



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Deanna J. Santana

**SUBJECT:** MEDICAL MARIJUANA

**DATE:** December 8, 2010

Approved

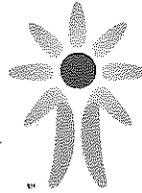
Date

12/9/10

**REASON FOR SUPPLEMENTAL REPORT**

To provide the City Council with information recently received from the public.

DEANNA J. SANTANA  
Deputy City Manager



**CannBe**

2107-A Livingston St.  
Oakland, CA 94606

t . 888 589 7778  
t . 510 629 6942  
f . 510 536 6262

www.CannBe.com  
info@CannBe.com

## **MC3 POLICY POSITIONS RE: SAN JOSE MEDICINAL CANNABIS REGULATION**

### **1. The sale of medicinal cannabis is legal, and any language stating otherwise should be removed.**

- California Health & Safety Code §11362.775 states in plain language that collectives and cooperatives are not subject to criminal sanctions for sales, for maintaining a place for sales, nor for managing or controlling a place for sales. The appellate courts have confirmed this more than once. There is no basis for a claim that the sale of medicinal cannabis is not legal.

### **2. The tax on medicinal cannabis collectives should be reasonable.**

- Without a provision for efficient-scale cultivation, a gross receipts tax of more than 1% in addition to sales tax will cripple collectives' ability to provide their patients with crucial services and compete with the underground market.

### **3. Both onsite and offsite cultivation should be permitted in appropriate locations.**

- Without centralized, efficient-scale cultivation, collectives cannot afford a gross receipts tax on top of the sales tax they already pay.

### **4. Medicinal cannabis collectives should be allowed to locate in both commercial and industrial zones.**

- Retail distribution of medicinal cannabis is appropriate in both commercial and industrial zones. Commercial zones are accessible to patients, while industrial zones are more secluded and secure, but both can handle traffic flow, have sufficient parking, and support needed economic activity.

### **5. Regulatory fees imposed should be directly related to the actual cost of regulation.**

- All regulatory fees imposed on medicinal cannabis collectives should be no more than the City's cost of regulation. For complete cost recovery including CUP, estimates based on existing regulations are less than \$35,000 per year.

### **6. The number of collectives in the City should be capped at 30.**

- The City should set its cap at 30, the number of collectives operating when it issued its soft moratorium on March 30, 2010.

### **7. Law enforcement should not have unrestricted access to individuals' private medical records.**

- The City must have access to a collective's records to ensure that collectives are complying with local regulations and state law. However, requiring collectives to make available to law enforcement the personal medical records of their patients violates their privacy and is unnecessary to the City's mission to verify compliance.



**CannBe**

2107-A Livingston St.  
Oakland, CA 94606

t . 888 589 7778  
t . 510 629 6942  
f . 510 536 6262

[www.CannBe.com](http://www.CannBe.com)  
[info@CannBe.com](mailto:info@CannBe.com)

## **MC3 POLICY POSITIONS RE: SAN JOSE MEDICINAL CANNABIS REGULATION**

*In order for the City of San Jose to collect significant tax revenue from medicinal cannabis collectives, three steps must be taken to ensure the viability of the industry:*

- 1. Sales must be explicitly allowed.**
  - Without sales, there are no transactions to tax.
- 2. Collectives must be allowed to cultivate.**
  - Without centralized, efficient-scale cultivation, collectives cannot afford a gross receipts tax on top of the sales tax they already pay.
- 3. Regulations must be reasonable.**
  - Collectives should be allowed to locate in both commercial and industrial zones.
  - Cultivation may be on or off site, but only in industrial zones if more than ancillary.
  - Any fees imposed should be tied to the actual cost of regulation.
  - The number of collectives in the City should be capped at 30 to meet foreseeable demand.
  - The City's access to a collective's records should be tailored to protect patient privacy while allowing reasonable oversight.



**CannBe**

2107-A Livingston St.  
Oakland, CA 94606

t . 888 589 7778  
t . 510 629 6942  
f . 510 536 6262

[www.CannBe.com](http://www.CannBe.com)  
[info@CannBe.com](mailto:info@CannBe.com)

## **MC3 POSITION RE: MEDICINAL CANNABIS ZONING**

*Retail distribution of medicinal cannabis is appropriate in both commercial and industrial zones.*

Both commercial and industrial zones are appropriate locations for medicinal cannabis collectives, depending on the specific character of each property. Provided that collectives must traverse the Zoning Permit process in which any property-specific concerns can be addressed, collectives should be allowed to locate in both commercial and industrial zones. The permit process already accounts for all of the City's and the community's concerns. Collectives must be buffered from sensitive uses regardless of what zone they're located in, and allowing them to be located in additional zones will not increase the total number in the City.

While additional zones do not translate to additional collectives, they do increase the number of allowable properties, thus increasing the total number of applications. More applications are good: under a Zoning Permit review, the more applications there are, the more choice the City will have when awarding permits. A larger pool results in more qualified applicants to choose from and ultimately more competent operators.

Commercial zones are a good place to start. Commercial is the most appropriate zone in which to locate a retail use such as a collective, and commercial zones tend to be accessible to patients, able to cover large traffic flows, and have sufficient parking. But commercial zones are not the only zones appropriate for use as medicinal cannabis collectives.

Industrial zones are also compatible with usages such as medicinal cannabis collectives. Industrial zones offer great security for both the patient and the public, as cannabis will be kept out of public areas. The belief that allowing medicinal cannabis collectives to operate within industrial zones will somehow hinder the economic stability of these areas, as stated in the Staff Report, is erroneous. The collective model is designed not only to have the potential to generate large amounts of tax revenue for the City, but will also be returning benefits directly back to the community. An average mid-sized collective can generate 20 full-time living wage jobs with full benefits and gross revenues of \$2-3 million annually. Collectives often return profits directly back to the community by offering additional holistic health services and education classes to their patients. Moreover, contrary to claims made in the Staff Report, Collectives are not a "conversion" of industrial properties. Collectives generate tax revenue and employment, so locating collectives in industrial areas maintains the City Council's policy against converting industrial uses to other uses.

Additionally, allowing collectives in both commercial and industrial zones increases patient access. When buffers from sensitive uses are taken into account, there are few places a collective can locate. Allowing both industrial and commercial zones would spread the collectives out more, putting them closer to more patients.



**CannBe**

2107-A Livingston St.  
Oakland, CA 94606

t . 888 589 7778  
t . 510 629 6942  
f . 510 536 6262

www.CannBe.com  
info@CannBe.com

## **CITY OF SAN JOSE MEASURE U PROJECTED TAX REVENUES**

The numbers below represent total current market potential based on the San Jose Area estimated patient population of 55,000 and historical performance surveys of existing Medicinal Cannabis Collectives Coalition (MC3) member collectives. Current estimated performance is approximately half of this potential—roughly equivalent to the total City of Oakland Area reported performance for 2009, approximately \$30 million in total gross sales.

Due to competition with the underground market, aboveground medicinal cannabis collectives cannot afford to pay gross receipts taxes in excess of 1%—unless they are licensed to cultivate cannabis on a centralized, efficient-scale basis. With cultivation, the following projections are feasible.

### **Medicinal Cannabis Tax Revenue Projections**

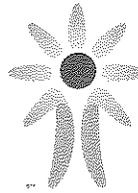
Based on 55,000 patients spending an average of \$137 per month each—\$55 per visit, 2.5 times monthly. (Approximately 4500 patient visits/day = 30 Collectives x 150 visits per day each.)

@2% tax x \$137 x 55,000 per month x 12 = \$1,808,400 new tax revenue to City

@3% tax x \$137 x 55,000 per month x 12 = \$2,712,600 new tax revenue to City

@4% tax x \$137 x 55,000 per month x 12 = \$3,616,800 new tax revenue to City

@5% tax x \$137 x 55,000 per month x 12 = \$4,521,000 new tax revenue to City



CannBe

2107-A Livingston St. t . 888 589 7778  
Oakland, CA 94606 t . 510 629 6942  
f . 510 536 6262

www.CannBe.com  
info@CannBe.com

## MC3 POSITION RE: SALES

### Medical Cannabis Sales are Legal Under California Law

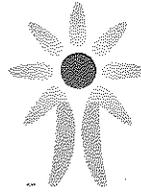
Cal. Health & Safety Code §11362.775<sup>1</sup> states in plain language that collectives and cooperatives are not subject to criminal sanctions for sales, for maintaining a place for sales, nor for managing or controlling a place for sales. In *People v. Urziceanu*, the appellate court held that Cal. H&S Code §11362.775's "specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*People v. Urziceanu* (2005), 132 Cal. App. 4th 747, 785.) The court further explained that it was the intent of the Legislature to exempt qualifying patients and their caregivers who collectively or cooperatively cultivate marijuana from criminal sanctions for possession for sale, distribution for sale, and the other offenses listed in Cal. H&S Code 11362.775. (*Urziceanu* at 785.)

The recent California appellate decision in the case of *Qualified Patients Association v. City of Anaheim* also addresses the sale of medical cannabis. It reiterates the statement in the *Urziceanu* case that the legislature intended to allow sales of medical cannabis. (*QPA v. City of Anaheim* (2010), 187 Cal. App. 4th 734, 745.) It also notes that the express purpose of the legislature in adding Sections 11362.7 through 11362.83 was to enhance the access of patients and caregivers to medical cannabis. (*QPA* at 744.)

For the foregoing reasons, medical cannabis sales to patients (or their caregivers) in a lawful collective or cooperative are clearly legal under California law. There is no legal basis for any assertion to the contrary. San Jose must follow state law in implementing its medical cannabis regulations and permit lawful sales. Such sales are the source of revenues contemplated in Measure U.

---

<sup>1</sup> "[Q]ualified patients and their designated caregivers who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Sections 11357 [possession], 11358 [cultivation & processing], 11359 [possession for sale], 11360 [sales], 11366 [maintaining a place for sales], 11366.5 [managing or controlling a place for sales], or 11570 [drug nuisance incl. sales]." (Cal. Health and Safety Code 11362.775.)



CannBe

2107-A Livingston St.  
Oakland, CA 94606

t. 888 589 7778  
t. 510 629 6942  
f. 510 536 6262

www.CannBe.com  
info@CannBe.com

## MC3 POSITION RE: SALES

### Medical Cannabis Sales are Legal Under California Law

Cal. Health & Safety Code §11362.775<sup>1</sup> states in plain language that collectives and cooperatives are not subject to criminal sanctions for sales, for maintaining a place for sales, nor for managing or controlling a place for sales. In *People v. Urziceanu*, the appellate court held that Cal. H&S Code §11362.775's "specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." (*People v. Urziceanu* (2005), 132 Cal. App. 4th 747, 785.) The court further explained that it was the intent of the Legislature to exempt qualifying patients and their caregivers who collectively or cooperatively cultivate marijuana from criminal sanctions for possession for sale, distribution for sale, and the other offenses listed in Cal. H&S Code 11362.775. (*Urziceanu* at 785.)

The recent California appellate decision in the case of *Qualified Patients Association v. City of Anaheim* also addresses the sale of medical cannabis. It reiterates the statement in the *Urziceanu* case that the legislature intended to allow sales of medical cannabis. (*QPA v. City of Anaheim* (2010), 187 Cal. App. 4th 734, 745.) It also notes that the express purpose of the legislature in adding Sections 11362.7 through 11362.83 was to enhance the access of patients and caregivers to medical cannabis. (*QPA* at 744.)

For the foregoing reasons, medical cannabis sales to patients (or their caregivers) in a lawful collective or cooperative are clearly legal under California law. There is no legal basis for any assertion to the contrary. San Jose must follow state law in implementing its medical cannabis regulations and permit lawful sales. Such sales are the source of revenues contemplated in Measure U.

---

<sup>1</sup> "[Q]ualified patients and their designated caregivers who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Sections 11357 [possession], 11358 [cultivation & processing], 11359 [possession for sale], 11360 [sales], 11366 [maintaining a place for sales], 11366.5 [managing or controlling a place for sales], or 11570 [drug nuisance incl. sales]." (Cal. Health and Safety Code 11362.775.)



**CannBe**

2107-A Livingston St.  
Oakland, CA 94606

t. 888 589 7778  
t. 510 629 6942  
f. 510 536 6262

www.CannBe.com  
info@CannBe.com

## **Analysis of San Jose City Attorney's Office's Misstatements of Medicinal Cannabis Law**

**September 30, 2010**

### **INTRODUCTION**

Below is a side-by-side analysis of the San Jose City Attorney's Office's claims about medicinal cannabis law compared to statements from the Attorney General and the California Appellate Courts. Areas where the law remains undecided are also highlighted.

### **BACKGROUND**

#### **QUALIFIED PATIENTS AND CAREGIVERS HAVE IMMUNITY**

State law gives qualified patients and their caregivers limited immunity from criminal prosecution for the possession, cultivation, and transportation of cannabis. (CA H&S Code 11362.5; *People v. Trippet* (1997), 56 Cal.App.4th 1532, 1551). Patients and caregivers may also distribute cannabis to other qualified patients and caregivers so long as they are members of a properly organized Collective or Cooperative. (CA H&S Code 11362.775; AG Guidelines p. 8, 10).

#### **STATE STATUTE AUTHORIZES COLLECTIVES & COOPERATIVES**

CA Health and Safety Code 11362.775 states that "qualified patients and their designated caregivers who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Sections 11357 (possession), 11358 (cultivation & processing), 11359 (possession for sale), 11360 (sales), 11366 (maintaining a place for sales), 11366.5 (managing or controlling a place for sales), or 11570 (nuisance)."

#### **CLAIM 1: Collectives & Cooperatives May Not Sell Medical Cannabis**

The City Attorney's Office has repeatedly stated that the sale of medical cannabis is prohibited. In a memo to the Mayor and Council dated June 18, 2010, Deputy City Attorney Angelique Gaeta-Nedrow included a Q&A. Question three of the Q&A asks, "Does state law allow for the sale of medical marijuana?" The answer provided is "No." (6/18/10 Memo Q&A p. 2). There is no explanation, no case law, and no citations given to support this conclusion. This is because the conclusion is incorrect.

CA Health & Safety Code 11362.775 states that Collectives and Cooperatives are not subject to state criminal sanctions for sales, maintaining a place for sales, and managing or controlling a place for sales. (CA H&S Code 11362.775). In *Urziceanu*, the Court stated that "[the statute's] specific itemization of the marijuana sales law indicates it

contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana.” (*People v. Urziceanu* (2005), 132 Cal. App. 4th 747, 785). The Court further explains that it was the intent of the Legislature to exempt qualifying patients and their caregivers who collectively and cooperatively cultivate marijuana from criminal sanctions for possession for sale, distribution for sale, and the other offenses listed in CA H&S Code 11362.775. (*Urziceanu* at 785).

The recent California appellate decision in the case of *Qualified Patients Association v. City of Anaheim* also addresses the sale of medical cannabis. It reiterates the statement in the *Urziceanu* case that the legislature intended to allow sales of medical cannabis. (*QPA v. City of Anaheim* (2010), 187 Cal. App. 4th 734, 745). It also notes that the express purpose of the legislature in adding Sections 11362.7 through 11362.83 was to enhance the access of patients and caregivers to medical cannabis. (*QPA* at 744).

As a consolation, the City Attorney’s Office suggests that in-kind contributions, barter, or trades may be used as an alternative to sales. (6/18/10 Memo Q&A p. 5). However, this suggestion contradicts the view that sales are not legal. California prohibits all distribution of cannabis whether for sale, trade, or gift under the same statute. (CA H&S Code 11360). CA H&S Code 11362.775 provides that patients and caregivers are immune from all distribution charges outlined in CA H&S Code 11360. The City Attorney’s office is attempting to assert that patients and caregivers are immune from one element of the statute, but not the rest. Patients and caregivers are either immune from distribution or not immune. The City Attorney cannot have it both ways. Further, the City of San Jose itself defines “sale” as any exchange, barter, or offer for sale. (SJ Municipal Code 1.04.020). According to his own interpretation, the alternatives suggested by the City Attorney should also be prohibited.

The City Attorney’s opinion is misguided and incorrect. Collectives and Cooperatives are authorized to distribute medical cannabis by any means including sales.

**CLAIM 2: Collectives & Cooperatives May Not distribute Edibles, Concentrates, or “Manufactured” Cannabis Products**

The City Attorney's office has consistently stated that Collectives and Cooperatives may not distribute concentrated cannabis, edibles, or "manufactured" products. (6/22/10 Transcript p. 85, 101). The Courts and the Attorney General's office disagree.

Concentrated cannabis is defined as the separated resin, whether crude or purified, obtained from marijuana. (Health & Safety Code 11006.5). Edibles are food products that contain cannabis or concentrated cannabis extracts. Other cannabis products include lotions, balms, bath salts, and tinctures. Possession of cannabis and concentrated cannabis are prohibited under the same section of the same statute. (CA H&S Code 11362.5 (d)). Edibles and other cannabis products are not specifically prohibited by California law, but are included in the general proscriptions on cannabis and concentrated cannabis.

Under state law, qualified patients and caregivers are immune from both the possession

statute and the statute that prohibits cultivation, harvesting, and *processing* cannabis. (CA H&S Code 11358). Accordingly, the Attorney General's office has published an opinion that concentrated cannabis is included in the protections of the Compassionate Use Act. (AG Opinion 86 Ops.Cal.Atty.Gen. 180 (2003)). In addition, the court in *Chavez* stated that, "Proposition 215 was approved by the voters without specificity as to the strength, quality, or quantity of marijuana to be used for medical purposes as long as the use is reasonably related to the patient's current medical needs and was recommended or approved by a physician." (*Chavez v. Superior Court* (2004) 123 Cal.App.4th 104, 109).

Patients and caregivers thus have immunity from charges of processing cannabis, possessing concentrated cannabis, and distributing cannabis in any form. The City Attorney's office is once again attempting to assert that the immunity extends to only one part of the statute and not its entirety. The City Attorney's office cannot have it both ways. Patients and caregivers are either immune to the statute or not immune at all.

Patients and caregivers however are not protected from charges of manufacturing a controlled substance under CA H&S Code 11379.6(a). This may be the source of some of the confusion surrounding concentrated cannabis. In a case involving a qualified patient, the Court stated that using butane or other chemicals to extract cannabis violates the prohibition on manufacturing a controlled substance. (*People v. Bergen* (2008) 166 Cal.App.4th 161, 169). The Legislature intended to punish more harshly the use of chemicals in the production of controlled substances because of the dangers posed from the use of hazardous substances such as fires, fumes, or explosions. (*Bergen* at 169-170). However, other extraction methods that use pressure or cold water do not present such hazards and thus are not included in the prohibition on manufacturing. (*Bergen* at 169). Consequently, the only prohibition on concentrated cannabis extracted without dangerous chemicals are the prohibitions on processing, possession, and distribution. These are charges that the Legislature, the Courts, and the Attorney General's office have made clear do not apply to qualified patients and caregivers.

Patients and caregivers may process, possess, and collectively or cooperatively distribute concentrated cannabis, edibles, and other "manufactured" cannabis products.

### **CLAIM 3: Collectives & Cooperatives May Not Be Compensated For Their Services**

During the June 22, 2010 Council Meeting, the City Attorney stated that only caregivers may be compensated for providing medical cannabis and that state law does not allow Collectives or Cooperatives to be compensated for overhead costs. (6/22/10 Transcript p. 128; 6/18/10 Memo Q&A p. 4).

This statement is wrong. While it is correct that caregivers may be compensated for all of their costs in providing medical cannabis to the patient including labor, Collectives and Cooperatives may also be compensated for the cost of providing medicine. (AG Guidelines p. 10-11; *QPA* at 748). According to the State Attorney General, Collectives and Cooperatives may charge fees reasonably calculated to cover overhead costs and operating expenses. (AG Guidelines p. 10-11). The Court reaffirmed this statement in the *Qualified Patients Association* case. (*QPA* at 748).

Even the City Attorney's Office recognizes that Collectives and Cooperatives may be compensated for the costs of providing medicine. In the Q&A Deputy City Attorney Angelique Gaeta-Nedrow wrote that members may make contributions toward overhead expenses. (6/18/10 Memo Q&A p. 5).

State law clearly allows Collectives & Cooperatives to be compensated for their services.

#### **CLAIM 4: Collectives May Not Hire Employees**

Although Deputy City Attorney Angelique Gaeta-Nedrow agrees that members may make contributions toward the overhead expenses of Collectives and Cooperatives, she qualifies this statement by declaring that overhead expenses do not include salary, wages, or benefits paid to members of the Collective or Cooperative. (6/18/10 Memo Q&A p. 5). This assertion is based on the misguided view that only caregivers may be compensated. Because Collectives & Cooperatives generally are not "caregivers" they may not be compensated and therefore may not hire anyone to help cultivate the medical cannabis. According to the City Attorney even if the employee is a member of the Collective as a primary caregiver, the primary caregiver would have to be an employee of the patient and not the Collective. (6/18/10 Memo Q&A p. 5).

As previously discussed, the State Attorney General and Courts of Appeal have consistently stated that Collectives & Cooperatives may charge fees reasonably calculated to cover overhead costs *and* operating expenses. (AG Guidelines p. 10-11; *Urziceanu* at 785). The California Business and Professions Code defines overhead expenses as all costs of doing business including without limitation labor (including salaries of executives and officers), rent, selling cost, maintenance of equipment, licenses, taxes, insurance, and advertising. (CA Bus & Prof Code 17029). There is no indication from the Courts or Attorney General that salary, wages, and employee benefits are not to be included in the calculation of overhead and operating expenses. Neither the courts nor the Attorney General have stated that Collectives and Cooperatives may not hire employees.

The only restriction on Collective and Cooperative employees comes from the prohibition on profits. No individual may profit from the sale of medical cannabis. (AG Guidelines p. 9). While, directors, officers, and staff are not expected to work for free, they may only receive reasonable compensation for actual work completed. (Treas Reg. Section 1.62-7(b)(3), 53.4958-6). Unreasonably excessive compensation would amount to profiting and would violate both criminal and civil laws.

Collectives and Cooperatives may hire employees so long as their salaries and wages are reasonable.

#### **CLAIM 5: Caregiver Guidelines apply to Collectives & Cooperatives**

The City Attorney's Office lacks an understanding of the difference between caregiver cultivation and collective cultivation. This has caused confusion over compensation and

employees that has already been discussed. In addition, there is confusion over the basic operating model and legal requirements of collective cultivation.

At the June 22, 2010 Council Meeting, Council Member Ash Kalra asked the City Attorney how Oakland operates and he responded that the city uses a caregiver model. (6/22/10 Transcript p. 129). This is not accurate. Very few Collectives and Cooperatives provide the type of extensive services that would qualify them as a caregiver under state law. (See Generally *People v. Mentch* (2008), 45 Cal.4th 274). Instead, they operate as associations of patients and their caregivers who collectively cultivate cannabis and allocate costs among members. The four licensed storefront dispensaries in Oakland operate as Collectives and Cooperatives, not caregivers. (Oakland Code 5.80.010). The storefront dispensaries in San Jose also operate as Collectives and Cooperatives and not caregivers.

In addition, in the Q&A Deputy City Attorney Gaeta-Nedrow incorrectly asserts that collective cultivation needs to occur between the patient and the primary caregiver. (6/18/10 Memo Q&A p. 4). This is incorrect because Proposition 215 (CA H&S Code 11362.5) authorized cultivation between caregiver and patient. However, Proposition 215 does not authorize patients to cultivate for other patients. It was necessary for the Legislature to enact SB 420 (CA H&S Code 11362.775) to allow for collective cultivation between patients. This is the express purpose of the statute.

The City Attorney's Office misunderstands the fundamental workings and legal requirements for Collectives and Cooperatives.

#### **CLAIM 6: Collectives and Cooperatives are Not Organizations**

In the June 18, 2010 Q&A, Deputy City Attorney Gaeta-Nedrow wrote that state law does not require the formation of a legal "Cooperative" or some form of a "Collective." Instead, the words "collectively" and "cooperatively" are used to describe the process by which protected cultivation activities must occur, not the form the "group" ultimately takes. (6/18/10 Memo Q&A p. 2). She also writes that state law does not define the term "Cooperative." (6/18/10 Memo Q&A p. 2).

According to the Attorney General, patients and caregivers may only distribute cannabis to other qualified patients and caregivers so long as they are members of a properly organized Collective or Cooperative. (AG Guidelines p. 8, 10). Distribution must stay within a "closed circuit" of members. (AG Guidelines p. 10). Distribution to non-members is prohibited. (AG Guidelines p. 10). Thus it *is* the association, and not the cultivation process, that provides immunity for patients and caregivers. (AG Guidelines p. 10).

The Attorney General explains that a Collective or Cooperative is properly organized if it is a California Cooperative Corporation or a Mutual Benefit Nonprofit Corporation. (AG Guidelines p. 8). Cooperatives are specifically defined and regulated under the California Corporations Code. (AG Guidelines p. 8). Collectives are not defined anywhere under state law and operators have thus opted to become nonprofit corporations.

On the same page where Deputy City Attorney Gaeta-Nedrow states that the term Cooperative is not defined by state law, she also writes that Cooperatives must be organized and registered under the Corporations Code. This is just another example of how the City Attorney's office often contradicts its own misstatements of law.

**CLAIM 7: Collectives and Cooperatives May Not Receive Profits**

During the June 22nd City Council Meeting, Deputy City Attorney Gaeta-Nedrow stated that state law does not contemplate a collective or cooperative that makes or receives any profits. (6/22/10 Transcript p. 79). She has also stated that whether those profits are reinvested as required by the Corporations Code for Nonprofit and Cooperative Corporations is insignificant. (6/18/10 Memo Q&A p. 3).

This interpretation of state law is unreasonable. State law does prohibit the sale of marijuana for profit, however it also allows collectives and cooperatives to charge fees reasonably calculated to cover overhead and operating expenses. (AG Guidelines p. 10-11; *Urziceanu* at 785). It is impossible for Collectives and Cooperatives to avoid the receipt of profits. Nowhere in the law is it stated or contemplated that a Collective or Cooperative must calculate all expenses down to the penny. Instead the Attorney General advises Collectives and Cooperatives to form a Cooperative Corporation or similar entity. (AG Guidelines p. 8). Both Cooperative Corporations and Nonprofit Corporations comply with the restriction on profits because they require all net proceeds, aka profits, to be reinvested into the organization and used to benefit members. (AG Guidelines p. 8; CA Corp Code 7411(a)). Therefore no individual receives any profits and the Collective or Cooperative remains immune from charges of distribution.

According to the City Attorney's Office, if a Collective or Cooperative charged one cent over the actual costs of providing medicine, this would be considered profiteering subject to criminal prosecution. This view is unreasonable and it would be inconsistent for the Court to state that Collectives and Cooperatives may charge fees reasonably calculated but then punish those who miscalculate and end up with net proceeds at the end of the year.

Collectives and Cooperatives may receive profits, but they must be reinvested into the organization and used to benefit members.

**CLAIM 8: Members Must Participate in the Cultivation of Medical Cannabis**

The City Attorney's office has stated that Collective cultivation requires each member to contribute to the overall effort through in-kind services. (6/18/10 Memo Q&A p. 4). They cite no case law or resources to support this assertion.

The Attorney General and the Court of Appeal disagree with the City Attorney. Nothing in the law requires members to cultivate cannabis or otherwise participate in the management of the Collective or Cooperative or any storefront dispensaries they may operate. Members may contribute either labor, resources, or money to the enterprise. (*QPA* at 748.) Medical cannabis may be provided free to members, in exchange for

services to the Collective or Cooperative, allocated based on fees reasonably calculated to cover overhead costs, or any combination of the three. (AG Guidelines p. 10).

The City Attorney's assertion is incorrect and Collective & Cooperative members do not have to participate in the cultivation of medical cannabis.

**CLAIM 9: Only Collectives & Cooperatives Are Legal, Not "Dispensaries"**

In several memos to the Mayor and Council, the City Attorney repeatedly states that commercial dispensaries that distribute cannabis to qualified patients or their primary caregivers do not comport with state law. (3/16/10 Memo p. 2-5; 6/18/10 Memo Q&A p. 2). Here the City Attorney is participating in a game of semantics that has been criticized by the courts who have made it clear that storefront medical cannabis "dispensaries" are legal so long as they are operated by a properly organized Collective or Cooperative.

In *QPA v. City of Anaheim*, the Court commented that Anaheim's "oft-repeated, pejorative characterization of QPA as a storefront dispensary rather than a Cooperative or Collective is not persuasive." (*QPA* at 751). The Court then rejected the city's argument that any medical cannabis outlet designated a "dispensary" violates California law. (*QPA* at 751). Agreeing with the State Attorney General, the Court declared "a properly organized Collective or Cooperative that dispenses medical marijuana through a storefront may be lawful so long as they comply with the published guidelines." (*QPA* at 752; AG Guidelines p. 11).

The City Attorney's office cannot use the label "dispensary" to declare a prohibition on storefront medical cannabis Collectives and Cooperatives.

**CLAIM 10: Storefront Medical Cannabis Dispensaries are A Nuisance Under Local and State Law**

In a memo to the Rules and Open Government Committee dated January 21, 2010, the City Attorney incorrectly states that storefront medical cannabis dispensaries are a nuisance under local and state law. (1/21/10 Memo p. 2-3). Rather, the State Legislature has made it clear that the nuisance statute does not apply to medical cannabis Collectives and Cooperatives. In addition, the use of the local nuisance statute against Collectives and Cooperatives may also be prohibited.

CA H&S Code 11362.775 states that Collectives and Cooperatives are not subject to state criminal sanctions for maintaining a place for sales, managing or controlling a place for sales, or nuisance charges for using a building for unlawful distribution. (CA H&S Code 11362.775). In *Urziceanu*, the Court declared that the Legislature intended to exempt qualifying patients and their caregivers who Collectively and Cooperatively cultivate marijuana from criminal sanctions for all of the offenses listed in CA H&S Code 11362.775 including nuisance charges. (*Urziceanu* at 785). Consequently, storefront medical cannabis dispensaries cannot be labeled a nuisance under state law.

Currently, the San Jose Municipal Code defines a public nuisance as any use that violates local, state, or federal law. (SJ Code 1.13.050 (A)(3)). Storefront dispensaries that comply with the Attorney General's Guidelines do not violate state law. (*QPA* at 752; AG Guidelines p. 11). Local law can be amended by the City Council to allow for storefront dispensaries. While federal law does prohibit cannabis distribution, as explained below cities may not rely on federal law to prohibit medical cannabis activities. Therefore the local nuisance statute cannot be said to prohibit Collectives and Cooperatives.

The City of San Jose must tread lightly when using the nuisance code against medical cannabis storefront dispensaries.

**CLAIM 11: Federal Law allows San Jose to Deny a Permit for Medical Cannabis Activities**

In the memo dated March 16, 2010, the City attorney contends that permits for a storefront medical cannabis Collective or Cooperative may be denied because of federal law. (3/16/10 Memo p. 2). This assertion is misguided because cities and counties may not use federal law or invoke federal preemption as a justification for banning medical cannabis activity. (*QPA* at 762).

Case law has consistently held that federal law does not preempt California's medical cannabis laws. (*QPA* at 758 -760, 762-763). While the federal government is free to prohibit cannabis, it cannot force the states to do the same. (*QPA* at 759). California could go so far as to legalize all possession and use of cannabis and the federal government could not stop it. However California has not yet decided to do so and instead provides a limited immunity for people meeting certain requirements. Of course, the federal government may continue to arrest and prosecute Californians under the federal Controlled Substances Act.

Furthermore, there is nothing in a city's compliance with state medical cannabis laws that would result in a violation of federal law. (*QPA* at 760). A city's compliance with state law in the exercise of its regulatory, licensing, and zoning powers with respect to the operation of storefront medical cannabis dispensaries would not violate federal law. The fact that some members of Collectives or Cooperatives might choose to act in a way that violates federal law does not implicate the city in any such violation. (*QPA* at 759-760). Governmental entities do not incur aider and abettor status or direct liability by complying with their obligations under the state medical cannabis laws. (*Garden Grove* (2007), 157 Cal.App.4th 355, 389-390; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825, fn. 13). As a result, cities and counties are free to establish and implement regulations that allow for the collective or cooperative operation of storefront medical cannabis dispensaries.

Storefront medical cannabis dispensaries are not a nuisance under state law and have a strong defense to the local nuisance statute.

**ELLER & ASSOCIATES**

ATTORNEYS AT LAW

60 SOUTH MARKET STREET, SUITE 1201

SAN JOSE, CALIFORNIA 95113-2351

TELEPHONE: (408) 299-0180

FACSIMILE: (408) 271-0754

jelleresq@aol.com

REC'D DEC 06 2010

December 3, 2010

Deborah Figone  
City Manager, City of San Jose  
200 E. Santa Clara Street  
San Jose, CA 95113

Deanna Santana  
Deputy City Manager, City of San Jose  
200 E. Santa Clara Street  
San Jose, CA 95113

Re: Proposed Medical Cannabis Dispensary Ordinance

Dear Deb and Deanna:

This office represents SVCare which is a medical cannabis dispensary currently operating in San Jose. In contemplation of the December 13 Study Session for the City Council with regard to the above-referenced proposed ordinance, I would like to offer a few thoughts on behalf of my client.

Since the passage of Proposition 215 (the Compassionate Use Act of 1996) and the subsequent passage by the legislature of the Medical Marijuana Program Act in 2004, cities throughout the State of California have been struggling with the proper way to regulate medical cannabis dispensaries. While the use of marijuana to treat a variety of medical conditions has become relatively mainstream in the medical profession, the business of medical marijuana dispensaries has been plagued with scofflaws, drug dealers, and characters of questionable business ethics. My client, SVCare, believes that the dispensaries should be operated professionally, safely and accountably, without being intrusive to the general community. For example, SVCare suggests that all dispensaries meet the following standards:

- Dispensaries should be required to prominently display and operate security cameras for the interior and exterior of the premises and they should be positioned in such a way as to cover the entire premises.
- All products should be kept in a safe during the evening and kept in a secure space during hours of operation

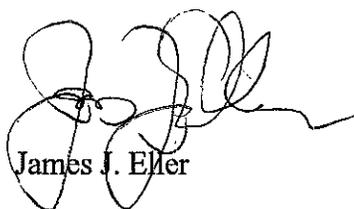
- The product should not be generally available in the lobby area of the dispensary. Only approved patients should be allowed beyond the lobby area for the purpose of obtaining the product.
- The product should be sold in child proof containers.
- A dispensary should be in a safe area, well lit, and generally visible.
- Each dispensary should have a verifiable accounting and sales system.
- A delivery service for patients of the dispensary should be allowed so long as deliveries are only to verified patients and addresses (no deliveries in open areas such as parking lots or parks).
- All deliveries must be pre-paid and identification must be presented at the time of delivery.
- Dispensaries should be regulated much like a pharmacy or a liquor store. Regulating dispensaries to remote, unsecure locations will only create unnecessary opportunity for abuse and the increased need for policing.
- Assuming the professional, safe and accountable operation of a dispensary, zoning should allow dispensaries in general commercial zones as well as being allowed to operate in buildings used primarily for medical purposes.

This list is only a sample of the regulations SVCare would propose for the operation of dispensaries. There is no reason that a dispensary cannot be operated in an unobtrusive manner for the benefit of its patients. SVCare is committed to a high level of professionalism and community cooperation. It has many other suggestions as to how the dispensaries might be utilized in the City of San Jose for the benefit of those in need of its product and thus serving a community need and at the same time generating additional revenue for the City of San Jose just as any other business would do. My client would welcome the opportunity to meet with you prior to the study session to share some further thoughts as to how dispensary operation might be achieved to the satisfaction of the decision makers for the City of San Jose.

Please contact me to discuss this matter further. I look forward to hearing from you.

Very truly yours,

ELLER & ASSOCIATES



James J. Eller

Deborah Figone  
December 3, 2010  
Page 3

Cc: Pierluigi Oliverio  
Sam Liccardo

15502