



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Legal Update on Medical
Marijuana

DATE: February 6, 2012

SUPPLEMENTAL MEMORANDUM

The attached Informational Memorandum is being redistributed for Council's consideration at the February 14, 2012 meeting. The memorandum was originally distributed on January 31, 2012.

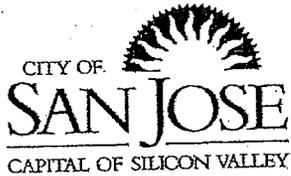
RICHARD DOYLE
City Attorney

By

Colleen D. Winchester
Sr. Deputy City Attorney

Encl.

For questions please contact Colleen D. Winchester, Sr. Deputy City Attorney, at 535-1946.



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

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SUBJECT: Legal Update on Medical
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DATE: January 31, 2012

INFORMATIONAL MEMORANDUM

BACKGROUND

This memorandum provides Council with the legal developments surrounding medicinal marijuana for its consideration in taking action upon the petition for referendum ("Petition") filed by the advocates for the medicinal marijuana industry.

In September 2011, Council adopted two Ordinances creating affirmative defenses to the enforcement of the San Jose Municipal Code for collectives or cooperatives that comply with certain regulatory measures (Title 6, "Regulatory Ordinance") and conform to zoning restrictions (Title 20, "Zoning Ordinance"). On October 28, 2011, advocates for the medical marijuana industry submitted the Petition challenging the Regulatory Ordinance. As a result, the effective date of the Regulatory Ordinance was automatically suspended. The Petition did not address the Zoning Ordinance. Therefore, on November 8, 2011, Council acted to suspend the effective date of the Zoning Ordinance so it could operate in tandem with the Regulatory Ordinance as intended.

On December 30, 2011, the County of Santa Clara's Registrar of Voters confirmed that the Petition contained a sufficient number of valid signatures. In light of the Petition, Council must now consider whether to repeal the Regulatory Ordinance or submit it to the voters. At this juncture and in light of the referendum, Council has five policy alternatives:

1. Submit the Regulatory Ordinance to the voters;
2. Repeal the Regulatory Ordinance;
3. Repeal the Regulatory Ordinance and adopt an ordinance creating an affirmative defense to enforcement of the San Jose Municipal Code for individuals;
4. Repeal the Regulatory Ordinance and reinstate the Zoning Ordinance which solely addresses location of the collectives; or

5. Repeal the Regulatory Ordinance and adopt an ordinance that is "essentially different" from the one that is repealed, addressing the collectives and cooperatives.

This memorandum provides Council with updates on the ever-changing status of medical marijuana for its consideration in considering these policy options.

A. Procedural Developments since September, 2011.

Since the adoption of the Regulatory Ordinance, there have been several important legal developments regarding medicinal marijuana:

1. The federal government's concerted enforcement action against California collectives by the United States Attorneys,
2. The State Attorney General's inability to adopt updated guidelines regarding medical marijuana;
3. Americans for Safe Access' request to initiate a petition to place an statewide initiative on the November, 2012, ballot; and
4. The California Supreme Court's decision to grant review in four opinions regarding medical marijuana, including *Pack v. City of Long Beach* and *City of Riverside v. Inland Empire*.

San Jose's principles on marijuana and each of these actions will be discussed in detail below.

B. San Jose's Marijuana Principles.

For over two years, San Jose's policy on medical marijuana has been debated at numerous Council and staff meetings. Both the Regulatory and Zoning Ordinances are shaped to conform to the principles adopted by Council in March, 2010. The principles include the following:

1. San Jose recognizes that California law allows a patient's primary caregiver to cultivate and possess marijuana for the personal medical purposes of the patient upon the recommendation of a physician;
2. San Jose will follow the guidance of the California Attorney General and the United States Attorney General in criminal enforcement of the laws regarding medicinal use of marijuana.
3. Individuals or entities that cultivate or distribute marijuana for profit are operating illegally under state law and are illegal under the San Jose Municipal Code.

Within the past two months, the second of these principles, to follow the guidance from the state and federal law enforcement officials, has become increasingly difficult.

In 1996, California voters adopted the Compassionate Use Act (CUA) to “encourage the federal and state governments to implement a plan to provide for safe and affordable distribution of marijuana to all patients in need of medical marijuana.” Although the state subsequently adopted the Medical Marijuana Program Act (MMPA), the federal and state governments have neither implemented a “plan” nor provided guidance to allow local governments to do so in its absence.

ANALYSIS

The legal uncertainty surrounding medical marijuana has increased in the past several months in light of federal law enforcement’s recent actions against marijuana collectives and Attorney General Kamala Harris’ inability to issue revised statewide guidelines. These events are complicated by the California Supreme Court’s action granting review in four decisions regarding the regulation of medical marijuana at the local level. Two of the decisions, *Pack v. City of Long Beach* and *City of Riverside v. Inland Empire Patient’s Health & Wellness Center*, address how far a local jurisdiction may “permit” or regulate medicinal marijuana collectives and whether or not the cities have the ability to ban collectives entirely. The other two cases address preemption and who has the ability to challenge ordinances. In short, the legal landscape has become more uncertain.

A. Federal Enforcement Actions.

As explained recently in our September 7, 2011, memorandum, marijuana remains illegal under federal law regardless of the status of a particular state’s law on compassionate medicinal use. Federal law enforcement officials have emphasized that it will not focus its investigative and prosecutorial resources on *individuals* who are in strict compliance with a state’s compassionate medicinal use laws.

On June 29, 2011, the United States Deputy Attorney General James Cole expressed alarm about the increase in cultivation, sale and distribution of marijuana for purported medical purposes. “Several jurisdictions have considered or enacted legislation to authorize privately-operated industrial marijuana cultivation centers. Some of these facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.” Deputy AG Cole states that a prior memorandum “was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”

On October 6, 2011, four United States Attorneys announced in a joint press conference coordinated enforcement measures targeting California’s “illegal commercial

marijuana industry." The effort is "aimed at curtailing the large, for profit marijuana industry that has developed" since the Compassionate Use Act was adopted in 1996.

After this press conference, some cooperatives and their landlords received letters providing "formal notice" that their dispensary operations violate federal law and that the operation may result in "criminal prosecution, imprisonment, fines and forfeiture of assets, including the real property on which the dispensary is operating and any money you receive (or have received) from the dispensary operator."

B. State Attorney General's Position.

In 2003, the Medical Marijuana Program authorized the State's Attorney General to develop and adopt appropriate guidelines to ensure the "security and nondiversion of marijuana grown for medical use by qualified patients under the Compassionate Use Act of 1996." In 2008, then Attorney General Brown adopted guidelines, which soon became outdated by the ever-evolving case law regarding medical marijuana. When Kamala Harris was elected, she was urged to revisit the 2008 guidelines.

On December 21, 2011, Attorney General Harris issued two letters on medical marijuana, one addressed to state legislators and the other to "partners and colleagues", stating that her office is unable to issue updated guidelines until there is clarification of the state's laws. (Exhibit "A".)

She prefaces both letters with the following:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises and others.

AG Harris indicates that she "cannot protect the will of the voters, or the ability of seriously ill patients to access their medicine, until statutory changes are made that define the scope of the cultivation right, whether dispensaries and edible marijuana products are permissible, and how marijuana grown for medical use may be lawfully transported."

AG Harris has met with law enforcement, cities, counties, patients and representatives from civil rights communities. She cites several ambiguities in state law that, combined with the recent unilateral federal enforcement, has highlighted the need for statewide clarification on important issues including the right to cultivate, dispensary model, transportation, non-profit operation and edibles. Each of these issues and San Jose's approach to it is set forth below.

i. Scope of the right to cultivate.

The Health and Safety Code recognizes that "qualified patients and their primary care givers" "who associate in order to collectively or cooperative cultivate marijuana for medicinal purposes, shall not solely on the bases of that fact be subject to state criminal sanctions" under Section 11357 (possession), 11358 (planting, harvesting or processing), 11359 (possession for sale), 11360 (unlawful transportation, importation, sale or gift), 11366 (maintenance of a place), 11366.5 (management or control of place) or 11570 (drug house).

AG Harris discusses the conflicting legal interpretations. Strict constructionists argue that only those involved in the physical cultivation are entitled to the defense, whereas others believe large scale distribution models are permitted. The divergent viewpoints create uncertainty for both law enforcement and the seriously ill patients.

In *People v. Mentch* (2008) 45 Cal.4th 274, the California Supreme Court analyzed the Compassionate Use Act and the Medical Marijuana Program in the context of marijuana grown in an individual's home. Roger Mentch had a physician's recommendation for marijuana which he grew in his home in an "elaborate set up" of at least 82 marijuana plants in various stages of growth. Mentch provided marijuana to several other individuals with physician recommendations. He used the money paid to him for nutrients, rent and utilities, but did not profit from the marijuana, but, rather sometimes he did not cover his expenses. He was arrested and charged with cultivation of marijuana (Section 11358) and possession with the intent to sell (Section 11359).

Mentch argued that he was a qualified patient entitled to cultivate and that he was a primary care giver entitled to cultivate and possess it for sale to others. The trial court refused to instruct the jury on a primary caregiver defense and Mentch was convicted. The Supreme Court granted review to address the definition of a "primary caregiver." It held that a "primary caregiver" must have: "(1) consistently assumed responsibility for a patient's care; (3) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana."

The Court found that Mentch was not a primary caregiver entitled to the defense under the Compassionate Use Act. The Court said that the text of the statute implies a "caretaking relationship directed as the core survival needs of a seriously ill patient, not just one single pharmaceutical need." The Supreme Court quoted the ballot measure in support of the Compassionate Use Act:

Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws.

Mentch testified that he provided excess growth to marijuana clubs. The Supreme Court rejected a primary caregiver defense. Even if he were a caregiver to one person, it would "not protect him from prosecution for cultivating marijuana and providing it to cannabis clubs." The Court also noted a ballot pamphlet argument that the Act was not intended to protect "anyone who grows too much, or tries to sell it."

The Court also found also that the Medical Marijuana Program provides additional criminal immunities but only for "specific actions". The Court noted that those who fall within the parameters of the MMP are not subject "on that sole basis" to criminal liability for those actions. To the extent that conduct falls outside of the enumerated conduct, the defenses do not apply.

The *Mentch* Court does not address whether the individuals would have had a defense if they were part of an association of individuals "to collectively or cooperatively" cultivate marijuana under Health and Safety Code Section 11362.775.

Decisions following *Mentch* have raised, but not resolved, this issue. As stated in this Office's memorandum of December 10, 2010, case law suggests that the MMPA allows for the creation of collectives, but the collective membership must be involved in the collective's activities other than simply paying for medical marijuana.

For these reasons, the Regulatory Ordinance as adopted by Council on September 13, 2011 and subject to the referendum provides:

No medical marijuana shall be provided to any persons other than the individual collective members who participate, either directly or through a primary caregiver, in the collective cultivation at or upon the premises and/or location of that collective.

SJMC §6.88.440(G).

ii. Dispensaries

AG Harris states that the term "dispensary" is neither found in the CUA nor defined in the later MMPA. She urges the Legislature to "weigh in" about hours, locations, audits, security, zoning, compensation and whether or not sales are permissible.

AG Harris warns that the decision in *Pack v. City of Long Beach* suggests if the "State goes too far in regulating medical marijuana enterprises (by permitting them, requiring license or registration fees, or calling for mandatory testing) the law may be preempted by Federal law." (*Pack* is one of the cases under review by the California Supreme Court.)

San Jose's Regulatory and Zoning Ordinances address hours, locations, audits, security and zoning. The City does not "permit" or "allow" any conduct prohibited by federal law and instead creates an affirmative defense to Municipal Code enforcement.

Local limitations in light of the federal law were previously explained by the California Supreme Court in *Ross v. RagingWire Telecommunications, Inc.*:

No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (citation), even for medical users (citations). Instead of attempting the impossible, as we shall explain, California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. ... Although California's voters had no power to change federal law, certainly they were free to disagree with Congress's assessment of marijuana, and they also were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug.

Thus, the Regulatory and Zoning Ordinances create an affirmative defense to local enforcement. No published decision addresses whether a public entity is preempted from creating an affirmative defense to local municipal code enforcement.

iii. Non-Profit Operation

AG Harris states distribution and sales for profit of marijuana, medical or otherwise, are illegal. (Health & Safety Code §11362.765.) AG Harris requests that the state legislature clarify the scope of "non-profit" operation of a collective, including what level of expenses are permissible. This clarification should include determining what costs are reasonable for a collective to incur, including whether or not compensation may be paid to members for working in a collective.

The Regulatory Ordinance provides that in-kind or monetary contributions toward overhead expenses must be in "strict compliance with State law." It continues that on the fifteenth of each month, the collectives are to provide an accounting of the overhead expenses to each of its members. [SJMC §6.88.440 (D), (E).] Overhead, in turn, is defined to include, "actual costs of cultivating medical marijuana incurred by the collective including mortgage payments, rent, utilities, business and property taxes, property insurance, cultivation materials and equipment, and fees paid to comply with the requirements of this Chapter." (SJMC §6.88.250.)

A prior draft of the Regulatory Ordinance excluded "salaries, wages and benefits" paid to employees from the definition of overhead. In April, 2011, this exclusion was deleted in light of the AG's guidelines that permitted such overhead, leaving the Regulatory Ordinance silent. AG Harris urges that the legislature clarify this issue.

iv. Edibles

AG Harris states that the edible products such as cookies, brownies, butter or ice cream are not monitored or regulated by state and local health authorities like commercially distributed food products or pharmaceuticals. There are no standards for dosage of THC in the products. She concludes:

Commercial enterprises that manufacture and distribute marijuana edibles and candy do not fit into any recognized model of collective or cooperative cultivation and under current law may be engaged in the illegal sale and distribution of medical marijuana.

AG Harris' concern about the dosage or standards for THC should not be limited to edibles as there is no standard THC content in any marijuana dose, regardless of the form of consumption.

A prior draft of the Regulatory Ordinance prohibited edibles. At Council's direction, the prohibition was deleted. Distribution of commercially produced edibles through the collectives would not be appropriate. As a general rule, the regulation of the safety of retail food is with the state's exclusive jurisdiction. If edibles are allowed, they should only be permitted to the extent that they are made by members and with marijuana cultivated on site. This would avoid AG Harris' concerns that commercially produced marijuana edibles which do not comply with the CUA are not distributed through the collectives.

C. Advocates' Initiative for State Legislation.

On December 20, 2011, Americans for Safe Access reported that it filed a request with the Attorney General to prepare and title an initiative for circulation to appear on the statewide November, 2012, ballot. The proposed initiative, "The Medical Marijuana Regulation, Control and Taxation Act" (Initiative), would preempt local regulation or "control" of medical marijuana other than zoning restrictions. The Initiative would impose a 2.5% supplemental state sales tax on marijuana transactions, and allow local governments to tax marijuana sales in amount not to exceed 2.5%. (Any local tax above 2.5% is preempted.)

The Initiative requires that no collective may operate until registered with the state other than those in compliance with local zoning restrictions. Those collectives may operate until registered. In addition, collectives in good standing under local ordinances may operate for three years without state registration.

The Initiative was submitted to the Attorney General for titling and summary. After that occurs, the proponents must collect the signatures necessary for it to be placed on the

ballot. Even though the initiative process is in its early stages, it may be a long-term consideration.

D. Action by the California Supreme Court.

As previously stated, on January 19, 2012, the California Supreme Court granted review in four cases involving medical marijuana. Once the California Supreme Court grants review of a case, it cannot be used or relied upon until the Court makes a decision. In the meantime, legal analysis must be based upon prior published decisions. Here, the four cases now before the Supreme Court address issues that are central to the medical marijuana analysis:

1. *Pack v. Superior Court* (2011) 199 Cal. App. 4th 1070: In this case, the court of appeal held that Long Beach's ordinance "permitting" collectives was preempted by federal law. The court found that the Long Beach's ordinance went beyond decriminalization.
2. *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.* (2011) 200 Cal. App. 4th 885: This decision held that Riverside's ban of medical marijuana collectives was a lawful use of its zoning powers and was not preempted by either federal or state law.
3. *People v. G3 Holistic* (2011) 2011 Cal. App. Unpub. LEXIS 8634: This case also upheld the City's ability to ban collectives.
4. *Traudt v. City of Dana Point* (2011) 199 Cal. App. 4th 886: This case addresses "standing" or who has the ability to challenge a zoning restriction.

There are several published opinions regarding medical marijuana that remain good law while the Supreme Court is considering review of these cases. In addition, AB1300 adopted in January, 2011 clarifies that:

Nothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective. (b) The civil and criminal enforcement of local ordinances described in subdivision (a). (c) Enacting other laws consistent with this article.

Thus, even though the cases are pending review, Council does have the ability to take action. Obviously, the scope of the issues for the Supreme Court's consideration presents a significant challenge in adopting further legislation in the interim.

E. San Jose's Alternatives in Light of Referendum.

Council must take action on the Regulatory Ordinance in response to the Petition for Referendum. It may either repeal the Regulatory Ordinance or send it to the voters for approval. If Council acts to repeal the Regulatory Ordinance or the ordinance is submitted to the voters and the voters do not approve it, the Council cannot enact the same ordinances for one year.

A case called *Martin v. Smith* states, "[t]he Council may, however, deal further with the subject matter of the suspended ordinance, by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance". Another case, *Rubalcava v. Martinez*, explains:

"The determination whether subsequent legislation is essentially the same begins with a comparison of the terms of the legislation challenged by referendum and the subsequent legislation, focusing on the features that gave rise to popular objection." (Citation) We may consult the record as a whole to identify the "popular" objections to the ... ordinance.

The court looks to determine whether ordinances are "essentially different" and whether or not they were enacted "not in bad faith, and not with the intent to evade" the referendum petition.

Therefore, Council has the following options:

1. Submit the Regulatory Ordinance to the Voters.

Council could place the Regulatory Ordinance on the ballot for the voters. If the voters repeal the Regulatory Ordinance, Council has the same ability to adopt an ordinance that is "essentially" different than the one that was repealed. Even if the Regulatory Ordinance were approved by the voters, however, the uncertain legal climate may require that it be amended depending on the California Supreme Court's rulings.

The County's Registrar of Voters estimates the cost of the first citywide ballot measure on the June 2012 election to be \$607,000.00 and the cost of each subsequent measure to be \$401,000.00.

2. Repeal the Regulatory Ordinance.

Council could repeal the Regulatory Ordinance and continue with enforcement of those collectives creating a nuisance or that violate state law without adopting a formal ban.

Whether or not an express ban is permitted will ultimately be decided by the California Supreme Court. As we have stated previously, the San Jose Municipal Code currently

prohibits a person from maintaining property as a nuisance. Nuisance is defined as any violation of federal law. Thus, medical marijuana collectives are in violation of federal law and subject to abatement under the Municipal Code, including the zoning ordinance.

Enforcement priorities have focused on the collective operations that result in a public nuisance and those operating in violation of state law. This should remain the priority pending decision by the California Supreme Court.

3. Repeal the Regulatory Ordinance and Create an Affirmative Defense for Individuals.

The San Jose Municipal Code provides that property which has been used or maintained in violation of federal law is a nuisance which may be abated by the City. To address the needs of patients who need to cultivate medical marijuana, the City could create an affirmative defense to Municipal Code enforcement limited to individual patients who grow marijuana for their own medical use or those patients and/or their primary caregivers who associate for collective cultivation on their own premises. The Regulatory Ordinance recognizes associations of three or less such individuals, who collectively cultivate on their own property for their own medical use, provided that the cultivation remains incidental to the residential use of the property. (SJMC §6.88.900.)

4. Repeal the Regulatory Ordinance and Reinstate the Zoning Ordinance.

The Zoning Ordinance was not subject to the referendum. Therefore, the suspension can be terminated and the Zoning Ordinance could be reinstated without the Regulatory Ordinance. Although this would place location restrictions on the collective operations, it would do so without any regulatory protection. The Zoning Ordinance also limits the number of collectives to ten. This alternative would probably increase the number of collectives and result in an increased need for staff. The Zoning Ordinance is clear that no collective is "permitted" or allowed to operate, to avoid both federal preemption argument as well as any claim of entitlement, should a ban be subsequently pursued if the California Supreme Court holds that a local jurisdiction cannot regulate the operations.

5. Repeal the Regulatory Ordinance and Adopt an Ordinance that is "Essentially Different" addressing Collectives.

Adopting an essentially different ordinance presents the challenges noted in AG Harris' letters. The Regulatory Ordinance attempts a delicate balance in this regulatory vacuum. The protests to the Regulatory Ordinance focused on two issues: (1) the number of collectives; (2) on-site cultivation.

a. Increase the number of collectives.

The advocates strongly protested the limitation on the number of collectives, and therefore increasing the number of collectives would probably be "essentially different ordinance" for purposes of satisfying the referendum.

One approach would be to follow the Planning Commission recommendation of twenty-five (25) collective locations. Alternatively, Council could remove the limit on the number of collectives and create an affirmative defense for every collective meeting the requirement of the Regulatory and Zoning Ordinance. This approach would be inconsistent with Council's past direction to maintain control over the number.

Any increase in the number of collectives will result in increased demand upon staff resources. It is unclear if such an increase in number would correlate to an increase the amount of revenue received by the City from the marijuana tax, because presumably smaller operations would serve a smaller number of patients.

Finally, whether a collective would fall within the scope of what federal enforcement officials would tolerate would depend upon the degree to which the collective operated as a collection of individual patients and primary caregivers cultivating for their own medical needs versus its resemblance to more of a business or commercial operation (whether profitable or not).

b. Off-site cultivation.

The on-site cultivation requirement insures a closed loop system and further allows for inspection for reasons of product safety. In addition, the on-site cultivation requirement removes the legal risk that those who transport medical marijuana from a grow location to a collective for distribution are not entitled to a defense under criminal law.

AG Harris' letter urges clarification on this issue because she "cannot protect the will of the voters, or the ability of seriously ill patients to access their medicine" without statutory changes that define the scope of the cultivation right *including* how the medical marijuana may be transported. Advocates urge that off-site cultivation is permitted as those who collectively associate to cultivate marijuana have a defense at state law for transportation. However, under the California Supreme Court's *Mentch* analysis, it would not appear that an individual could grow excess marijuana in another location and distribute his or her excess marijuana through a collective.

CONCLUSION

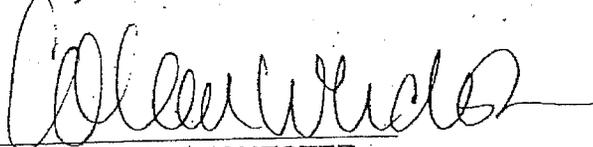
In March 2010, Council adopted a principle to follow the guidance of the California Attorney General and in the enactment of City ordinances. This has become increasingly difficult, if not impossible, due to federal enforcement actions and the State

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Attorney General's inability to provide further guidance on the scope of legal collective operations. Moreover, the California Supreme Court's decision to address four cases involving medical marijuana collectives presents future challenges. We are optimistic that the next year will bring clarity in this important area of law for both patients and local public entities.

RICHARD DOYLE
City Attorney

By:



COLLEEN WINCHESTER
Sr. Deputy City Attorney

cc: Debra Figone

For questions please contact COLLEEN WINCHESTER, Sr. Deputy City Attorney, at
(408) 535-1946

Exhibit A



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

December 21, 2011

Re: Medical Marijuana Guidelines

Dear Partners and Colleagues:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises, and others. Senior members of my staff recently concluded an almost yearlong series of meetings with representatives across the state from law enforcement, cities, counties, and the patient and civil rights communities. The primary purpose of the meetings was to assess whether we could clarify the medical marijuana guidelines that my predecessor published in 2008 in order to stop the abuses.

These conversations, as well as the federal government's recent unilateral enforcement actions, reaffirmed that the facts today are far more complicated than was the case in 2008. The consensus from our conversations is that state law itself needs to be reformed, simplified, and improved to better explain how, when, and where individuals may cultivate and obtain physician-recommended marijuana, and to provide law enforcement officers with guidelines for enforcement. In short, it is time for real solutions, not half-measures.

At the same time, almost every group of stakeholders has asked me to postpone issuance of new guidelines until the courts have acted in a number of key cases. Because I have come to recognize that non-binding guidelines will not solve the problems with the state's medical marijuana law, I have decided to honor this request and am urging the California Legislature to amend the law to establish clear rules governing access to medical marijuana.

We cannot protect the will of the voters, or the ability of seriously ill patients to access their medicine, until statutory changes are made that define the scope of the group cultivation right, whether dispensaries and edible marijuana products are permissible, and how marijuana grown for medical use may lawfully be transported.

I have begun discussions with the California Legislature about legislative solutions. One point is certain—California law places a premium on patients' rights to access marijuana for medical use.

I look forward to working with you on these issues going forward. Please do not hesitate to contact my office if you have questions or concerns.

Sincerely,

KAMALA D. HARRIS
Attorney General



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

December 21, 2011

The Honorable Darrell Steinberg
President Pro-Tempore
State Capitol, Room 205
Sacramento, CA 95814

The Honorable John A. Perez
Speaker of the Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0046

Re: Medical Marijuana Legislation

Dear President Pro-Tempore Steinberg and Speaker Perez:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises and others. My Office recently concluded a long series of meetings with representatives across the state from law enforcement, cities, counties, and the patient and civil rights communities. The primary purpose of the meetings was to assess whether we could clarify the medical marijuana guidelines that my predecessor published in 2008 in order to stop the abuses. These conversations, and the recent unilateral federal enforcement actions, reaffirmed that the facts today are far more complicated than was the case in 2008. I have come to recognize that non-binding guidelines will not solve our problems — state law itself needs to be reformed, simplified, and improved to better explain to law enforcement and patients alike how, when, and where individuals may cultivate and obtain physician-recommended marijuana. In short, it is time for real solutions, not half-measures.

I am writing to identify some unsettled questions of law and policy in the areas of cultivation and distribution of physician-recommended marijuana that I believe are suitable for legislative treatment. Before I get into the substance, however, I want to highlight two important legal boundaries to keep in mind when drafting legislation.



First, the Court of Appeal for the Second Appellate District recently ruled in *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070 that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts and are therefore preempted by the federal Controlled Substances Act. Although the parties involved in that case have sought review of the decision in the California Supreme Court, for now it is binding law. As mentioned below, the decision in *Pack* may limit the ways in which the State can regulate dispensaries and related activities.

Second, because the Compassionate Use Act (Proposition 215) was adopted as an initiative statute, legislative efforts to address some of the issues surrounding medical marijuana might be limited by article II, section 10(c) of the Constitution, which generally prohibits the Legislature from amending initiatives, or changing their scope or effect, without voter approval. In simple terms, this means that the core right of qualified patients to cultivate and possess marijuana cannot be abridged. But, as long as new laws do not "undo what the people have done" through Proposition 215, we believe that the Legislature remains free to address many issues, including dispensaries, collective cultivation, zoning, and other issues of concern to cities and counties unrelated to the core rights created in the Compassionate Use Act.

With this context, the following are significant issues that I believe require clarification in statute in order to provide certainty in the law:

(1) Defining the contours of the right to collective and cooperative cultivation

Section 11362.775 of the Health and Safety Code recognized a group cultivation right and is the source of what have come to be known as "dispensaries." It provides, in full:

Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, 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 Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

There are significant unresolved legal questions regarding the meaning of this statute. Strict constructionists argue that the plain wording of the law only provides immunity to prosecution for those who "associate" in order to "collectively or cooperatively . . . cultivate" marijuana, and that any interpretation under which group members are not involved in physical cultivation is too broad. Others read section 11362.775 expansively to permit large-scale cultivation and transportation of marijuana, memberships in multiple collectives, and the sale of marijuana through dispensaries. These divergent viewpoints highlight the statute's ambiguity. Without a substantive change to existing law, these irreconcilable interpretations of the law, and the resulting uncertainty for law enforcement and seriously ill patients, will persist. By articulating the scope of the collective and cooperative cultivation right, the Legislature will help law enforcement and others ensure lawful, consistent and safe access to medical marijuana.

(2) Dispensaries

The term "dispensary" is not found in Proposition 215 and is not defined in the Medical Marijuana Program Act. It generally refers to any group that is "dispensing," or distributing, medical marijuana grown by one or more of its members to other members of the enterprise through a commercial storefront.

Many city, county, and law enforcement leaders have told us they are concerned about the proliferation of dispensaries, both storefront and mobile, and the impact they can have on public safety and quality of life. Rather than confront these difficult issues, many cities are opting to simply ban dispensaries, which has obvious impacts on the availability of medicine to patients in those communities. Here, the Legislature could weigh in with rules about hours, locations, audits, security, employee background checks, zoning, compensation, and whether sales of marijuana are permissible.

As noted, however, the *Pack* decision suggests that if the State goes too far in regulating medical marijuana enterprises (by permitting them, requiring license or registration fees, or calling for mandatory testing of marijuana), the law might be preempted by the Controlled Substances Act. We also cannot predict how the federal government will react to legislation regulating (and thus allowing) large scale medical marijuana cultivation and distribution. However, the California-based United States Attorneys have stated (paraphrase Cole memo re: hands off approach to those clearly complying with relevant state medical marijuana laws).

(3) Non-Profit Operation

Nothing in Proposition 215 or the Medical Marijuana Program Act authorizes any individual or group to cultivate or distribute marijuana for profit. Thus, distribution and sales for profit of marijuana – medical or otherwise – are criminal under California law. It would be helpful if the Legislature could clarify what it means for a collective or cooperative to operate as a "non-profit."

The issues here are defining the term "profit" and determining what costs are reasonable for a collective or cooperative to incur. This is linked to the issue of what compensation paid by a collective or cooperative to members who perform work for the enterprise is reasonable.

(4) Edible medical marijuana products

Many medical marijuana collectives, cooperatives, and dispensaries offer food products to their members that contain marijuana or marijuana derivatives such as cannabis oils or THC. These edible cannabis products, which include cookies, brownies, butter, candy, ice cream, and cupcakes, are not monitored or regulated by state and local health authorities like commercially-distributed food products or pharmaceuticals, nor can they be given their drug content. Likewise, there presently are no standards for THC dosage in edible products.

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Commercial enterprises that manufacture and distribute marijuana edibles and candy do not fit any recognized model of collective or cooperative cultivation and under current law may be engaged in the illegal sale and distribution of marijuana. Clarity must be brought to the law in order to protect the health and safety of patients who presently cannot be sure whether the edibles they are consuming were manufactured in a safe manner.

I hope that the foregoing suggestions are helpful to you in crafting legislation. California law places a premium on patients' rights to access marijuana for medical use. In any legislative action that is taken, the voters' decision to allow physicians to recommend marijuana to treat seriously ill individuals must be respected.

Please do not hesitate to contact me if you have questions or concerns.

Sincerely,

KAMALA D. HARRIS
Attorney General

cc: The Honorable Mark Leno
The Honorable Tom Ammiano