ORD-22

Attachment

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Cc:	<cityclerk@longbeach.gov>, <cityattorney@longbeach.gov>
Date:	01/12/2011 05:53 PM
Subject:	Medical Marijuana Ordinance Amendments

Dear Mayor Foster and Members of the Long Beach City Council:

This firm represents Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers with respect to the City of Long Beach's ("City") proposed amendment of Ordinance No. ORD 10-0007 ("amended ordinance"). I understand that the City has placed the amended ordinance on the agenda for January 18th for a second reading. My clients are respectfully requesting that this matter be removed from the agenda as a result of the defects outlined below:

- Non-Compliance with Section 1002 of City Charter; Failure to Refer to Planning Commission
- Violation of Procedural Due Process; Failure to Provide Neutral Hearing
- Spot Zoning; Because of Exclusion of Beaches from Definition of Parks
- Violation of Collectives' Equal Protection Rights by Unreasonably Discriminating against Collectives who were Successful in the City's Lottery Process
- Failure to Comply with the California Environmental Quality Act
- Video Surveillance Without Legal Process Violates Constitutional Right to Privacy
- Preemption of Criminal Penalties under State's Medical Marijuana Program Act

The attached letter describes in detail the defects of the amended ordinance. Thank you in advance for your time and consideration of these issues.

Regards,

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January 12, 2011

VIA ELECTRONIC MAIL AND PERSONAL DELIVERY

Mayor Bob Foster and
Members of the Long Beach City Council
City of Long Beach
333 W. Ocean Blvd, 14th Floor
Long Beach, CA 90802
mayor@longbeach.gov

Re: Medical Marijuana Ordinance Amendments

Dear Mayor Foster:

This firm represents Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers with respect to the City of Long Beach's ("City") proposed amendment of Ordinance No. ORD 10-0007 ("amended ordinance"). I understand that the City has placed the amended ordinance on the agenda for January 18th for a second reading. My clients are respectfully requesting that this matter be removed from the agenda as a result of the defects outlined below:

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Amended Ordinance Does Not Comply with Section 1002 of the City Charter

The amended ordinance violates Section 1002 of the City Charter, which requires that the Planning Commission review any proposed amendments to the City's Zoning Regulations prior to the adoption by the City Council. Section 1002 states the following:

> "It shall be the responsibility of the Planning Commission to advise the City Council on all matters affecting the development and redevelopment of the City and to perform such other related functions as may be authorized by the City Council . . . The powers and duties of the Planning Commission shall include the following: . . . (c) To prepare, approve and recommend to the City Council such ordinances and resolutions, including zoning and subdivision regulations, as are necessary to implement the General Plan, specific neighborhood plans and redevelopment area plans. **The City Council shall not adopt or amend any such ordinances or resolutions until it has first requested a report and recommendation from the Commission.** The report shall be submitted within a reasonable time and shall evaluate such recommendation with regard to its consistency with the General Plan."

The amended ordinance unquestionably both implicates and includes zoning regulations. Indeed, the City's Attorney's December 14th Report to the City Council states that the amended ordinance "clarifies that Collectives must adhere to the City's **zoning regulations** regarding parking and signage requirements." To accomplish this, Chapter 5.87.040(X) of the amended ordinance states the following: "The City Council shall approve and issue a Medical Marijuana Collective Permit if the application and evidence submitted in the hearing, conducted pursuant to Section 5.87.030, Subdivisions (D) and (E) as set forth above, sufficiently demonstrate that: . . . . The property meets the off-street parking and loading requirements set forth in Chapter 21.41. For the purposes of determining required parking, a Medical Marijuana Collective shall be deemed to be a 'personal services' type use." It is undisputed that the amended ordinance impacts the City's zoning regulations by subjecting Medical Marijuana Collectives to the City's off-street parking and loading requirements. Pursuant to Section 1002 of the City Charter, the Planning Commission must therefore review the amended ordinance prior to the adoption by the City Council.

The addition of a new buffer zone to the City's Medical Marijuana Ordinance also effects a change in the City's Zoning Regulations. Chapter 5.87.040 of the amended ordinance would add an additional "buffer zone" from Medical Marijuana Collectives, namely public parks. Indeed, the City's Attorney's Report to the City Council dated December 14, 2010 states the following: "The amended ordinance would: (1) [c]reate an additional 'buffer zone' so that a Collective could not locate within 1,000 feet of a public park." In other words, medical marijuana uses would be prohibited on parcels located within 1,000 feet of a public park. This would impact thousands of parcels in the City and would change the status quo adopted in Ordinance No. ORD-10-0007, which only prohibited medical marijuana uses in exclusive residential zones (*See* Chapter 5.87.040 (A) stating, "Medical Marijuana Collectives are not permitted to operate in exclusive residential zones as established pursuant to Title 21 of this Code.") and established buffers zones between collectives and schools (*See* Chapter 5.87.040 (B) and (C)). Because the City's new public park buffer zone seeks to prohibit a particular use (medical marijuana) that was previously permitted subject to issuance of the appropriate permits, the amended ordinance directly effects the City's zoning regulations and must first be considered by the City's Planning Commission prior to adoption by the City Council. (*See* Section 1002 of the City

Charter). The City Council does not have the authority to disregard the mandate of its own charter and property owners and collectives impacted by the amended ordinance are entitled to due process of the law and the opportunity to be heard by the Planning Commission prior to the adoption of ordinance. A case from 1958, *Kissinger v. Los Angeles* (1958) 161 Cal.App. 2d 454, 465, discusses an almost identical provision in the City of Los Angeles' City Charter. In *Kissinger*, the City failed to provide the Planning Commission the opportunity to review and provide recommendations to a proposed rezoning decision and the appeal's court subsequently invalidated the ordinance, saying:

> "Certainly sound common sense and wise public policy would require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted and we must assume that the framers of the charter had such purpose in view in limiting . . . the council's right to act. . . . [i]t would be absurd to construe these charter provisions as appellants would have us construe them, i.e. as requiring the council to make but a token submission of the ordinance to the planning commission without giving the commission the power or opportunity to perform the duties cast upon it by the charter. Such a construction is not to be placed upon the charter unless required by the plain provisions thereof. That the provisions of the charter do not require such an absurd result is too clear for argument."

Kissinger v. Los Angeles, supra, 161 Cal.App. 2d at 464-65. The City is required to seek the recommendation of the Planning Commission prior to the adoption of the ordinance and provide impacted property owners and collectives adequate notice and an opportunity to be heard. Failure to refer the amended ordinance to the Planning Commission not only violates Section 1002 of the City Charter, but prejudices collectives and impacted property owners, including Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers. The City has never analyzed the land use impacts associated with the siting of collectives within 1000 feet of "parks" and a host of questions remain, including the following:

- Is there a need for such a buffer zone around parks?
- What potential impacts have been documented to justify such a buffer zone?
- Is there evidence demonstrating an increase in crime or traffic?
- Should all parks be included in the buffer zone?
- Should the City include in the definition of "park" or "public park" all "publicly owned natural or open areas owned or maintained by the City of Long Beach and set aside for active and passive public use for recreational, cultural or community service activities"?
- What properties actually qualify for inclusion under this broad definition?
- What does it mean for a publicly owned natural or open space be "maintained" by the City?
- Which parks or open spaces have been "set aside for active and passive public use for recreational, cultural or community service activities"?
- Which property owners will be impacted by the new buffer zone? Have they been noticed?
- Does it make a difference whether a park is infrequently visited?
- Does the size of the park make a difference? Should it?
- Is there a need for a buffer zone around beaches? If not, why?
- Is their a rational justification from the removal of beaches from the park buffer zone?
- Is there a need for a buffer zone around daycare centers?

Property owners, collective patients and caregivers, and the City Planning Commission should be given an opportunity to review the aforementioned questions. Indeed, Section 1002 of the City Charter compels referral of the amended ordinance to the City Planning Commission.

Violation of Procedural Due Process by Failing to Provide Neutral Hearing Prior to Closure of Collectives Impacted by Amended Ordinance

The City cannot extinguish either the statutorily conferred rights of existing collectives that will be impacted by the amended ordinance or the rights of collective applicants impacted by the new park buffer zone without due process of law. Article I, Section 7(a) of the California Constitution clearly states that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . ." The amended ordinance will reduce the total number of collectives authorized in the City to 22 and will remove 10 collectives from the pending permit process. Section 5.87.020 of the amended ordinance makes it unlawful in the City to operate in the City without a Medical Marijuana Collective Permit.[1] Any person that violates the City's Medical Marijuana Ordinance is declared to be "guilty of a misdemeanor punishable by a fine of not more than [] $1,000.00 or by imprisonment for not more than twelve (12) months, or by both such fine and imprisonment."[2] The amended ordinance provides no opportunities to be heard at a meaningful time and in a meaningful manner by collectives impacted by the proposed amendments to the Medical Marijuana Ordinance. Collectives, including Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers, have obtained a statutorily conferred benefit from the State of California pursuant to Medical Marijuana Program Act (codified at Health and Safety Code § 11362.775 [3]) and therefore enjoy procedural due process protection.

The case of *Ryan v. California Interscholastic Federation,* (2001) 94 Cal.App.4th, 1069-71, makes this abundantly clear: "[w]hen a person is deprived of a statutorily conferred benefit, due process analysis must start not with a judicial attempt to decide whether the statute has created an 'entitlement' that can be defined as 'liberty' or 'property,' but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake. . . . Although under the state due process analysis an aggrieved party need not establish a protected property interest, the claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution . . . ." The amended ordinance is absent of any mechanism for a neutral hearing and therefore removes the rights conferred by state law as found in the Health and Safety Code. Therefore, the amended ordinance denies without due process of law the statutorily conferred right to operate a collective and is therefore unconstitutional.

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[1] Section 5.87.020 states the following: "It shall be unlawful for any person or entity to engage in, operate, conduct or carry on, in or upon any premises, a Medical Marijuana Collective as that term is defined in this Ordinance unless that person or entity first obtains and continues to maintain in full force and effect a Medical Marijuana Collective Permit issued by the City as required by this Chapter."

[2] *See* Chapter 5.87.100 of the Medical Marijuana Ordinance.

[3] Cal. Health and Safety Code § 11362.775 provides: "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 criminal sanctions . . ."

The Amended Ordinance Amounts to Spot Zoning

Chapter 5.87.040(I) of the amended ordinance is an exercise in "spot zoning." Spot zoning describes an arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specifically zones for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the General Plan. Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole. Fitting the facts at hand to the previously described model, the larger areas can be viewed as "public parks" and the smaller area "beaches." Spot zoning has variously been characterized as implicating substantive due process, takings and equal protection concerns. *Buckles v. King County,* 191 F.3d 1127, 1137 (9th Cit. 1999).

It is clear from the record of the proceedings held on December 10, 2010 that Councilman Steven Neal requested that the definition of "parks" be changed to benefit one particular collective, Belmont Shore Natural Care ("Belmont Shore Collective") located at 5375 2nd Street. As originally proposed by the City Attorney and presented to City Council on December 14, 2010, the amended ordinance would have eliminated the Belmont Shore Collective from siting in this particular location as it was located within 1,000 feet of a beach (which by definition is a "park" under Chapter 21.35 of the Long Beach Municipal Code).[4] It is clear that this was the objective of Councilman Neals' proposed amendment to Chapter 5.87.015(L), as the original request was to simply remove one beach from the definition, Alamitos Beach, which, again, could only have benefited one collective, Belmont Shore Natural Care. At the suggestion of City staff, the amendment was broadened to include all beaches, but the effect was the same as only one collective was removed from the new 1,000 buffer zone, the Belmont Shore Collective. It is clear from the record that the amendment of Chapter 5.87.15(L) to exclude beaches from the definition of "parks" is designed to relieve a particular property and collective from the newly proposed restrictions (i.e. park buffer zone) for the benefit of a particular property and interested party to the detriment of other properties and collectives in the vicinity and the City of Long Beach community as a whole.

As noted by several Councilmembers at the hearing of December 14, 2010, the exclusion of beaches from the definition of parks arbitrarily and capriciously violates the community's well-considered comprehensive zoning plan and is out of conformance with the City's General Plan, specifically, the Open Space Element dated October 2002. The Open Space Element treats the City's parks and beaches as equally important public resources and the policies and goals/objectives identified in the Open Space Element do not appreciably differ between parks and beaches. Further, the Open Space Element establishes a specific policy to "Protect and improve the community's natural resources, amenities and scenic values including nature centers, beaches, bluffs, wetlands and water bodies." If you accept the City's stated rationale for the amended ordinance ("additional public safety"), then excluding beaches from the definition of public parks does the exact opposite. Moreover, the exclusion of beaches serves no public purpose, is solely for private gain and discriminates against the 10 collectives which will be eliminated by passage of the amended ordinance. "While it is true than

[4] Chapter 5.87.015(L) of the first draft of the amended ordinance defines "Park" or "Public Park" as "publicly owned natural or open space areas owned or maintained by the City of Long Beach and set aside for active and passive public use for recreational, cultural or community services activities." Included in the definition of "Parks" are "all those areas in the City that have been dedicated, designated, or zones as 'park' in Chapter 21.35 of the Long Beach Municipal Code."

the motives which influence a legislative body in passing an ordinance which is within its power to pass may not be inquired into, where, as here, the facts are such as to show an attempt to exercise the police power in such a manner as to oppress or discriminate against an individual or individuals we are entitled to give weight to the evidence disclosing a purpose other than that declared by the ordinance in determining its validity." *Kissinger v. Los Angeles* (1958) 161 Cal.App. 2d 454.

Viewed in relation to public parks, beaches are certainly no less impacted by medical marijuana collectives. The proffered basis for the proposed amendments to Ordinance No. ORD-10-0007 was "additional public safety." *See* memorandum dated November 9, 2010 from Councilmembers Gary DeLong, Patrick O'Donnell and Gerrie Schipske. Ten collectives and parcels eliminated by the City's newly proposed park buffer zone are being discriminated against and denied equal protection of the City's zoning laws as a result of the City's actions. Beaches are indistinguishable in character from the City's other public parks and the removal from the proposed park buffer zone results in an unjustifiable privilege to a *single collective* and an unjustifiable detriment to the 10 collectives that are poised to be eliminated by the City's proposed new park buffer zone. There is absolutely no evidence in the record to support the idea that beaches are less impacted in terms of public safety by medical marijuana collectives than public parks.[5] Indeed, the City's own records demonstrate that over 7.5 million people visit the City's beaches on an annual basis.[6] Comparatively, only 26 of the City's parks are even staffed and just 620,000 people visited those parks during the 2010 fiscal year.[7] If the objective of the new buffer zone was truly for "additional public safety" and not for the prejudical, discriminatory purposes of eliminating certain collectives while allowing others to move forward, then the City would not have excluded beaches from the definition of "parks."[8] Indeed, the City will be hard pressed to find any compelling evidence that there has been a change in the character of "beaches" since their inclusion in the definition of "parks" in Chapter 21.35 of the Long Beach Municipal Code to justify their removal for the purposes of this specific ordinance.

Violation of Collectives' Equal Protection Rights

Notwithstanding the unlawful beach carve out provision, the amended ordinance unlawfully discriminates between collectives and violates collectives' equal protection rights provided for at Article I, Section 7(a) of the California Constitution. The lottery was allegedly designed to provide a fair and equitable way to apply the City's Medical Marijuana Ordinance and implement the City's buffer zone and residential restrictions. Collective applicants were notified of the City's permitting process through a series of public meetings from May 21 -27. Collectives were fully aware of the Medical Marijuana Collective permitting process and the City began accepting applications from June

[5] *See Kissinger v. Los Angeles* (1958) 161 Cal.App. 2d 454 (invalidating ordinance as spot zoning noting that "the property is no more subject to the hazards created by the operations of the air field than any other properties within the flight area.")

[6] *See* General Plan, Open Space Element, page 6, dated October 2002, stating "Currently it is estimated that the annual visitation rate to these beaches is 7.5 million visitors."

[7] Data obtained from City of Long Beach Parks, Recreation & Marine Department.

[8] Indeed, Councilmember DeLong's staff has repeated the following sentence to residents who have expressed interest in Herbal Solutions Naples: "Councilmember DeLong is opposed to a medical marijuana dispensary at this location and we will do everything we can to restrict it from opening." (emphasis added).

1st to June 8th with an application review period from June 21st to September 16th. Thereafter, a lottery was held on September 20th to determine which collectives could continue in the City's permitting process. Significantly, the lottery was designed by the City to offer **equal opportunity** for all applicants. The amended ordinance's retroactive enforcement of the park buffer zone, however, fundamentally **destroys the equity** that the lottery process was specifically designed to achieve and irrevocably taints the results of the lottery. For example, some collectives were eliminated from the City's permitting process via lottery because of competing adjacent collectives that are now poised to be eliminated by the new park buffer zone. Retroactive zoning legislation is fraught with constitutional peril.[9] As noted above, the State of California permits collective cultivation by statute.[10] Indeed, collectives have obtained a statutorily conferred benefit to operate a collective regardless of whether or not the City has conferred a right or issued a permit to operate collectives within its borders. The amended ordinance's retroactive effect does not guarantee equal protection of the law and unreasonably discriminates against collectives that followed the rules and regulations established in ORD-10-007 and participated in the lottery.

The Amended Ordinance Fails to Comply with the California Environmental Quality Act

Noticeably absent from the amended ordinance is any analysis of the amended ordinance under the California Environmental Quality Act ("CEQA"). Under CEQA, the City is compelled to analyze whether the proposed project will result in any "significant, adverse effects on the environment." Ordinance No. ORD-10-0007, codified at Chapter 5.87 of the Long Beach Municipal Code, went into effect on May 2, 2010 and a lottery was held on September 20, 2010 to determine the collective/cultivation sites. The Medical Marijuana Ordinance establishes the environmental status quo. Notably, the City's Medical Marijuana Ordinance does NOT provide for a buffer zone between parks and medical marijuana collectives/cultivation sites. The record from the administrative proceedings leading up to the adoption of the City's Medical Marijuana Ordinance demonstrates that the City considered whether or not to include such a buffer zone, but this idea was rejected for a number of reasons, including environmental equity concerns. Moreover, it is undisputed that the City has begun to implement its Medical Marijuana Ordinance and a total of 32 collectives and 5 cultivation-only sites were successful in the City's lottery. These 37 collective/cultivation sites represent the environmental baseline and the environmental status quo in which the City must review the amended ordinance. Moreover, regardless of the City's asserted position regarding the legality of the numerous existing medical marijuana collectives in the City, the fact remains that medical marijuana collectives have existed in the City for over 7 years and the evidence will demonstrate that the City has known of their existence during the same time period. The City now seeks to relocate existing collectives to other parts of the City and at the same time authorize new collectives in areas of

[9] *See Jones v. Los Angeles* (1930) 211 Cal. 304, 321 (**"**Our conclusion is that where, as here, a **retroactive** ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power."); *Edmonds v. County of Los Angeles* (1953) 40 Cal. 2d 642, 651 (reaffirmed principle that "[t]he rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected. [Citation.] Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses....")

[10] Cal. Health and Safety Code § 11362.775

the City where they have not previously existed. The City's actions will certainly change the environmental status quo by reducing the total number of collectives in the City from 32 to 22 and reducing access to medical marijuana in large sections of the City. Patients have come to depend on the existing locations in the City. The amended ordinance will result in a physical change in the environment and requires review under CEQA. This impact is not speculative and is certainly foreseeable. Indeed, City staff has published a map identifying the precise collective/cultivation projects that would be impacted.[11] It is clear from the map that medical marijuana patients in Council District 5 will now have no access at all to medical marijuana in their council district.

The City is compelled to prepare an Initial Study pursuant to §15063 of the California Public Resources Code as there are no applicable exemptions established in Division 13, Articles 18 or 19 of the California Public Resources Code.[12]

Any Initial Study conducted by the City must analyze the reasonably foreseeable indirect or secondary effects of the amended ordinance. The term "project" as defined in Cal. Pub. Res. Code § 21065 has been broadly interpreted by courts. For example, in a seminal case decided by the California Supreme Court, the court stated that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. Further courts have concluded that the term "project" encompasses regulatory approvals such as general plan amendments, zone changes, and annexations which may ultimately lead to physical environmental changes. 14 Cal. Code Regs. § 15378(a)(1); *Bozung v. Local Agency Formation Commission*, (1975) 13 Cal. 3d 263, 277 n.16, 118 Cal. Rptr. 249. The City is required under CEQA to undertake a review of an ordinance when it is apparent that the regulations will "*culminate* in physical change to the environment." *Bozung v. Local Agency Formation Commission*, 13 Cal. 3d 263, 281 (emphasis added).

The fact that the "project" at issue is the adoption of an ordinance as opposed to a development project proposed by an applicant does not relieve the City of the obligation to undertake a review of the project under CEQA. *Rosenthal v. Board of Supervisors* (1975) 14 Cal.App.3d 815, 823 (stating that "adopting an ordinance [is] a project"); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 118 Cal.Rptr. 34 (impliedly holding that adoption of ordinance is a project within the meaning of CEQA); 60 Ops.Cal.Atty.Gen. 335 (1977) ("ordinances and resolutions adopted by a local agency are 'projects' within the meaning of CEQA"). The Attorney General Opinion issued in 1977 concluded that the following ordinances were all subject to CEQA: (1) an open-range ordinance requiring private land owners to fence out cattle; (2) an ordinance allowing construction of single family dwellings in rural

[11] http://www.longbeach.gov/civica/filebank/blobdload.asp?BlobID=29621

[12] The project at issue is not eligible for an exemption pursuant to Section 15270 as "projects which are disapproved." The amended ordinance seeks to shut down both existing medical marijuana collectives in the City as well as collective/cultivation sites that were already given the green light in the City's lottery process to proceed with obtaining a medical marijuana permit. Under these circumstances, review under CEQA is mandated. The City's implementation of its Medical Marijuana Ordinance has progressed to a point whereby amendment to the Ordinance mandates CEQA review. The City has already conducted its lottery and approved 37 collectives/cultivation sites to move forward in the permitting process identified in the Medical Marijuana Ordinance. While disapproval of the collectives rendered ineligible in the City's lottery process *may* be exempt from CEQA, elimination of collective/cultivation projects is not. In any event, the impact of the amended ordinance by itself (e.g. reduced access leading to patients having to drive further, increased waste water, electrical consumption, bio-waste, etc.) warrants review under CEQA.

areas without electricity, running water, or flush toilets; and (3) an ordinance modifying road improvement standards for new subdivisions. The bottom line is that a project need not directly effect a physical change in the environment: reasonably foreseeable indirect or secondary effects must also be analyzed. The relative inquiry is whether or not the project, or in this case, the amended ordinance, will ultimately culminate in physical changes to the environment. *Id.* As described below, the City's amended ordinance will unquestionably culminate in a physical change to the environment and an Initial Study that the City conducts must analyze these impacts before the City can adopt the amended ordinance.

The environmental impacts of the amended ordinance could be profound. The environmental factors that the City is compelled to consider include the following: (1) Aesthetics, (2) Agriculture and Forestry, (3) Air Quality, (4) Biological Resources, (5) Cultural Resources, (6) Geology / Soils, (7) Greenhouse Gas Emissions, (8) Hazards & Hazardous Materials, (9) Hydrology / Water Quality, (10) Land Use / Planning, (11) Mineral Resources, (12) Noise, (13) Population / Housing, (14) Public Services, (15) Recreation, (16) Transportation/Traffic, and (17) Utilities / Service Systems. While the amended ordinance may have not have a significant effect on the environment with respect to one particular environmental factor (e.g. Mineral Resources), it may nonetheless have a significant environmental effect on another factor (e.g. Transportation / Traffic). Without conducting an Initial Study, the City has no way of knowing the effects on the environment. Even a cursory review of the amended ordinance reveals environmental concerns that mandate review under CEQA. Here are the facts:

- Thirty-two collectives were successful in the City's lottery process. Additionally, five cultivation-only sites were selected from the lottery.
- Ten collectives will be eliminated as a result of the amended ordinance. Further, three cultivation-only sites will be eliminated or rendered useless as a result of the amended ordinance.
- In sum, the amended ordinance will leave 22 collectives in the City and 2 cultivation-only sites. The amended ordinance will result in a 31.25% reduction in the number of collectives in the City and a 60% reduction in the number of cultivation-only sites.

The amended ordinance will create a greater burden on the remaining 22 collectives in the City who will be tasked with meeting the needs of a greater number of patients. There are foreseeable environmental consequences that implicate agriculture, air quality, water quality, traffic, land use planning, etc. Consider the following:

- Assuming medical marijuana patients comprise 2% of the Long Beach population, then there are 10,000 patients in Long Beach.
- Assuming patients use 1 ounce of marijuana per month, then 7500 pounds of cannabis per year would need to be cultivated to meet patient needs.
- This amounts to 234 pounds per year/per collective if there are 32 collectives in the City.
- The amended ordinance, however, would <u>increase</u> the cultivation requirement of each collective by 106 pounds per year (or 340 pounds/per collective).
- In other words, each collective would need to increase production by almost <u>45%.</u>

Such a large increase in cannabis production will have significant effects on the environment. Obviously, larger cultivation facilities will be required and additional waste water will be created as a result of these cultivation activities. Moreover, additional waste plant material (a.k.a bio-waste) will be created that must be disposed of properly. There will also be an increase in the electrical consumption that will be required. Approximately 400 watts of electricity is required to grow one pound of cannabis per year. As a result of the amended ordinance, the remaining collectives will need approximately 42,000 watts per year of electricity. These facts are compelling and demonstrate potential significant environmental effects in terms of (1) Greenhouse Gas Emissions, (2) Hazards & Hazardous Materials, (3) Hydrology / Water Quality, and (4) Utilities / Service Systems.

Moreover, there are transportation/traffic and air quality issues that are implicated as well. It is undisputed that the amended ordinance will result in a reduced number of collectives and the absence of any collectives in Council District 5 (by far the largest district in the City). Moreover, Council Districts 3 and 4 will have very few collectives despite the fact that these districts comprise a large part of the City. Further, collectives will be clustered in the few areas of the City that comply with the buffer zone requirements and residential restrictions embodied in the Medical Marijuana Ordinance. Because collectives are necessarily comprised of patients and caregivers that live throughout the City (and presumably in residential areas), these individuals (who have a medical need) will have to travel to distant collectives. Patients will likely travel by car or public transit. Further, significant land use/planning impacts may result from the amended ordinance. As previously noted, the exclusion of beaches from the park buffer zone is inconsistent with the City's General Plan. Further, the clustering of collectives in certain areas of the City creates land use compatibility problems that the City is compelled to analyze under CEQA.

While the above discussion is not intended to be an exhaustive list of the reasonably foreseeable indirect or secondary effects of the adoption of the amended ordinance, it is illustrative of the types of impacts that the City has completely failed to consider. A fair argument has been outlined regarding the amended ordinance's significant environmental effects. As such, the City must conduct an Initial Study under CEQA and provide the public with a review period to comply with the legal mandates of CEQA.

Video Surveillance Without Legal Process Violates Constitutional Right to Privacy

The amended ordinance's provision authorizing the City of Long Beach Police Department the ability to view live and recorded video surveillance footage "without requirement for a search warrant, subpoena or court order"[13] is a violation of the California Constitution's right to privacy.[14] Section 5.87.040(I) of the amended ordinance requires collectives to install a video surveillance "that monitors no less than the front and rear" of collective locations and "capture[s] a full view of the public rights-

[13] Section 5.87.040(I)(4) states the following: "Consent is given by the Medical Marijuana Collective under this subsection to the provision of said recordings or live video feed to the Police Department without requirement for a search warrant, subpoena or court order."

[14] Article 1, Section 1 of the California Constitution states the following: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

of-way[] and any parking lot under the control of the Medical Marijuana Collective." Section 5.87.040(I)(3) of the amended ordinance also requires collectives "to allow the Long Beach Police Department to view live and recorded video from these cameras over the Internet." While a regulation requiring the utilization and operation of a video surveillance system *may* be a lawful regulation, the compelled consent to provide unfettered access to the Police Department without legal process is an unconstitutional violation of patients' right to privacy. The case of *Vo v. Garden Grove,* (2004) 115 Cal.App.4th 425 is instructive. In that case, the City of Garden Grove adopted regulations for cybercafés, including a requirement to install video surveillance equipment. The City's Ordinance stated that "[t]he system shall be subject to inspection by the City during business hours" and "[t]he videotape shall be maintained for a minimum period of 75 hours." An impacted cybercafé sued the City and obtained a preliminary injunction. The City appealed. While the appellate court overturned the trial court's injunction on privacy grounds, the court took clear note of the fact that the City of Garden Grove's Ordinance did **not** provide for access to videos without legal process, recognizing that this would have created grave privacy concerns. The court stated the following:

> "First, we note what the appeal on this issue is *not* about. Plaintiffs argue, 'Garden Grove has decided that the plaintiffs must collect video records of all its patrons and make those images available to the government for any purpose whatsoever.' But reasonably interpreted, that is *not* what the ordinance requires. 'The system shall be subject to inspection" and the "videotape shall be maintained for a minimum period of 72 hours.' The ordinance does not require the owner to allow inspection of the *tape* upon demand. For enforcement purposes, the city can assure itself the video surveillance *system* is operational. That is all the ordinance requires.
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> At the hearing on the preliminary injunction, counsel for the city agreed with this interpretation, and acknowledged the city could not take possession of the video tape without legal process such as a search warrant. . . . While the ordinance permits the city to inspect the video system to ensure it is operational, the ordinance does **not** subject the videotape to inspection by the city on demand."

Vo, supra, 115 Cal.App.4th at 445-46 (emphasis added). Here, the amended ordinance does much more than merely allow the Police Department to determine that a collective's video surveillance system is operational. The Police Department has on-demand access and can obtain video recordings without any legal process whatsoever. Section 5.87.040 (I) allows the Police Department to view much more than just public property or places where there is no reasonable expectation of privacy. Indeed, the video surveillance system described in the amended ordinance require the system to "monitor[] no less than the front and the rear of the Property." Further, Section 5.87.040 (I)(3) requires the video surveillance system to "[b]e of adequate quality, color rendition and resolution to allow the ready identification of any individual committing a crime **anywhere on** or adjacent to the exterior of the Property." Section 5.87.040 (I)(4) provides the Chief of Police (at his or her discretion) the ability to require collective's to "add additional cameras. Section 5.87.040(I)(1) also mandates that the video surveillance system must capture "any parking lot under the control of the Medical Marijuana Collective." As described by the amended ordinance, the system would clearly allow the Police Department to view patient vehicle license plates (via parking lot access). Police officers would be able to discern the identity of thousands of patients by reviewing this information against government and

DMV databases. The Police Department will be given the ability to gather patient information and enter into it databases or use that information for subsequent surveillance of patients. Moreover, patient activity inside a collective could also be viewed by the Police Department. This is exactly the type of government snooping that the drafter's of California's constitutional right to privacy meant to prevent. *See White v. Davis* (1975) 13 Cal.3d 757. The City can certainly pursue the amended ordinance's purpose ("additional public safety") through less restrictive means, namely the requirement that police pursue the appropriate legal process prior to obtaining video footage. The uncertainty surrounding the possible uses of this information renders patient's invasion of privacy serious enough to trigger constitutional protection *See Hill v. National Collegiate Athletic Association,* (1994) 7 Cal.4th 1.

The Criminal Penalties in the Ordinance are Preempted by State Law

The criminal penalties set out in Chapter 5.87.100 of Ordinance No. ORD-10-007 are preempted by the Medical Marijuana Program Act ("MMPA"), which is codified at Cal. Health and Safety Code § 11362.775.

Chapter 5.87.100(A) states that "Any person violating any provision of this Chapter or knowingly or intentionally misrepresenting any material fact in procuring the permit herein provided for, shall be guilty of a misdemeanor punishable by a fine or not more than one thousand dollars ($1,000.00) or by imprisonment for not more than twelve (12 months, or by both such fine and imprisonment." Chapter 5.87.100(B) goes on to state that "Any person who engages in any Medical Marijuana Collective operations after a Medical Marijuana Collective Permit application has been denied, or a Medical Marijuana Collective Permit has been suspended or revoked, and before a new permit is issued, shall be guilty of a misdemeanor."

"Local legislation 'is "contradictory" to general law when it is inimical thereto.' (Citation.) A local ordinance is preempted by a state statute only to the extent that the two conflict." *Action Apartment Assn., supra,* 41 Cal 4th 1232, 1242-43. "Local Laws contradict state laws if they 'prohibit what the statute commands or command what it prohibits.'" *Sherman- Williams v. City of Los Angeles* (1993) 4 CaL4th 893, 902.

The criminal sanctions portions established at Chapter 5.87.100 contradict the MMPA. Support for this conclusion comes from *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App. 4th 734:

> The trial court apparently did not consider whether the MMPA's provisions that are distinct from the CUA, including sections 11362.765 and 11362.775, preempt the city's ordinance. The court in *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, held that the "general availability of injunctive relief under [s]ection 11570 against buildings and drug houses used to sell controlled substances is not affected by" the CUA. The Legislature subsequently enacted the MMPA. Sections 11362.765 and 11362.775 of the MMPA immunize operators of medical marijuana dispensaries-provided they are qualified patients, possess valid medical marijuana identification cards, or are primary caregivers-from prosecution under state nuisance abatement law (§ 11570) "solely on the basis" that they use any "building or place ... for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance...." *Sections* 11362. 765 *and* 11362.775 *also provide qualifying*

persons immunity from nonfederal criminal sanctions imposed "solely on the basis" of "open[ing] or maintain[ing] any place for the purpose of unlawfully selling, giving away, or using any controlled substance ... " (§ 11366) or for "rent[ing], leas[ing], or mak[ing] available for use ... [a] building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance ..." (§ 11366 .5).

Whether the MMPA bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined. Unlike in Ross, where the Supreme Court observed that "[t]he operative provisions of the [CUA] do not speak to employment law" (42 Cal.4th at p. *928), the MMPA explicitly touches on land use law by proscribing in sections* 11362.765 *and* 11362.775 *the application of sections 11570,* 11366, *and* 11366.5 *to uses of property involving medical marijuana.* Here, viewing the allegations of the complaint most favorably to the plaintiffs, as is required on demurrer, *it appears incongruous at first glance to conclude a city may criminalize as a misdemeanor a particular use of property the state expressly has exempted from "criminal liability" in sections* 11362 .765 *and* 11362.775. Put another way, it seems odd the Legislature would disagree with federal policymakers about including medical marijuana in penal and drug house abatement legislation (compare 21 U.S.C. §§ 812 & 856 with §§ 11362.765 & 11362.775), but intend that local legislators could side with their federal-instead of state-counterparts in prohibiting and criminalizing property uses "solely on the basis" of medical marijuana activities. (§§ 11362.765 & 11362.775.) After all, local entities are creatures of the state, not the federal government.

Qualified Patients Assn., supra, 187 Cal.App.4th at 753-54.

As *Qualified Patients Assn.* suggests, there is a statutory and logical contradiction between the Medical Marijuana Ordinance and the MMPA. The MMPA prohibits criminal sanctions for collective cultivation if one uses land for that sole purpose, while the Ordinance criminally sanctions that same conduct. There is no readily apparent way to reconcile these two contradictory laws. The criminal sanctions language from the MMPA controls. The City should amend Chapter 5.87.110 because it commands what the state law prohibits: criminal prosecution for collective cultivation of medical marijuana.

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Conclusion

In sum, Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers request that this matter be removed from the upcoming agenda as a result of the procedural and substantial defects outlined above. Please note that Natural Herbal Solutions, Herbal Solutions Naples and One Source Discount Caregivers hereby reserves the right to supplement this letter with additional evidence to be presented at or prior to the hearing on January 18, 2011.

Sincerely,

Jamie T. Hall
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