MATTHEW S. PAPPAS
ATTORNEY

22762 ASPAN ST, #202-107
LAKE FOREST, CA 92630

E-MAIL: OFFICE@MATTPAPPASLAW.COM

(949) 382-1485
FACSIMILE: (949) 382-1512

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VIA E-MAIL ONLY

Ms. Donita Van Horik, Chair
Mr. Alan Fox, Vice Chair
Long Beach Planning Commission
333 W. Ocean Blvd.
Long Beach, CA 90802

Re: Review of Proposed Medical Marijuana Ordinances

Dear Commissioners Van Horik and Fox:

I ask that this letter please be included in the record of the Planning Commission meeting set for July 17, 2014. As you likely know, I was a candidate for City Attorney in the primary election held April 8, 2014. I also represent seriously ill and disabled patients who have, in the past, been members of Long Beach Medical Marijuana Collectives. Those collectives are now closed.

During the recent election, Mr. Parkin made clear his job is not to set policy, but rather to act as a legal adviser. To wit, during the election, at one of the various forums, Mr. Parkin was asked about the City's underfunded pension issue. According to James Johnson, former 7th District Councilman and one of the candidates for City Attorney, Mr. Parkin gained hundreds of thousands of dollars in pension value. Mr. Parkin's response was that it is not the City Attorney's job to set policy – that the council sets policy and he simply determines whether something is legal or not. In the case of the pension issue, he said it was legal, so that determination is where the City Attorney's job ended.

Despite saying this during the campaign, Mr. Parkin has insisted on putting forward a proposed medical marijuana ordinance rife with problems. He's done this even though City staff has been presented with and responded positively to an ordinance prepared by the Long Beach Medical Marijuana Ordinance Task Force – an ordinance that is far less susceptible to legal attack. Indeed, that task force, established pursuant to the City Council's vote in December to re-regulate medical marijuana, includes as members a former L.A. County Deputy Sheriff and a former Deputy Los Angeles City Attorney.

COMPELLED INCRIMINATION

Although the federal position has changed after my office won several federal forfeiture cases last October, there is still a conflict between state medical marijuana law and federal law. In order for the difference between the laws of the two sovereigns to result in potential issues, the state and federal provisions must positively conflict with each other. One of the biggest problems with Mr. Parkin's ordinance is *compelled incrimination*. People cannot be compelled to incriminate themselves under the Fifth Amendment to the Constitution. Since any marijuana activity is currently illegal under federal law despite the changing position of Congress as well as the Executive Branch, laws that require reporting of who is engaged in marijuana activities, names of patients and video recording of those activities indeed force, by a government entity, people to incriminate themselves. The City Attorney's ordinance includes a host of provisions that will are subject to legal attack:

> "The ordinance also includes record-keeping provisions as a condition of obtaining a permit. (Long Beach Mun. Code, ch. 5.87, § 5.87.040, subd. S.) Other record-keeping provisions appear unconnected to the permit requirement. (Long Beach Mun. Code, ch. 5.87, § 5.87.060.) **Although we requested briefing on the issue of whether the record-keeping provisions violated the Fifth Amendment privilege against self-incrimination, the trial court will first have to determine, as a preliminary matter, whether each of the comprehensive record-keeping provisions can stand in the absence of the permit provisions**." (*Pack v. Superior Court [City of Long Beach, Real Party in Interest]* (2011) *slip opinion* at p. 35, *fn*. 35.)

That quote is from *Pack v. Superior Court (City of Long Beach, Real Party in Interest)* (2011) *slip opinion*. Although *Pack* was de-published when it was taken-up by the California Supreme Court, it is still valid in terms of the City of Long Beach through the rule of *law of the case* following remittitur by the Appellate Court back in 2012. Please note that the Appellate Court, in the highlighted sentence, "requested briefing on the issue of whether the record-keeping provisions violated the Fifth Amendment privilege against self-incrimination." Including such provisions in the new ordinance is doing the same thing over again and expecting a different result – it is asking for protracted litigation that will cost taxpayers thousands, if not millions, of dollars. There's no need to expose taxpayers to such potential liability because the Task Force ordinance does not include such provisions yet still provides strong regulation of collectives.

PERMITTING

Perhaps the best way to demonstrate why the Conditional Use Permit system is likely invalid is to quote directly from the Second District California Court of Appeal in its *Pack* opinion:

> "The City's ordinance, however, goes beyond decriminalization into authorization. Upon payment of a fee, and successful participation in a lottery, it provides permits to operate medical marijuana collectives ... **In other words, the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives.** A law which "authorizes [individuals] to engage in conduct that the federal Act forbids . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" and is therefore preempted. (*Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board* (1984) 467 U.S. 461, 478.)" (*Pack* at

I've highlighted a sentence from the opinion – *In other words, the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives*. The Court then went on to strike the permitting and lottery parts of the ordinance.

Although the permit at issue in *Pack* was called a "Medical Marijuana Collective Permit," disguising the same thing as a *Conditional Use Permit* does not vitiate the original problem – the City "determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives." It is the same thing with the name changed. The problem remains in the City Attorney's ordinance. They have simply reworded the same thing thereby exposing taxpayers.

The Long Beach Medical Marijuana Task Force proposed ordinance does **not** issue a permit. It provides for a general business license. The general business license is for revenue purposes only – it is not regulatory. Every business in Long Beach must have a business license, including certain non-profit charitable organizations that still must obtain business licenses, but that are not subject to the same business license fee every other business must pay. There is no collection of extra fees paid for approval.

> "The City has created a system by which: (1) of all collectives which follow its rules, only those which pay a substantial fee may be considered for a permit; and (2) of all those which follow its rules and pay the substantial fee, only a randomly selected few will be granted the right to operate. **The conclusion is inescapable:**

> **the City's permits are more than simply an easy way to identify those collectives against whom the City has chosen not to enforce its prohibition** against collectives; the permits instead authorize the operation of collectives by those which hold them. As such, the permit provisions, including the substantial application fees and renewal fees, and the lottery system, are federally preempted." (*Pack* at p. 33.)

The Long Beach Medical Marijuana Task Force proposed ordinance includes additional restrictions – substantial restrictions. However, rather than using a **permit** system (*i.e.* the conditional use permit system provided in the City Attorney's proposed ordinance), the Task Force's ordinance uses general business licenses that every business must have as **"simply an easy way to identify those collectives against whom the City has chosen not to enforce it prohibition**." Unlike the City Attorney's proposed ordinance, those restrictions –restrictions that are substantial – are <u>not</u> tied to a permitting system:

> "However, we make the following observations: **Several provisions of the City's ordinance simply identify prohibited conduct without regard to the issuance of permits.** For example, the ordinance includes provisions (1) prohibiting a medical marijuana collective from providing medical marijuana to its members between the hours of 8:00 p.m. and 10:00 a.m. (Long Beach Mun. Code, ch. 5.87, § 5.87.090 at subd. H); (2) prohibiting a person under the age of 18 from being on the premises of a medical marijuana collective unless that person is a qualified patient accompanied by his or her physician, parent or guardian (id. at subd. I); and (3) prohibiting the collective from permitting the consumption of alcohol on the property or in its parking area (id. at subd. K). **These provisions impose further limitations on medical marijuana collectives beyond those imposed under the MMPA, and do not, in any way, permit or authorize activity prohibited by the federal CSA**." (*Pack* at p. 34.)

<u>PUNITIVE MEASURES</u>

The City Attorney's office wrote and submitted LBMC Chapter 5.87 in 2009 and 2010. The permitting and lottery parts of that ordinance were stricken and then the City Attorney demanded the Council impose a ban. Former council members who voted for the hastily passed ban, including then 7th District Councilman James Johnson, said they were provided with "bad legal advice" when they approved the 5.89 prohibition of all collectives. Before 5.87 was even enacted, former Councilwoman Reyes-Uranga called the law "pretty much a sham."

People invested hundreds of thousands of dollars based on their belief the City Attorney had provided an effective law. They spend millions on improvements and permits – all to comply with a law that was not properly drafted. Now, the City Attorney is presenting an ordinance that is replete with the same problems that plagued the original 5.87 law. It does not appear the City Attorney has recently read the *Pack* opinion even though that decision is still in effect in Long Beach. More importantly, the new ordinance seeks to penalize people that have provided medical marijuana to patients. Not only was the law in flux in Long Beach, it was in flux throughout California – it is still, to a lesser degree, undergoing changes. The point system included in the City Attorney's proposed law imposes penalties against people who operated during what was, for all intents and purposes, a "hurricane" of legal changes happening statewide. It makes absolutely no sense to penalize people who believed they were complying with the law. Moreover, there were many people who continued to operate collectives following a host of appellate court decisions holding City's could not ban patient collectives. In one opinion issued in the summer of 2012 – *AMCC v. County of Los Angeles* – the Second District held bans of medical marijuana collectives were invalid under state law. That was later reversed by the state Supreme Court in May, 2013 when the decision in *City of Riverside v. Inland Empire Health and Wellness* was handed-down, but reliance on the *AMCC* opinion and decisions to continue to operate by collectives in light of seven or eight different opinions out there before *Riverside* should not result in the punitive measures included in the new ordinance proposed by the City Attorney. Instead, the people who were operating should have past penalties, convictions and fines removed. Cases under the older laws should be dismissed and the City should move forward – not penalize people in an area that was so "upside-down" nobody knew which way it would end up.

Apparently, it was suggested that the City will need to hold another "lottery" for medical marijuana collectives. Again, it does not appear the City Attorney has even looked at the *Pack* opinion. The quotes I've provided in this letter show the big problem with the lottery system. It is important to remember that the *Pack* decision was not *reversed* -- review was dismissed because 5.87 had been repealed and the issue became moot for purposes of appellate review. When the case returned to the appellate court, while it remains de-published outside of Long Beach, the decision still applies here in our city. At the very least, the new ordinance proposed by the City Attorney should have been vetted to ensure it would not violate *Pack*. Not only vetted in regard to the holding in *Pack*, but also potential issues – like the *compelled incrimination* issue the appellate court took very seriously and ordered briefing on while the case was pending before it.

The ordinance proposed by the City Attorney is extremely susceptible to legal attack. It violates the holding in *Pack* which is still a case in-force in Long Beach. It

exposes taxpayers to substantial financial risk and utterly certain legal costs and expenses that will amount to hundreds of thousands if not millions of dollars. On the other hand, the ordinance proposed by the Medical Marijuana Ordinance Task Force is well designed and thoughtfully accounts for the issues that came up in *Pack*. It reduces the exposure of taxpayers while providing significant restrictions. If enacted, it will be considered – along with the mechanism of using a Task Force – the best way for other cities to create legislation. It will demonstrate leadership by Long Beach – the leadership the City should be providing for other cities and counties throughout California.

When speaking on the issue of pensions, Mr. Parkin said the City Attorney's office does not set policy. Rather, it determines whether something is legal or illegal. It follows that Mr. Parkin's job here is to evaluate whether the Long Beach Medical Marijuana Ordinance Task Force's ordinance is valid. The City Council voted to create the Task Force. The Task Force has done its job and provided a strong and thoughtful law. The City Attorney's job is to evaluate that ordinance in terms of its legality. That is what Mr. Parkin said his job was during the recent campaign. The Medical Marijuana Ordinance Task Force proposed law is less susceptible to attack, well designed and was researched, prepared and drafted by an experienced group of citizens, including a former Deputy Los Angeles City Attorney and Deputy Sheriff. It reduces potential taxpayer exposure and provides a law that is much more stable for medical marijuana patients and for all Long beach citizens.

Very truly yours,

Matthew S. Pappas

MSP:jm

cc: Hon. Robert Garcia, Mayor, City of Long Beach
Hon. Members of City Council, City of Long Beach
Mr. Pat West, City Manager, City of Long Beach