries”) and at the same time adopt regulations prohibiting the  
25 existence of medical marijuana dispensaries in the City of Albany;

26

1                   **NOW, THEREFORE, the City Council of the City of Albany ordains as follows:**

2                   Section 1.       Findings. The City Council finds and determines that the facts set  
3 forth in the recitals of this Ordinance are true and correct and hereby incorporates them herein  
4 by this reference.

5                   Section 2.       Chapter 20.20.110 “Medical Marijuana Dispensaries” (established  
6 by Ordinance No. 07-01) of the Albany Municipal Code is hereby repealed in its entirety.

7                   Section 3.       Chapter 20.12.040 “Permitted Land Use Tables by District” is  
8 hereby amended to read as follows:

9

TABLE 1. 20.12.040 PERMITTED LAND USES BY DISTRICT - = Not Permitted										
Land Use <sup>1</sup>	R-1	R-2	R-3	R-4	RHD	SC	SPC	CMX	PF	WF <sup>11</sup>
Medical Marijuana Dispensary	“ - ”	“ - ”	“ - ”	“ - ”	“ - ”	<b>P</b> “ - ”	<b>P</b> “ - ”	<b>P</b> “ - ”	“ - ”	“ - ”

10

11                   Section 4.       Any reference to “Medical Marijuana” being a permitted use within  
12 Chapter 20 “Land Use Development” of the Albany Municipal Code is hereby rescinded.

13                   Section 5.       Chapter 20.20.110 “Medical Marijuana Dispensaries” (established  
14 by Ordinance No. 2011-08) is hereby enacted to the Albany Municipal Code to read as follows:

15

16                   **Chapter 20.20.110 MEDICAL MARIJUANA DISPENSARIES**

17                   A. Purpose and intent.

18                   The purpose of this Chapter is to promote the public health, safety and welfare  
19 by:

20                   1. Prohibiting medical marijuana dispensaries and cultivation sites from  
21 locating in the City of Albany.

22                   2. Protecting citizens from the secondary impacts and effects associated

1 with unregulated and unpermitted medical marijuana dispensaries and related activities,  
2 including, but not limited to, loitering, increased pedestrian and vehicular traffic,  
3 increased noise, fraud in obtaining or using medical marijuana identification cards, sales  
4 of medical marijuana to minors, drug sales, robbery, burglaries, assaults or other violent  
5 crimes.

6 3. Decreasing demands on police or other valuable and scarce City  
7 administrative, financial, or personnel resources in order to better protect the public.

8 4. This Chapter is not intended to conflict with federal or state law. It is the  
9 intention of the City Council that this Chapter be interpreted to be compatible with  
10 federal and state enactments and in furtherance of the public purposes which those  
11 enactments encompass.

12 B. Definitions.

13 Unless the particular provision or the context otherwise requires, the definitions and  
14 provisions contained in this section shall govern the construction, meaning and application  
15 of words and phrases used in this Chapter:

16 a. "Cultivation Site" means any facility, establishment, location, or business,  
17 indoors or outdoors, that independently or collectively, grows or stores marijuana, in  
18 excess of the limitations set forth in Health and Safety Code Section 11362.7 et seq.,

19 b. "Identification Card" shall have the same definition as given such term in  
20 California Health and Safety Code Section 11362.7, as may be amended, and which  
21 defines "Identification Card" as a document issued under the authority of the State  
22 Department of Health Services which identifies a person authorized to engage in the  
23 medical use of marijuana, and identifies the person's designated primary caregiver, if  
24 any.

25 c. "Marijuana" shall have the same definition as given such term in  
26 California Health and Safety Code Section 11018, as may be amended, and which  
27 defines "Marijuana" as all parts of the plant Cannabis sativa L., whether growing or not;

1 the seeds thereof; the resin extracted from any part of the plant; and every compound,  
2 manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It  
3 does not include the mature stalks of the plant, fiber produced from the stalks, oil or  
4 cake made from the seeds of the plant, any other compound, manufacture, salt,  
5 derivative, mixture, or preparation of the mature stalks (except the resin extracted  
6 therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of  
7 germination. "Marijuana" includes any of the above parts of the plant, its seeds, or resin,  
8 incorporated or infused in foodstuff.

9 d. "Medical Marijuana" means Marijuana authorized in strict compliance  
10 and used or cultivated for medical purposes in accordance with California Health and  
11 Safety Code Sections 11362.5, or 11362.7, et seq., or any such section as may be  
12 amended.

13 e. "Medical Marijuana Dispensary or Dispensary" means any association,  
14 business, facility, use, establishment, location, delivery service, cooperative, collective, or  
15 provider, whether fixed or mobile, that possesses, cultivates, distributes, or makes  
16 available medical marijuana to three or more of the following: a Primary Caregiver, a  
17 Qualified Patient, or a patient with an Identification Card or a patient with a prescription  
18 or recommendation from a medical doctor. A Dispensary shall not include the following  
19 uses, as long as the location of such uses is otherwise regulated by this code or  
20 applicable law:

21 1. A clinic licensed pursuant to Chapter 1, Division 2 of the Health and  
22 Safety Code;

23 2. A healthcare facility licensed pursuant to Chapter 3.01 of Division 2  
24 of the Health and Safety Code;

25 3. A residential care facility for persons with chronic life-threatening  
26 illnesses licensed pursuant to Chapter 3.01 of Division 2 of the Health and Safety Code;

27 4. A residential care facility for the elderly licensed pursuant to

1 Chapter 3.2 of Division 2 of the Health and Safety Code;

2 5. A residential hospice or a health home agency licensed pursuant to  
3 Chapter 8 of Division 2 of the Health and Safety Code, as long as such use complies  
4 strictly with applicable law, including but not limited to, Health and Safety Code Section  
5 11362.5 et seq.

6 f. "Primary Caregiver" shall have the same definition as given such term in  
7 California Health and Safety Code Sections 11362.5 and 11362.7 as may be  
8 amended, and which define "Primary Caregiver" as an individual, designated by a  
9 Qualified Patient or Identification Card holder, who has consistently assumed  
10 responsibility for the housing, health, or safety of that Qualified Patient.

11 g. "Qualified Patient" means a person who is entitled to the protections of  
12 Health and Safety Code Section 11362.5 for patients who obtain and use marijuana  
13 for medical purposes upon the recommendation of an attending physician, whether or  
14 not that person applied for and received a valid Identification Card issued pursuant to  
15 state law.

16  
17 C. Medical marijuana dispensary prohibited.

18 a. No person or entity shall operate or permit to be operated a Medical  
19 Marijuana Dispensary or Cultivation Site in or upon any premise or any zone in the City.  
20 The City shall not issue, approve, or grant any permit, license, or other entitlement for the  
21 establishment or operation of a Medical Marijuana Dispensary or Cultivation Site.

22 b. It shall be unlawful for any person or entity to own, manage, conduct,  
23 establish, operate or facilitate the operation of any Medical Marijuana Dispensary or  
24 Cultivation Site, or to participate as an employee, contractor, agent, or volunteer, or in  
25 any other manner or capacity, in any Medical Marijuana Dispensary or Cultivation Site  
26 in the City. The term "facilitate" shall include, but not be limited to, the leasing, renting  
27 or otherwise providing any real property or other facility that will in any manner be



1 used or operated as a Medical Marijuana Dispensary or Cultivation Site in the City.

2 c. Nothing in this section shall alter, affect, or limit the criminal defense  
3 authorized by state law and available to Qualified Patients and their Primary  
4 Caregivers to possess, transport, deliver or collectively or cooperatively cultivate  
5 medical marijuana in accordance with Health and Safety Code Section 11362.71.  
6

7 D. Establishment, maintenance, or operation of medical marijuana dispensaries declared a  
8 public nuisance.

9 The establishment, maintenance, operation, facilitation, of, or participation in a  
10 Medical Marijuana Dispensary or Cultivation Site within the City limits of the City of  
11 Albany is declared to be a public nuisance, and may be abated by the City or subject to  
12 any available legal remedies, including but not limited to civil injunctions and  
13 administrative penalties. The City Attorney may institute an action in any court of  
14 competent jurisdiction to restrain, enjoin or abate any condition(s) found to be in violation  
15 of the provisions of this Chapter, as provided by law. In the event the City files any action  
16 to abate any dispensary or cultivation site as a public nuisance, the City shall be entitled  
17 to all costs of abatement, costs of investigation, attorney's fees, and any other relief  
18 available in law or in equity.  
19

20 E. Existing Medical Marijuana Dispensary operations and pending applications.

21 a. No Medical Marijuana Dispensary, Cultivation Site, Collective, operator,  
22 establishment, or provider that existed prior to the enactment of this Chapter shall be  
23 deemed to be a legally established use or a legal non-conforming use under the  
24 provisions of this Chapter or the Code.

25 b. Existing use permit applications which have been filed with the City of Albany  
26 prior to the enactment of this Chapter but have not been deemed complete pursuant to  
27 the rescinded Code Section 20.20.110 (G) of the Albany Municipal Code will be subject

1 to the new provisions of “Medical Marijuana Dispensaries” as established by Ordinance  
2 No. 2011-08 of the Albany Municipal Code.

3 c. The provisions of this Chapter 20.20.110 enacting a ban shall apply, to the  
4 fullest extent under the law, to any applications that have been denied by previous action  
5 of the City.

6  
7 F. Penalties for violation.

8 a. The violation of any provision of this Chapter is unlawful and constitutes a  
9 misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000) or a  
10 jail term of six (6) months, or both. Each and every day a violation occurs shall be  
11 deemed a separate violation.

12 b. In addition to the remedies set forth herein, the City in its sole discretion,  
13 may also issue an Administrative Citation in accordance with Chapter 1-11  
14 “Administrative Citations” of the Albany Municipal Code to any person or entity that  
15 violates the provisions of this Chapter.

16  
17 G. Severability.

18 If any provision of this Chapter, or the application thereof to any person or  
19 circumstance, is held invalid, that invalidity shall not affect any other provision or  
20 application of this Chapter that can be given effect without the invalid provision or  
21 application; and to this end, the provisions or applications of this Chapter are severable.

22  
23 Section 6. **CEQA Determination.** The City Council finds that this Ordinance is  
24 not subject to environmental review under the California Environmental Quality Act pursuant to  
25 Title 14 of the California Code of Regulations (CEQA Guidelines) Section 15060 (c)(2) (the  
26 activity will not result in a direct or reasonably foreseeable indirect physical change in the  
27 environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378)

1 because it has no potential for resulting in physical change to the environment, directly or  
2 indirectly.

3

4           Section 7.       **Declaration of Urgency.** This Ordinance is an emergency measure,  
5 for the purposes of public peace, health and safety, and is urgently required for the reason that  
6 the City’s existing medical marijuana regulatory process as set forth in Chapter 20.20.110 of the  
7 Code has recently been declared by the Second District Court of Appeal for the State of  
8 California to be in conflict with, and preempted by Federal law. Failing to adopt this Ordinance  
9 as an urgency measure will place the City of Albany in a situation where it has no regulatory  
10 control over medical marijuana dispensaries, which situation would likely lead to an exacerbation  
11 of the negative secondary effects that such facilities have caused, and continue to cause in the  
12 City, which effects are more fully described elsewhere herein.

13

14           Section 8.       **Publication or Posting.** This Ordinance is an emergency ordinance  
15 duly adopted by the City Council by a vote of five of its members and shall take effect  
16 immediately. The City Clerk shall certify to a separate roll call and vote on the question of the  
17 emergency of this ordinance and to its passage by the vote of five members of the City Council of  
18 the City of Albany, and cause the same to be posted in three conspicuous places in the City of  
19 Albany.

20

21           Section 9.       **Severability.** That if any if any section, subsection, sentence, phrase  
22 or clause of this ordinance is for any reason held to be invalid or unconstitutional by the decision  
23 of a court of competent jurisdiction, the holding shall not affect the validity or enforceability of  
24 the remaining provisions, and the City Council hereby declares that it would have adopted each  
25 provision of this ordinance irrespective of the validity of any other provision.

26

27

1 PASSED, APPROVED and ADOPTED this \_\_\_\_ day of \_\_\_\_, 2011.

2

3 AYES:

4 NOES:

5 ABSENT:

6 ABSTAIN:

7

\_\_\_\_\_

8

Mayor

9

10 ATTEST:

11

12 \_\_\_\_\_

13 City Clerk

14