AmericansFor SafeAccess
Advancing Legal Medical Marijuana Therapeutics and Research

COPY Mary Wiesner

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October 2, 2006

Michael Aguirre
City Attorney
City of San Diego
Civic Center Plaza
707 Broadway, Suite 700, MS 70
San Diego, CA 92101

Re: ***Legal Opinion on Medical Marijuana Dispensaries***

Dear Mr. Aguirre:

I am Chief Counsel with Americans for Safe Access, which is a nonprofit corporation that advocates on behalf of medical marijuana patients and their primary caregivers. I understand that you have been asked by members of the San Diego City Counsel for a legal opinion regarding the status of medical marijuana dispensaries under state law. I write to you with the following information in the hopes that it aids your research.

On November 4, 1996, the California electorate enacted the Compassionate Use Act (Cal. Health & Safety Code § 11362.5) [hereinafter "the CUA"] "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(A).) Although the Act did not expressly provide for a distribution system for marijuana to the seriously ill, it sought "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Cal. Health & Safety Code § 11362.5, subd. (b)(1)(C).) To meet the voters' challenge, on September 10, 2003, the California Legislature passed SB 420, also known as the "Medical Marijuana Program Act" or "the MMPA." (Cal. Health & Saf. Code § 11362.7 *et seq.*;

People v. Urziceanu (2005) 132 Cal.App.4th 747, 785.) This legislation provides that "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." (Cal. Health & Safety Code § 11362.775). Thus, as the court recognized in *Urziceanu, supra:*

> [T]he Legislature . . . exempted those qualifying patients and primary caregivers who collectively or cooperatively cultivate marijuana for medical purposes from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. . . . [The MMPA'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.*

(*Urziceanu, supra*, 132 Cal.App.4th at p. 785; see also Stats. 2003, C. 875, Section 1, subd. (b)(3) [declaring that the purpose of the MMPA is to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects"].) In short, under California law, medical marijuana dispensaries are legal.

I hope this information helps. Please do not hesitate to contact me at any time with any questions or comments. Thank you.

Sincerely,

Joseph D. Elford

California Government Code section 65858 allows for a moratorium on any uses in order to protect the public safety, health and welfare. The otherwise applicable procedures for the adoption of a zoning ordinance need not be complied with. The requirements and limitations of this section are as follows:

- The prohibited use must be in conflict with a contemplated general plan, specific plan or zoning proposal that the legislative body, planning commission or planning department is considering, studying or will consider or will study within a reasonable time.

- The urgency measure requires a four-fifths vote.

- The interim ordinance is of no effect 45 days after adoption.[1]

- An extension of the ordinance may be obtained for 10 months and 15 days, and a subsequent one year extension, after compliance with the requirements of GC section 65090 and a public hearing. These extensions also require a four-fifths vote.

- Alternatively, an extension may be obtained for 22 months and 15 days by compliance with GC section 65090 and a public hearing; also with a four-fifths vote.

- The adoption and any extension must contain a finding that there is a current and immediate threat to the public health, safety, or welfare and that the approval of any additional entitlements would result in a threat to public health, safety, or welfare.

- 10 days prior to the expiration of the interim ordinance or any extension, the legislative body must issue a written report describing the measures taken to alleviate the condition that lead to the adoption of the ordinance.

- At the end of the effective date or any extensions, a new urgency ordinance may not be enacted to address the same threat to public safety, health and welfare as the prior interim ordinance.

Past subjects of moratoriums in the City of San Diego include land development in the North City Future Urbanizing Area (1991) and adult entertainment permits (1993). A moratorium that is reasonable in purpose and duration is not considered a taking of private property. *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781 (1992).

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[1] Reading this limitation in conjunction with the requirements of San Diego Charter section 17, the interim ordinance would be effective 30 days after passage and would be in effective for only 15 days before expiration. Before that time, the City would need to enact an extension, in order for the moratorium to be of continued effect. An exception would be an ordinance adopted as an emergency, to "provide for the immediate preservation of the public peace, property, health, or safety." San Diego Charter § 17.

California Peace Officers' Association

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CASE ALERT MEMORANDUM

JULY 18, 2007

Prepared by the firm of

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To: ***All Police Chiefs & Sheriffs***

From: ***Martin J. Mayer***

"RENT TO A POT DISPENSARY-GO TO JAIL"

Recently, the Federal Drug Enforcement Administration notified approximately 150 Los Angeles landlords that if they rent properties for use as medical marijuana dispensaries they face arrest, incarceration and loss of those properties.

Timothy J. Landrum, DEA special agent in charge of the Los Angeles office, sent a letter to landlords who have rented properties for use as medical marijuana dispensaries, informing them that they were aiding and abetting in the commission of a federal crime. Currently, there are approximately 400 medical marijuana dispensaries located in the City of Los Angeles.

It would appear that, even under California's Proposition 215, codified as the Marijuana Compassionate Use Act, such dispensaries are illegal. Senate Bill 420, which was enacted to implement Proposition 215, makes reference to "collectives" being permitted in order to grow and distribute medical marijuana, but the law specifically prohibits making a profit – which is exactly what marijuana dispensaries do.

In fact, on July 17, 2007, the DEA announced the indictment of nearly a dozen medical marijuana dispensaries, alleging that they profited from the illegal distribution of marijuana. Profiting from such distribution is illegal under California law, as well.

<u>Zoning Regulations May Violate</u>
<u>California Law</u>

It must also be noted that when cities issue zoning regulations which permit the establishment

of such dispensaries, even though regulating locations to commercial or industrial areas, such zoning regulations are in violation of California law.

Government Code Section 37100 prohibits local governments from promulgating ordinances which are in violation of the U.S. Constitution or state or federal law. Since the U.S. Supreme Court, in the case of Gonzalez v. Raich, ruled that the federal Controlled Substances Act (CSA) supersedes California's Compassionate Use Act, and that there is no medical exception under the CSA, the use, possession or distribution of marijuana continues to be a felony under federal law.

How This Effects Your Agency

The conflict between state and federal law regarding the use of marijuana for medical purposes creates an ongoing problem for California law enforcement. As has been pointed out on numerous occasions all that Proposition 215 established was a possible defense against prosecution for possession of marijuana by those who qualify under state law to use it for medical purposes. It did not legalize possession of marijuana in the state of California nor did it effect the prohibition which exists under federal law. All Proposition 215 established was that, under California law, one would not be prosecuted for possession and use of the drug if that individual was determined to be a qualified medical user.

This latest action by the federal Drug Enforcement Administration reinforces the fact that distribution of marijuana constitutes a felony under federal law. In this case, landlords who knowingly rent property for dispensaries are aiding and abetting in the commission of a crime. As such, those individuals are subject to arrest (by federal agents) and prosecution (under federal law).

This action does not appear to have a direct impact upon California law enforcement, other than to reinforce that marijuana dispensaries are still considered illegal under federal law and, therefore, pursuant to Government Code Section 37100 cannot be permitted through zoning regulations to be operated within the state of California.

As always, we urge that law enforcement agencies receive advice, guidance and direction from their designated legal advisors before taking any actions as a result of information generated in these Client Alert Memos. Should you wish to discuss this matter in greater detail, please feel free to contact me at 714 – 446-1400 or via e-mail, mjm@jones-mayer.com.

Progress Report to PS&NS Committee
By the Medical Marijuana Task Force
For October 16, 2002 Meeting

Dated: October 11, 2002
By: Chair, Juliana B. Humphrey

I. PROGRESS SUMMARY

Voluntary Verification Card Program Request for Proposal Process

As planned, the Voluntary Verification Card RFP was published in June 2002 with replies due by the end of July. After receiving and reviewing the submissions, a small committee met to discuss them on August 28, 2002. The committee decided to reject the submissions made based upon concerns regarding ability to perform the necessary functions of the contract as well as monetary issues. Further discussion yielded the opinion that (1) the City should obtain start up funds before reissuing the RFP; (2) the RFP needs to be directed to agencies that have a better understanding of the needs of the contract; and (3) non-profit agencies that regularly deal with patients likely to apply for the verification card would be ideal to supply this service.

Members of the Task Force are currently fine-tuning the RFP to enable respondents to more accurately prepare their proposals. It is anticipated that this RFP will be ready to publish in October with replies due in November. The goal of the Task Force is to select a provider by the end of the year and have verification cards ready to go early in 2003.

II. PROPOSAL

Possession and Cultivation Guidelines

Attached to this Report is a proposal from the Task Force entitled "City of San Diego Law Enforcement Guidelines Regarding Possession of Medicinal Cannabis." [*See **Attachment 1***.] These Guidelines represent the end product of much research, study and debate within the Task Force, with particular guidance from Dale Kelly Bankhead and the Legislative Subcommittee and StClair Adams and the Law Enforcement Subcommittee. As Chairperson Toni Atkins suggested during the June 19, 2002 report by the Task Force, we have actively sought input from the City Attorney, the San Diego Police Department, local physicians and patients, and the public, continuing the pattern of the Task Force's inclusive and exhaustive exploration of issues and options surrounding the implementation of the law.

Law enforcement guidelines are needed in our community. Contrary to the repeated assertions of the San Diego Police Department, patients, doctors and caregivers who have the legal right to avail themselves of the benefits of Prop. 215 are not doing so out of fear of reprisal from law enforcement. These law-abiding people are at a loss as to how to comply with the law and find no comfort in being told they are subject to a "case-by-case analysis." It is for the benefit of these residents -- a cancer patient who may never have tried marijuana before her diagnosis, a friend or family member of that patient that wants desperately to help alleviate her suffering, or a doctor who desires to learn more -- that the guidelines must be promulgated. The main goal of the Guidelines is to give notice to the community of the rights and responsibilities under the law and to provide a "safe harbor" for legitimate patients and their doctors and caregivers.

It bears repeating that Prop. 215 passed with a strong statewide majority which included the county of San Diego. [*See* ***Attachment 2***: Official Canvass on Prop. 215.] The community-at-large supports the medicinal use of marijuana. When respect for the vote of our citizens is shown by adopting the Law Enforcement Guidelines and creating a "safe harbor," the whole community benefits; respect for the law, and for enforcers of the law, cannot help but be enhanced.

The Task Force is not ignoring the conflict between our state law and federal law. Given the recent focus by the Drug Enforcement Agency on the seizure of patient cannabis gardens it is anticipated that there will soon be an answer to this dilemma in our courts. In the meantime, our California Attorney General still advises local jurisdictions to develop their own protocols regarding enforcement of Prop. 215, codified into California law as Health & Safety Code §11362.5. [*See* ***Attachment 3***: Text of Health & Safety Code §11362.5; and ***Attachment 4***: Memo by State Attorney General Bill Lockyer.] While the proposed guidelines do not, and cannot, resolve the state/federal clash, they can and do offer notice to local residents regarding the enforcement policies of the City of San Diego. However, in developing these guidelines, the Task Force reviewed current federal sentencing law in order to set threshold amounts of processed or cultivated cannabis below the mandatory minimum federal prison guidelines. [*See* ***Attachment 5***: 21 United States Code § 841 at pp. 2 - 3.]

The following is a synopsis of the terms of the Guidelines with supporting documentation and, where appropriate, an explanation of how or why a particular term was chosen. The Task Force is pleased to answer any questions regarding the guidelines or our process in advance of or at the October 16, 2002 PS&NS meeting.

A. Part I: Introduction

The goals of the Guidelines are set forth in the opening paragraphs of Part I. The fear surrounding the issue of arrest and seizure of medicinal cannabis are addressed first: no one who qualifies under these guidelines will be arrested, nor will their cannabis be