ORDINANCE NO. 2017-085

ORDINANCE OF THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA EXTENDING THE TEMPORARY MORATORIUM WITH A TERMINATION DATE OF OCTOBER 4TH 2017 FOR AN ADDITIONAL PERIOD OF ONE HUNDRED AND TWENTY (120) DAYS THEREFROM ON THE ACCEPTANCE, REVIEW, APPROVAL OR ISSUANCE OF ANY LAND DEVELOPMENT PERMITS AS THE TERM IS DEFINED IN FLORIDA STATUTES SECTION 163.3164(16), BUSINESS TAX RECEIPTS, OR ANY OTHER LICENSE OR PERMIT FOR THE ESTABLISHMENT OR OPERATION OF DISPENSING FACILITIES WITHIN THE CITY OF HIALEAH ENGAGED IN THE ON-SITE DISTRIBUTION, SALE, DELIVERY OR RETAIL OF LOW-THC CANNABIS, MEDICAL CANNABIS OR CANNABIS DELIVERY DEVICES PURSUANT TO SECTIONS 381.986 AND 499.0295 OF THE FLORIDA STATUTES, TO INCLUDE A MORATORIUM ON USES UNDER AMENDMENT 2 NOW ARTICLE X § 29 OF THE FLORIDA CONSTITUTION ENTITLED "MEDICAL MARIJUANA PRODUCTION, POSSESSION AND USE" OR AS OTHERWISE PROVIDED FOR PURSUANT TO FLORIDA LAW, IN ORDER TO PROVIDE THE CITY WITH AN OPPORTUNITY TO REVIEW AND ENACT REGULATIONS GOVERNING THE ESTABLISHMENT AND OPERATION OF DISPENSING FACILITIES OR ORGANIZATIONS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH; PROVIDING PENALTIES FOR VIOLATION HEREOF; PROVIDING FOR A SEVERABILITY CLAUSE AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Planning and Zoning Board at its meeting of October 25, 2017 recommended approval of this ordinance.

WHEREAS, pursuant to the Compassionate Medical Cannabis Act of 2014, the Florida Legislature authorized a very limited number of large nurseries to cultivate, process, and dispense non-euphoric, low-THC cannabis and operate dispensing organizations, as of January 1, 2015; and

WHEREAS, in 2016, the Florida Legislature amended Section 381.986 of the Florida Statutes to include medical cannabis, revised the requirements for physicians ordering low-THC cannabis, medical cannabis, or cannabis delivery devices, amended the requirements for the cultivation, processing, transportation, and dispensing of low-THC cannabis or medical cannabis, and revised the Florida Department of Health's authority and responsibility and provided for penalties; and

WHEREAS, due to the historical prohibition of cannabis, the City does not currently have any land development regulations governing the use of real property for the purpose of on-site distribution, sale, delivery or retail of low-THC cannabis, medical cannabis or cannabis delivery devices as provided by Florida Statutes Sections 381.986 and 499.0295; and

WHEREAS, Amendment 2 went into effect on January 3, 2017, and was added to the Florida Constitution under Article X § 29, "Medical marijuana production, possession and use" and the Department of Health has six months to set regulations thereon; and

WHEREAS, in order to promote the effective regulation of such activities, the City Council wishes to preserve the status quo while researching, studying, and analyzing the potential impact of dispensing facilities within the City's boundaries upon adjacent uses and the surrounding areas, including its effect on traffic, congestion, surrounding property values, demand for City services including inspections and increase police monitoring, and other aspects of the operation of dispensing facilities impacting the general welfare of the community; and

WHEREAS, the City Council finds that extending the existing moratorium for one hundred and twenty (120) days from its termination date of October 4th 2017, and issuing a temporary moratorium for uses under Amendment 2 now Article X § 29 of the Florida Constitution pertaining to the production, possession and use of medical marijuana, and uses permitted thereunder by Florida law, on the issuance of business tax receipts and the acceptance, processing and approval of any building or zoning permits for the establishment and operation of dispensing facilities within the corporate limits of the City of Hialeah is a reasonable period of time; and

WHEREAS, the City Council finds that extending this temporary moratorium will allow the City sufficient time to determine the zoning districts, if any, that are best-suited for this particular use, and how best to formulate land development and licensing regulations that will appropriately govern the use of real property for the purpose of on-site distribution, sale, delivery or retail of low-THC cannabis, medical cannabis or cannabis delivery devices; and

WHEREAS, the City Council recognizes that in 2014 the Florida Legislature enacted § 381.986, Florida Statutes, the Compassionate Medical Cannabis Act of 2014 "CMCA" to allow prescriptions for low-THC and medical cannabis, also known as marijuana; and

WHEREAS, in 2015 § 499.0295, Florida Statutes, was enacted allowing the use of cannabis under the CMCA for qualifying patients with terminal conditions; and

WHEREAS, the City Council recognizes that Amendment 2: the Use of Marijuana for Debilitating Medical Conditions, was placed on the ballot, and the Florida Electorate overwhelmingly voted in favor of the amendment to the Florida Constitution, allowing for the production, possession or use of marijuana of any mixture for medical use; and

WHEREAS, Amendment 2 went into effect on January 3, 2017, and was added to the Florida Constitution under Article X § 29 as "Medical marijuana production, possession and use", which provides that the use of medical marijuana shall not subject the physician who with reasonable care recommends its use, nor the person who uses it under the recommendation from the physician to criminal prosecution nor civil liability, and provided for the Department of Health in six months was to issue regulations for the implementation and enforcement thereof; and

WHEREAS, on June 23, 2017, the Governor signed Senate Bill 8A, amending Florida Statute §381.986 by adding subparagraph (11)(b)1., empowering local governments to ban medical marijuana dispensing facilities; and

WHEREAS, the Florida Constitution, Article X § 29(c)(5), states that: "Nothing in this section requires the violation of federal law or purports to give immunity under federal law."; and

WHEREAS, the federal law under the Controlled Substances Act ("CSA"), preempts state law that positively conflicts with it. 21 U.S.C Chapter 13 § 903; and

WHEREAS, under the CSA, the possession or use of marijuana is unlawful, 21 U.S.C. §§ 812(c)(10), 841, 844, 856, as is its manufacture, distribution, in *any amount*. 21 U.S.C. § 841(b)(1)(D); and

WHEREAS, marijuana is a Schedule I drug under federal law, meaning the federal government has determined that marijuana (1) has high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) has a lack of accepted safety for use under medical supervision. 21 U.S.C. §812(b)(1)(A-C); and

WHEREAS, the Department of Justice Drug Enforcement Administration (DEA) *that is responsible for scheduling or rescheduling scheduled drugs,* recently published on August 12, 2016 its "Denial of Petition to Initiate Proceedings to Reschedule Marijuana" because it determined that: 1) marijuana has a high potential for abuse, 2) marijuana has no currently accepted medical use in treatment in the United States, and 3) marijuana lacks accepted safety for use even under medical supervision. 81 Fed. Reg. 53767; and

WHEREAS, "the CSA does not contemplate that state legislatures' determinations about the use of a controlled substance can be used to bypass the CSA's rescheduling process." *Krumm v. Holder*, 2009 WL 1563381, at *9-10 (D.N.M. May 27, 2009); and

WHEREAS, on April 18, 2017 John Kelly, the Homeland Security Chief, said:

> "Let me be clear about marijuana. It is a potentially dangerous gateway drug that frequently leads to the use of harder drugs." "Its use and possession is against federal law and until that law is changed by the United States Congress, we at DHS along with the rest of the federal government are sworn to uphold all the laws that are on the books." New York Daily News (April 18, 2017).

WHEREAS, 21 U.S.C. §856(a) titled: "Maintaining drug-involved premises" provides: "Except as authorized by this subchapter, it shall be unlawful to-- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. §856(a); and

WHEREAS, there is a clear and direct conflict between the CSA and Florida's newly adopted Amendment 2 and the Florida statutes that allow for the possession or use, cultivation of, and housing a location for marijuana, or for the manufacture and distribution of marijuana, and generating profits therefrom, and, the federal law, and the state law, cannot consistently stand together; and

WHEREAS, the City Council recognizes, as did the Amendment 2 ballot initiative and under Article X § 29 of the Florida Constitution, that the production, possession or use of marijuana under federal law is illegal; and

WHEREAS, the conflict between the federal law and state law regarding medical marijuana has been challenged in other jurisdictions under several clauses of the U.S. Constitution, and the courts that have consistently held that the CSA is constitutional, and that the CSA supersedes conflicting state law. See *Gonzales v. Raich,* 125 S. Ct. 2195 (2005), *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142 (N.D. Cal. 2011), *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, "The Supremacy clause[1] gives Congress the power to preempt state law. *Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012), and the CSA unambiguously provides that federal law shall prevail in the event of a positive conflict between federal and state law, and that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be." *Gonzales v. Raich*, 125 S.Ct. 2195 at 2212 (2005); and

WHEREAS, a "state law [cannot] "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law." *United States v. McIntosh,* 833 F.3d 1163, 1179, (9th Cir. Aug. 16, 2016); and

WHEREAS, the Supreme Court has held that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the *intrastate* manufacture and possession of marijuana for medical purposes that were voted in by the people of California was well within

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[1] The U.S. Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.C. Const. Art. VI, cl. 2

the Congress's reach under the Commerce Clause[2]. *Gonzales v. Raich*, 125 S.Ct. 2195 (2005); and

WHEREAS, Congress explicitly states in the CSA that "federal control of the *intrastate* incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §801(6); and

WHEREAS, challenges under the Fifth[3], the Ninth[4], or the Tenth Amendment[5] to the U.S. Constitution attempting to construe a right to use and possess medical marijuana have been soundly rejected. See *Gonzales v. Riach,* 125 S. Ct. 2195 (2005), *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142 (N.D. Cal. 2011), *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, a federal court has rejected arguments arising under the doctrines of judicial and equitable estoppel in reliance on the "Ogden Memo" [6] because the plain language within the memorandum stated that: "no State can authorize violations of federal law." *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100 (E.D. Cal. 2012); and

WHEREAS, simple possession (*any amount*) of marijuana constitutes a misdemeanor under federal law, punishable by up to one year imprisonment and a minimum $1,000 fine plus costs. 21 U.S.C. § 844(a); and

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[2] The U.S. Constitution vests to Congress the legislative power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S.C. Const. Art. 1 §8, cl. 3

[3] The U.S. Constitution provides that "No person shall be deprived of life, liberty, or property, without due process of law;" U.S.C. Const. Amend. V- Due Process

[4] The U.S. Constitution provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.C. Const. Amend. IX

[5] The U.S. Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.C. Const. Amend. X

[6] The "Ogden Memo" is a Memorandum for U.S. Attorneys, issued in 2009 by Deputy Attorney General David W. Ogden, stating that federal resources should not be expended on medical marijuana users that are in clear and unambiguous compliance with state law. In 2011, Deputy Attorney General James M. Cole issued a similar memorandum reiterating the same guidance, and warning those who were considering or who had already enacted legislation authorizing large-scale industrial marijuana cultivation centers that "The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law... State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA."

WHEREAS, the manufacture, distribution, or possession with the intent to distribute any amount of marijuana constitutes a felony, carrying a maximum sentence of five years imprisonment, and a maximum fine of $250,000 for individuals, and $1 million for entities. 21 U.S.C. § 841(b)(1)(D); and

WHEREAS, in *United States v. Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006) the court rejected the immunity granted to a city-authorized medical marijuana cooperative as this "contradicts the purpose of the CSA," and held: "*In conclusion, we reject the premise that an ordinance* such as the one Oakland enacted can shield a defendant from prosecution for violation of federal drug laws." (Emphasis original); and

WHEREAS, there exists the probable prospective for adverse impacts from secondary effects, such as increased crime, trespassing, corruption, and other significant problems, connected to marijuana, a cash only business. See *Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City, 861 F.3d 1052 (10th Cir. 2017)*. The Federal Reserve Bank denied an application for a "master account" by the credit union for banking services for marijuana-related businesses in Colorado—on the grounds that the CSA would be violated. Federal Reserve Bank approval allows financial institutions to tap into the Reserve's banking system. The denial, left the credit union, as a money vault only for marijuana related businesses; and

WHEREAS, Florida Statute § 381.986(11)(b)1., provides that a "municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within [its] boundaries . . . ."

WHEREAS, the City Council finds that imposing this temporary moratorium until adequate regulations are considered, and adopted, is in the best interest of the health, safety and general welfare of the community and the residents of the City of Hialeah.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND THE CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, THAT:

Section 1: The foregoing facts and recitations contained in the preamble to this ordinance are hereby adopted and incorporated herein by reference as if fully set forth herein.

Section 2: **Moratorium Imposed.**

The City of Hialeah, Florida hereby declares a temporary building and zoning moratorium on the establishment and operation of dispensing facilities within the corporate limits of the City of Hialeah for one hundred and twenty (120) days from the

termination date of October 4th 2017 under the existing moratorium on uses under Amendment 2 now Article X § 29 of the Florida Constitution pertaining to the production, possession and use of medical marijuana, and as otherwise provided by Florida law. The City shall not accept, process or approve any application for business tax receipts, building permits, land use changes, zoning variances or permits, or any other development permits for any property, entity, or individual concerning or related to dispensing facilities engaged in permitted uses under Florida law, as provided for in Florida Statutes Sections 381.986 and 499.0295, whether as a principal or accessory use, so long as this ordinance is in effect, and on uses under Amendment 2 now Article X § 29 of the Florida Constitution, or as may be sanctioned by Florida law. No person, corporation, partnership or other entity shall establish or operate a dispensing facility engaged in permitted uses under Florida law, specifically Florida Statutes Sections 381.986, 499.0295 and on uses under Amendment 2 now Article X § 29 of the Florida Constitution.

Section 3: Duration of Moratorium.

The temporary moratorium provided for in Section 2 shall take effect retroactively and immediately upon adoption of this ordinance and shall terminate one hundred and twenty (120) days from October 4th 2017, unless the City Council rescinds or extends the moratorium by a subsequent ordinance.

Section 4: Repeal of Ordinances in Conflict.

All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

Section 5: Penalties.

Every person violating any provision of the Code or any ordinance, rule or regulation adopted or issued in pursuance thereof shall be assessed a civil penalty not to exceed $500.00 within the discretion of the court or administrative tribunal having jurisdiction. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. In addition to the penalty prescribed above, the City may pursue other remedies such as abatement of nuisance, injunctive relief, administrative adjudication and revocation of licenses or permits.

Section 6: Severability Clause.

If any phrase, clause, sentence, paragraph or section of this ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such

invalidity or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

Section 7: Effective Date.

This ordinance shall become effective when passed by the City Council and signed by the Mayor or at the next regularly scheduled City Council meeting, if the Mayor's signature is withheld or if the City Council overrides the Mayor's veto.

PASSED AND ADOPTED this 28 day of November, 2017.

Vivian Casáls-Muñoz
Council President

THE FOREGOING ORDINANCE OF THE CITY OF HIALEAH WAS PUBLISHED IN ACCORDANCE WITH THE PROVISIONS OF FLORIDA STATUTE 166.041 PRIOR TO FINAL READING.

Attest:

Approved on this 7 day of December, 2017.

Marbelys Fatjo, City Clerk

Mayor Carlos Hernandez

Approved as to form and legal sufficiency:

Lorena E. Bravo, City Attorney

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Ordinance was adopted by a (5-0-2) vote with Councilmembers, Caragol, Zogby, Cue-Fuente and Casáls-Muñoz voting "Yes". Councilmember Hernandez and Garcia-Martinez absent.